College of St. Elizabeth
CONVENT STATION, N. J.

Santa Maria Hall

345.4
Library No. Un3

21417

DISCARDED
APR 19 2006
CSE

UNITED STATES REPORTS

VOLUME 302

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1937

FROM OCTOBER 4, 1937, TO AND INCLUDING JANUARY 17, 1938

ERNEST KNAEBEL

REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1938

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

345.4
U53

ERRATA.

187 U. S. 617, line 2 of headnote, "Kansas" should be "Arkansas."
298 U. S. 441, lines 11 and 12 from bottom, strike out "33 B. T. A. 634."
299 U. S. 567, No. 215, citation should be 14 F. Supp. 754.
301 U. S. 667, No. 807, line 10, "80" should be "89."

21417

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief 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.[2]
HUGO L. BLACK, Associate Justice.[3]

RETIRED

WILLIS VAN DEVANTER, Associate Justice.[4]

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.

[2] Mr. Justice Cardozo was absent from the bench, on account of illness, after December 10, 1937, and throughout the rest of the period covered by this volume.

[3] Mr. Hugo L. Black, of Alabama, was nominated to be Associate Justice by President Roosevelt on August 12, 1937, and the nomination was confirmed by the Senate on August 17, 1937. He was commissioned August 18th, took the constitutional and judicial oaths August 19th, and took his seat October 4, 1937.

[4] Mr. Justice Van Devanter retired June 2, 1937, as authorized by Act of March 1, 1937, c. 21, 50 Stat. 24.

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 D. Brandeis, Associate Justice.

For the Second Circuit, Harlan F. 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, Hugo L. Black, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Benjamin N. Cardozo, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Pierce Butler, Associate Justice.

November 8, 1937.

(For next previous allotment, March 28, 1932, see 301 U. S., p. IV.)

TABLE OF CASES REPORTED

TABLE OF CASES

Cited in Opinions

TABLE OF STATUTES

Cited in Opinions

(A) STATUTES OF THE UNITED STATES.

(B) STATUTES OF THE STATES AND TERRITORIES.

(C) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1937.

KELLY, DIRECTOR, ET AL. *v.* WASHINGTON EX REL. FOSS CO.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 2. Argued March 9, 1937. Reargued October 11, 12, 1937.—Decided November 8, 1937.

1. Tug-boats plying navigable waters of the United States, and employed partly in towing other vessels on interstate and foreign voyages, or in moving vessels engaged in interstate and foreign commerce, in and about the harbors where the tugs are stationed, are subject to regulation by Congress under the commerce clause. P. 4.
2. There is no express provision in federal laws and regulations for inspection of hull and machinery, in order to insure safety or determine seaworthiness, of motor-driven tugs which do not carry passengers or freight for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or (with respect to requirements as to load lines) are under one hundred and fifty gross tons. Pp. 4, 8.
3. The federal statutes are not to be construed as implying a prohibition of inspection by state authorities of hull and machinery, to insure safety and determine seaworthiness, in the case of vessels which in this respect lie outside the federal requirements. P. 9.
4. State regulation of interstate commerce is invalid: (a) if in conflict with an express regulation by Congress; (b) if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action; (c) where federal regulation has occupied the field. P. 9.

32094°—38——1

5. When Congress circumscribes its regulation of a subject of interstate commerce and occupies only a limited field, state regulation outside of that limited field and otherwise admissible is not forbidden or displaced. P. 10.
6. An exercise of state police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. P. 10.
7. Inspection of the hull and machinery of motor-driven tugs, in order to insure safety and seaworthiness, is not such a subject as by its nature requires uniformity of regulation, and therefore this field is open to the States in the absence of conflicting federal regulation under the commerce clause. P. 14.

   If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation, which in the judgment of its authorities may be desirable but which pass beyond what is plainly essential to safety and seaworthiness, the State may encounter the principle that such requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule.

186 Wash. 589, 596; 59 P. (2d) 373, reversed.

CERTIORARI, 299 U. S. 539, to review a reversal of a judgment denying a writ of prohibition.

On reargument, *Mr. E. P. Donnelly* for petitioners, and *Mr. Glenn J. Fairbrook* for respondents. *Assistant Solicitor General Bell,* with whom *Solicitor General Reed* and *Messrs. Sam E. Whitaker* and *J. Frank Staley* were on the brief of the United States, as *amicus curiae,* supporting the decision of the state court.

On original argument, *Messrs. W. A. Toner* and *Daniel Baker* for petitioners, and *Mr. Glenn J. Fairbrook* for respondents.

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

Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provi-

sions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., §§ 9843 *et seq.*) relating to the inspection and regulation of vessels. The Supreme Court of the State directed judgment for respondents, holding the statute invalid "if applied to the navigable waters over which the Federal Government has control." 186 Wash. 589, 596. We granted certiorari. 299 U. S. 539. After hearing, we ordered reargument and requested the Attorney General of the United States to present the views of the Government upon the question whether the state Act or the action of the officers of the State thereunder conflicts with the authority of the United States or with the action of its officers under the Acts of Congress. The case has been reargued accordingly and the views of the Government have been presented both orally and upon brief in support of the decision of the state court.

The material facts, as set forth in the opinion of the state court, are that respondents own and operate one hundred and thirty-nine motor-driven tugs of which one hundred and eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are enrolled and licensed under federal laws. For the most part these tugs are employed in intrastate commerce, but some tow to and from British Columbia ports or across the Columbia River or from other ports in Washington to ports in Oregon. Practically all these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce and other work in and about the harbors where they are stationed. 186 Wash. p. 590.

Respondents' complaint challenged the validity of a large number of requirements of the state Act which it was alleged the state authorities sought to enforce (186

Wash. p. 591), but these authorities by their answer and in the argument at bar disclaim an intention to enforce any of the state regulations which conflict with those established under the laws of the United States.

First. The first question is whether the state legislation as applied to respondents' motor-driven tugs is in all respects in conflict with express provisions of the federal laws and regulations. Wherever such conflict exists, the state legislation must fall. *Gibbons* v. *Ogden,* 9 Wheat. 1, 210.

Chapter 200 of the Washington Laws of 1907 is described by the state court as "a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States." Rem. Rev. Stat., § 9844; 186 Wash. p. 590. It cannot be doubted that the power of Congress over interstate and foreign commerce embraces the authority to make regulations for respondents' tugs. *Foster* v. *Davenport,* 22 How. 244; *Moran* v. *New Orleans,* 112 U. S. 69; *Harman* v. *Chicago,* 147 U. S. 396. Has Congress exercised that authority and, if so, to what extent?

The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation. Provisions with respect to steam vessels are extremely detailed. 46 U. S. C., c. 14, §§ 361 *et seq.* Provisions as to motor-driven vessels are far less comprehensive and establish only a limited regulation. By § 4426 of the Revised Statutes, as amended by the Act of March 3, 1905, c. 1457, 33 Stat. 1029, 1030, and by the Act of May 16, 1906, c. 2460, 34 Stat. 193, 194, it was provided that all vessels "above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid,

naphtha, or electric motors," should be subject to the provisions of the statute relating to the inspection of hulls and boilers and requiring engineers and pilots. These vessels were also required to carry life preservers for passengers and, while carrying passengers, to be in charge of a person duly licensed by the federal local board. 46 U. S. C. 404. It does not appear that respondents' motor-driven tugs are within the class of vessels which carry freight or passengers for hire.

In 1910, Congress enacted the Motor Boat Act. 36 Stat. 462. While this statute is applicable to respondents' tugs, so far as it goes, its scope is restricted. Section 1 defines the word "motor boat" as including "every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam." There follows in that section a proviso that the engine, boiler or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to the approval of the design thereof, where the vessels "are more than forty feet in length and are propelled by machinery driven by steam." Section 2 divides the motor boats which are subject to the Act into three classes; (1) those less than twenty-six feet in length; (2) those twenty-six feet or over and less than forty feet in length; (3) those forty feet or over and not more than sixty-five feet in length. Section 3 then provides for the carrying of lights by motor boats of the respective classes. Section 4 relates to whistles, fog horns and bells. Sections 5 and 6 provide that motor boats subject to the Act, and also motor boats more than sixty-five feet in length, shall carry life preservers or life belts or similar devices and fire extinguishing equipment. Section 5 requires that all motor boats carrying passengers for hire shall be in charge of a person duly licensed by the federal local board of Inspectors, and has the proviso that motor boats shall not be required to carry

licensed officers except as required by the Motor Boat Act. 46 U. S. C. 511–518. Under the federal regulations, motor boats are required to have on board two copies of the pilot rules to be observed by them, with copies of the departmental circular.

As documented vessels of the United States, motor boats must be marked in a specified manner with their names and home ports. 46 U. S. C. 46. All vessels, regardless of tonnage, size, or manner of propulsion, and whether or not carrying freight or passengers for hire (other than public vessels of the United States not engaged in commercial service), which have on board "any inflammable or combustible liquid cargo in bulk," are to be "considered steam vessels" and are made subject to the provisions of the statutes relating to such vessels. This provision does not apply to inflammable or combustible liquid for use as fuel or stores. Act of June 23, 1936, c. 729, 49 Stat. 1889; 46 U. S. C. 391a. Vessels transporting explosives or like dangerous cargo are subject to inspection to determine that such cargo may be carried with safety, and appropriate permit for that purpose is required. Act of August 26, 1935, c. 697, 49 Stat. 868, 46 U. S. C. 178. "Load lines" are established for merchant vessels of one hundred and fifty gross tons or over proceeding on a "coastwise voyage by sea," as defined, that is, outside the line dividing inland waters from the high seas. Act of August 27, 1935, c. 747, 49 Stat. 888, 46 U. S. C. 88. Compare International Load Line Convention of July 5, 1930, 47 Stat. 2229. It appears from statements in the record and in argument, which we do not understand to be challenged, that there are not more than three of respondents' motor tugs, here involved, which exceed one hundred and fifty tons gross.

The limited application of the provisions of the federal laws and regulations to vessels propelled by internal combustion engines was recently and definitely brought to

the attention of Congress. The report of the Bureau of Navigation and Steamboat Inspection showed that there were many large vessels of this class.[1] The Committee on Merchant Marine and Fisheries of the House of Representatives found that this situation was due to the fact "that when the steamboat-inspection laws were passed, internal-combustion-engine laws were unknown, with the result that many of the existing laws apply to steam vessels and under the opinion of the law officers of the department, do not apply to vessels operated by machinery other than by steam." The Committee added that "it was very doubtful whether under existing law lifeboats could be required on these motor vessels." [2] To meet that situation Congress has provided that existing laws covering the inspections of steam vessels shall be applicable "to seagoing vessels of three hundred gross tons and over propelled in whole or in part by internal-combustion engines" to such extent as may be required by the regulations of the Board of Supervising Inspectors of Steam Vessels with the approval of the Secretary of Commerce. Act of June 20, 1936, c. 628, 49 Stat. 1544, 46 U. S. C. 367. Even as thus limited, the Act expressly excepts vessels engaged "in fishing, oystering, clamming, crabbing, or any other branch of the fishery or kelp or sponge industry." It is manifest that Congress carefully considered the application of existing laws and decided to what extent its field of regulation should be widened.[3] Congress decided to extend its regulation as to motor-driven vessels only to those of the specified class.

---

[1] Report (June 25, 1935) of the Committee on Merchant Marine and Fisheries of the House of Representatives on "Inspection of Motor Vessels." H. R. Rep. No. 1321, 74th Cong., 1st sess. Reference was made to the situation as described by the Assistant Director of the Bureau of Navigation and Steamboat Inspection as follows:

"We have at the present time vessels that are operated by internal-

We find the conclusion inescapable that, apart from the particular requirements in other respects, there is no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs in order to insure safety or determine seaworthiness, where these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons. It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations. The testimony in the record shows that those laws and regulations are administered in accordance with this view.

---

combustion engines, of tonnages exceeding 100, there are 772 vessels of 819,935 gross tons that would come under the provision of this law [the proposed bill].

"For instance, we have in the class from 5,000 to 7,500 tons 29 vessels, with a total tonnage of 179,556; and over 7,500 tons we have 33 vessels, with a total tonnage of 300,292.

"Those large vessels at the present time are subject to only a very limited inspection—that is, the inspection of the hulls and boilers, and are required under the law to carry a licensed engineer and a licensed pilot. The provisions of section 4472 that provides for protection against fire do not apply to our 7,500-ton vessels that are in the trans-Atlantic trade. They are not required under the law to carry a single lifeboat. There are many other provisions of the steamboat inspection laws that are of the utmost importance to safety of life that do not apply to these large transoceanic vessels. As a matter of fact, we are inspecting those vessels at the present time, but it is only because the owners of the ships accept such inspection. It is not a matter of law."

[2] H. R. Rep. No. 2505, 74th Cong., 2d sess.

[3] *Id.*

Second. The next question is whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety and determine seaworthiness in the case of vessels which in this respect lie outside the federal requirements.

The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. pp. 593, 596. And this is the argument pressed by respondents and the Solicitor General.

This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject. *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617, 618; *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370, 379; *Erie R. Co.* v. *New York,* 233 U. S. 671, 681, 682; *Southern Ry. Co.* v. *Railroad Commission,* 236 U. S. 439, 446, 447; *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U. S. 87, 101, 102; *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605, 612, 613; *Gilvary* v. *Cuyahoga Valley Ry. Co.,* 292 U. S. 57, 60, 61.

Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their ter-

ritorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases,* 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 623, 624; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Crossman* v. *Lurman,* 192 U. S. 189, 199, 200; *Asbell* v. *Kansas,* 209 U. S. 251, 257, 258; *Missouri Pacific Ry. Co.* v. *Larabee Mills,* 211 U. S. 612, 623; *Savage* v. *Jones,* 225 U. S. 501, 533; *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280, 293, 294; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission,* 283 U. S. 380, 392, 393; *Mintz* v. *Baldwin,* 289 U. S. 346, 350. *Gilvary* v. *Cuyahoga Valley Ry. Co., supra.*

A few illustrations will suffice. In *Reid* v. *Colorado, supra,* the question arose with respect to a statute of Colorado aimed at the prevention of the introduction into the State of diseased animals. One who had been convicted of its violation contended that the subject of the transportation of cattle by one State to another had been so far covered by the federal statute, known as the Animal Industry Act (23 Stat. 31), that no enactment by the State upon that subject was permissible. While the

congressional act did deal with the subject of the driving or transporting of diseased livestock from one State into another, Congress had gone no further than to make it an offense against the United States for one *knowingly* to take or send from one State to another livestock affected with infectious or communicable disease. The Court concluded that the state statute, requiring a certificate that the cattle were free from disease, irrespective of the shipper's knowledge of the actual condition of the cattle, did not cover the same ground as the Act of Congress and was not inconsistent with it. *Id.*, pp. 149, 150. The principle was thus emphatically stated: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has often been reaffirmed—that, 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together'." [p. 148.]

In *Savage* v. *Jones, supra,* the Court held that a statute of Indiana regulating the sale, and requiring a statement of the formula of ingredients, of concentrated commercial food for stock was not repugnant to the federal Food and Drugs Act of 1906 (34 Stat. 768). A citizen of Minnesota sought to restrain the enforcement of the Indiana statute with respect to stock food sold and transported in interstate commerce. The federal Act dealt with the subject of adulterated and misbranded foods and defined misbranding. It covered any false or misleading statements as to ingredients but did not require a disclosure of the ingredients. The state statute dealt with that omitted matter. We found that the state requirements could be sustained without impairing the operation of the federal Act as to the matters with which that Act dealt. We

said: "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [p. 533.]

In *Mintz* v. *Baldwin, supra,* the question related to the validity of the requirement of a New York statute that cattle brought into that State for dairy or breeding purposes, and also the herds from which they came, should be certified to be free from Bang's disease by the chief sanitary official of the State of origin. One of the contentions was that the statute conflicted with the federal statute known as the Cattle Contagious Disease Act of 1903. 32 Stat. 791. To enable the Secretary of Agriculture to prevent the spread of disease among cattle and other livestock, he was authorized to establish regulations concerning interstate transportation from any place where he had reason to believe that diseases existed. When an inspector of the Bureau of Animal Industry certified that he had inspected cattle and had found them free from communicable disease, they were permitted to be transported "without further inspection or the exaction of fees of any kind except such as may at any time be ordered or exacted by the Secretary of Agriculture." [p. 351.] But the express exclusion of state inspection extended only to cases where there had been federal inspection and a certificate issued. Accordingly we held that it could not be extended to the case before the Court where the cattle had not been inspected and certified by federal authority. We said: "The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear." [p. 350.]

The application of the principle is strongly fortified where the State exercises its power to protect the lives and the health of its people. But the principle is not limited to cases of that description. It extends to exertions of state power directed to more general purposes. Thus it was applied in sustaining the order of a state commission requiring interstate carriers to construct a union passenger station as against the contention that Congress had occupied the field—in view of the broad sweep of the Act conferring authority upon the Interstate Commission to deal with the operation of interstate railroads—as it was found that Congress had not authorized the Commission to meet the public need in the particular matter in question. *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission, supra,* p. 391.

In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions. It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective power as to vessels not propelled by steam. The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established. When Congress took up the regulation of vessels otherwise propelled it applied its requirements to vessels of a described tonnage which carried freight or passengers for hire. When Congress a few years later passed the Motor Boat Act, it did not attempt to deal with the subject comprehensively but laid down rules in a few particulars of a definitely restricted range. And when, in 1936, Congress again addressed itself to the subject, it did not purport to occupy the entire field but confined its regulation to seagoing vessels of three hundred gross tons and over. It would be difficult to find a

series of statutes in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested.

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action.

Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand.

Third. The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400.

The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may

establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. But it does not follow that in all respects the state Act must fail.

We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.

We have mentioned the inspection of hull and machinery of respondents' vessels in order to insure safety and seaworthiness. There may be other requirements of the

state Act which also lie outside the bounds of the federal action thus far taken and as to which uniformity of regulation is not needed. That question cannot be satisfactorily determined on this record and must also remain for decision as it may be presented in the future in connection with some particular action taken by the state authorities. Our conclusion is that the state Act has a permissible field of operation in relation to respondents' tugs and that the state court was in error in holding the Act completely unenforceable in deference to federal law. The judgment of the state court to that effect is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

WHITE, FORMER COLLECTOR, *v.* ARONSON.

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

No. 20. Argued October 20, 1937.—Decided November 8, 1937.

1. The term "games," as used in § 609, of the Revenue Act of 1932, does not include jigsaw picture puzzles. P. 17.

   This section, headed "Tax on Sporting Goods," imposes a manufacturer's sales tax on a wide variety of articles used in sports and games, named specifically, and generally on "games and parts of games," "and all similar articles commonly or commercially known as sporting goods."

2. It is to be presumed that Congress, in enacting § 609 of the Revenue Act of 1932, was aware that, under earlier like provisions, no tax assessments were laid on sales of puzzles, and that Congress knew that in litigation over the question, there was proof that in commercial usage jigsaw puzzles were never regarded as games but a recognized distinction was made between games and puzzles. P. 20.

3. Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. *Id.*

87 F. (2d) 272, affirmed.

CERTIORARI, 301 U. S. 675, to review a judgment reversing a judgment of the District Court, 13 F. Supp. 913, in an action, tried without a jury, to recover money paid as taxes.

Mr. Paul A. Freund, pro hac vice, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the brief, for the petitioner.

The argument for respondent was opened by *Mr. Israel Gorovitz* and closed by *Mr. Samuel Gottlieb.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent, Aronson, trustee in bankruptcy of The Viking Manufacturing Company, Inc., brought suit in the United States District Court for Massachusetts to recover $37,021.63 exacted of the bankrupt by the Collector, under color of § 609 Revenue Act 1932,[1] c. 209, 47 Stat. 264, on account of jigsaw picture puzzles manufactured and sold from June 21, 1932, to May 1, 1933.

The puzzles were made by cutting selected pictures backed up by rigid cardboard into from 162 to 500 separate pieces. These were sold to those who found diversion or amusement in putting them together so as to reproduce the original picture.

Obviously the word "games" in the statute was intended to designate instrumentalities used in playing them.

The Collector maintained that the effort properly to arrange the pieces was for amusement or diversion and amounted to a game, within the appropriate definition of the word.[2] Accordingly, he said, these instrumentalities were taxable.

---

[1] Revenue Act 1932. Sec. 609. Tax on Sporting Goods.

"There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10

On the other hand, respondent insisted that the word "games" refers to contests, physical or mental, conducted according to set rules, undertaken for amusement or recreation or for winning a stake, requiring the participation of two or more persons; [2] also that the sundry pieces were parts of a puzzle, a contrivance designed for testing ingenuity—something not within the scope of the statute.[3]

The trial judge, having heard the cause upon pleadings and evidence without a jury, sustained the Collector's defense. The Circuit Court of Appeals concluded otherwise and directed judgment for the trustee. It said—

"The section [609] is headed 'Tax on Sporting Goods.' The articles or instrumentalities there specifically named are sporting goods whether they are used in connection with games or in some recreation or diversion other than a game. But the larger portion of the articles specifically named are all used in games of contest between two

---

per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods."

[2] Webster's New International Dictionary, 2d ed., gives the word "game" 17 definitions. "2 a An amusement or diversion; as, make-believe is a children's *game;* formerly, specif., amorous play, 'Daughters of the *game.*' Shak." "4. A contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake * * *."

[3] "Puzzle. 2. Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as, a crossword *puzzle.*" Webster's New International Dictionary, 2d ed.

or more persons, and the question of construction is whether the articles or instrumentalities intended to be covered by the phrase 'games and parts of games' mean articles or instrumentalities used in games of contest like the specific articles previously named in the section, which are used in games of tennis, polo, baseball, etc., all of which involve a contest. . . .

"Furthermore the particular article here sought to be taxed is a puzzle. A puzzle is defined as 'something which perplexes or embarrasses; a difficult problem or question; hence a toy, contrivance, question or problem designed for testing ingenuity; as a cross word puzzle.' Webster's New International Dictionary. A jigsaw picture puzzle comes squarely within this definition—'a contrivance . . . designed for testing ingenuity.' None of the articles specifically named in the statute and used in games is a contrivance designed for testing ingenuity. They are designed for use in games of contest, while a jigsaw puzzle is not."

Section 600 (f), c. 63, 40 Stat. 316, Revenue Act 1917, and § 900 (5), c. 18, 40 Stat. 1122, Revenue Act 1918, (repealed in 1921) laid a tax upon tennis rackets, golf clubs, baseball bats, etc., . . . "chess and checker boards and pieces, dice, games and parts of games." Jigsaw picture puzzles were then well known articles of commerce. They go back at least to the first part of the last century—perhaps much farther. The same words "games or parts of games" appear again in the like section—609—Revenue Act 1932.

The court below pointed out that—

"A jig saw puzzle was never taxed under Section 900 (5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the Government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that

jig saw or die cut picture puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces."

Ample evidence disclosed that in commercial usage jigsaw picture puzzles were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things; also knew that jigsaw picture puzzles were not assessed for taxes under the Acts of 1917 and 1918; and, further, was not unmindful of the uncertainties concerning the meaning of "game" disclosed by *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, and *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476.

The claim for the taxpayer here does not rest upon an exception to a general rule but upon construction of general language found in the Act.

The Circuit Court of Appeals rightly concluded that— "The words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated."

Certainly we cannot say that this construction was clearly erroneous. Other judges had accepted it. Nor can we affirm that the statute as framed gave adequate notice to the bankrupt that its puzzles were to be taxed.

Where there is a reasonable doubt as to the meaning of a taxing Act it should be construed most favorably to the taxpayer. *Gould* v. *Gould,* 245 U. S. 151. "Tax laws, like all other laws, are made to be obeyed. They

should therefore be intelligible to those who are expected to obey them." *Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321, 322.

Counsel for the Collector maintain that *Baltimore Talking Board Co.* v. *Miles* (1922), *supra,* the "Ouija Board" case, and *Mills Novelty Co.* v. *United States,* (1931), *supra,* "Coin Operated Gambling Machine" case, are in conflict with the ruling under review.

These causes involved the Act of 1918 and in both the judges expressed sharply opposing views. Of course, the general language of the opinions must be read in connection with the facts.

The ouija board is wholly different from the puzzle here under consideration; nothing indicates that it was commonly regarded by the trade as a puzzle; and in an application for a patent it had once been described as a game. If the opinion construes the statute as embracing all instrumentalities, not necessary for comfort, whose chief use is to afford amusement and diversion, it is obviously too broad. Knitting for diversion is not a "game"; nor is horseback riding.

The coin-operated gambling machine has no resemblance to a jigsaw picture puzzle and what was said concerning it is not helpful in the problem now before us.

Both of these causes were decided prior to the Act of 1932 in which the words of the 1918 Act were repeated notwithstanding the disclosed uncertainties concerning their meaning and with knowledge of the fact that theretofore puzzles had not been assessed for taxation under them.

The challenged judgment must be

Affirmed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result.

ATLANTIC REFINING CO. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1. Argued October 21, 22, 1936. Reargued October 11, 1937.—Decided November 8, 1937.

1. An entrance fee exacted by a State from a foreign corporation for a license to carry on local business is not a tax but compensation for a privilege, and the validity of the charge is not dependent upon the method by which the amount is determined. P. 26.
2. There is nothing to show that the entrance fee of $5000 charged the corporation in this case was more than reasonable compensation for the privilege granted. P. 27.
3. The amount of authorized capital stock does not represent either property owned or business done by a corporation; and an entrance fee for the privilege of doing local business, measured by the authorized capital stock of a foreign corporation having property situate in many of the States and abroad, used in interstate and foreign commerce, does not necessarily burden such commerce. P. 28.
4. Such an entrance fee, so measured, *held* not an arbitrary taking of property beyond the jurisdiction, nor arbitrary in amount. P. 29.

   The value of the privilege is dependent upon the financial resources of the corporation; not only present capital, but also capital to be procured by issuing additional stock. The power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located; and the value of the privilege to exert that power is not necessarily measured by the amount of the property located, or by the amount of the local business done, in the State granting the privilege.
5. Virginia statute imposing graded fees on foreign corporations, measured on authorized capital stock, for authority to do business in the State, does not operate arbitrarily and unequally between the appellant and other foreign corporations seeking the same privilege within the State. P. 31.
6. *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, and other cases distinguished. P. 32.

165 Va. 492; 183 S. E. 243, affirmed.

APPEAL from a judgment sustaining, on review, the refusal of the State Corporation Commission of Virginia to refund a sum of money paid, under protest, by the appellant corporation, for a certificate of authority to do local business in the State.

Mr. T. Justin Moore, with whom *Mr. Lewis F. Powell, Jr.,* was on the brief, for appellant.

Mr. Abram P. Staples, Attorney General of Virginia, with whom *Mr. W. W. Martin* was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Atlantic Refining Company is a Pennsylvania corporation engaged in refining and selling gasoline and petroleum which it markets throughout the United States and in foreign countries. In 1929 the year's sales aggregated more than $153,000,000. Prior to 1930 the company had never applied for permission to do business in Virginia. It had not done any intrastate business there; and had no property or place of business within the State. It had done some interstate business, but had not paid, or been requested by the State to pay, either an entrance fee or taxes. In January 1930 the company applied to the State Corporation Commission for a certificate of authority to do intrastate business. Its net assets were then $132,196,275; its authorized capital $100,000,000; its issued capital $67,049,500. The Commission granted the certificate; but, as prescribed by Chapter 53, § 38a of the Acts of Assembly of Virginia, 1910; Tax Code of Virginia (Michie, 1930) § 207, set forth in the margin,[1] exacted for the privilege $5,000 as an entrance

[1] "Section 207. Every foreign corporation, when it obtains from the State corporation commission a certificate of authority to do

fee. Payment was made under protest. Having duly claimed that by requiring it the statute violated the Federal Constitution, the company requested refund of the amount paid. The Commission refused to make the refund; the highest court of the State affirmed its order, 165 Va. 492; 183 S. E. 243, and the case is here on the company's appeal.

---

business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;

For a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each thousand dollars or fraction thereof;

Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

Over ten million dollars, and not to exceed twenty million dollars, one thousand two hundred and fifty dollars;

Over twenty million dollars, and not to exceed thirty million dollars, one thousand five hundred dollars;

Over thirty million dollars, and not to exceed forty million dollars, one thousand seven hundred and fifty dollars;

Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

Over fifty million dollars, and not to exceed sixty million dollars, two thousand two hundred and fifty dollars;

Over sixty million dollars, and not to exceed seventy million dollars, two thousand five hundred dollars;

Over seventy million dollars, and not to exceed eighty million dollars, two thousand seven hundred and fifty dollars;

Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

Over ninety million dollars, five thousand dollars.

But foreign corporations without capital stock shall pay fifty dollars for such certificate of authority to do business within the State.

For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

Answering the company's statement under Rule 12, the Commonwealth opposed our taking jurisdiction. Its objection was that the appeal presented no substantial federal question, since, in 1918, the validity of the statute was challenged under similar circumstances and sustained by a unanimous Court in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500; and, in 1928, was again sustained, by a Per Curiam opinion, in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The company asks us to overrule these decisions, contending that they are inconsistent with other and later cases. It asserts that in sustaining the Virginia statute this Court followed views expressed in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87; and that the doctrine of the *Baltic* case has since been repudiated, in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218 and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, 466. Consideration of the jurisdiction of this Court was postponed to the hearing on the merits.

By the statute foreign corporations are divided, for the purpose of fixing the amount of the entrance fee, into twelve classes. The fee for the lowest class—those whose authorized capital stock is $50,000 or less—is $30. The fee for the highest class—those whose authorized capital stock exceeds $90,000,000—is $5,000. The company does not object to the subject or the occasion of the exaction. Its objection is solely to the measure. Its claim is that the statute imposes an unconstitutional condition because it determines the amount of the fee by the amount of the company's authorized capital. The contention is that a fee so determined necessarily burdens interstate commerce, denies due process, and denies equal protection of the laws.

Unlike the cases in which the doctrine of unconstitutional conditions has been applied, the condition here

questioned does not govern the corporation's conduct after admission. But it may be assumed that the rule declared in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, is applicable also to conditions to be performed wholly before admission; and that the $5,000 must be refunded if its exaction involved denial of any constitutional right. For we are of opinion that in refusing to grant the authority to carry on local business except upon payment of the $5,000 no constitutional right of the company was violated.

First. Virginia recognized the constitutional right of the company to carry on interstate business without paying an entrance fee. On the other hand, the company conceded that the Federal Constitution does not confer upon it the right to engage in intrastate commerce in Virginia unless it has secured the consent of the State. Compare *Hemphill* v. *Orloff*, 277 U. S. 537, 548. Whether the privilege shall be granted to a foreign corporation is a matter of state policy. Virginia might refuse to grant the privilege for any business, or might grant the privilege for some kinds of business and deny it to others.[2] It might grant the privilege to all corporations with small capital while denying the privilege to those whose capital or resources are large. It might grant the privilege without exacting compensation; or it could insist upon a substantial payment as a means of raising revenue.

As the entrance fee is not a tax, but compensation for a privilege applied for and granted, no reason appears why the State is not as free to charge $5,000 for the privilege as it would be to charge that amount for a

[2] Virginia does, in fact, refuse to foreign corporations the privilege of doing any intrastate public service business. Virginia Const. (1902) § 163. This prohibition was sustained in *Railway Express Agency, Inc.* v. *Virginia*, 282 U. S. 440, as applied to a foreign corporation wishing to carry on within the state an extensive interstate and local express business.

franchise granted to a local utility, or for a parcel of land which it owned. If Virginia had the power to charge $5,000 for the privilege, the particular measure applied by the Legislature in arriving at that sum would seem to be legally immaterial; and the company is in a position like that of the taxpayer in *Castillo* v. *McConnico,* 168 U. S. 674, 680, of whom it was said: "His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law." The validity even of a tax "can in no way be dependent upon the mode which the State may deem fit to adopt." *Home Insurance Co.* v. *New York,* 134 U. S. 594, 600. "The selected measure may appear to be simply a matter of convenience in computation . . . and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule . . ." *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227, 233. Compare *Rae Consolidated Copper Co.* v. *United States,* 268 U. S. 373, 376; *New York* v. *Latrobe,* 279 U. S. 421, 427.

Second. Even if the Federal Constitution conferred upon every foreign corporation the right to enter any State and carry on there a local business upon paying a reasonable fee, there is nothing in the record to show that the $5,000 charged is more than reasonable compensation for the privilege granted. The payment required is a single, non-recurrent charge—a payment in advance for a privilege extending into the long future. No matter how large the company's local business may be, no matter how much, or how often, its issued capital may be increased, no additional entrance fee is payable. The value of such a privilege cannot be gauged by the sales expected in the year 1930.[3] They may increase

[3] Prior to 1930 two subsidiaries of the company did a local business in Virginia; and the company planned to take over all their

rapidly from year to year. The corporation with $132,196,275 assets in 1930 may have more than double the amount a decade later. Nor is it unreasonable to base the fee upon the amount of the capital authorized at the time of the application, instead of charging a fee based upon the amount of the capital then issued, or upon the amount of assets then owned, and exacting later additional fees if, and when, more capital stock is issued or more assets are acquired. By fixing the fee in accordance with the capital authorized at the time of the application for admission, the State relieves itself of the necessity of keeping watch of changes in the future in these respects.

Third. It is contended that a fee measured solely by the amount of the corporation's authorized capital stock necessarily burdens interstate commerce. In support of that contention it is said that the authorized capital stock represents property located in forty-seven States and several foreign countries used in both interstate and foreign commerce. But this is not true. Authorized capital has no necessary relation to the property actually owned or used by the corporation; furthermore, the fee for which it is the measure represents simply the privilege of doing a local business. Because the entrance fee does not represent either property or business being done, it is immaterial that in fixing its amount no apportionment is made between the property owned or the business done within the State and that owned or done elsewhere.

The entrance fee is obviously not a charge laid upon interstate commerce; nor a charge furtively directed against interstate commerce; nor a charge measured by such commerce. Its amount does not grow or shrink according to the volume of interstate commerce or the

property and business within the State. The aggregate of the sales of the company in interstate commerce in Virginia in 1929 and of sales by the subsidiaries in intrastate commerce amounted to $1,396,600. About two-thirds of this business was intrastate.

amount of the capital used in it. The size of the fee would be exactly the same if the company did no interstate commerce in Virginia or elsewhere. The entrance fee is comparable to the charter, or incorporation, fee of a domestic corporation—a fee commonly measured by the amount of the capital authorized.[4] It has never been doubted that such a charge to a domestic corporation whatever the amount is valid, although the company proposes to engage in interstate commerce and to acquire property also in other States. No reason is suggested why a different rule should be applied to the entrance fee charged this foreign corporation.

Fourth. It is contended that a statute which measures the entrance fee solely by the authorized capital deprives the corporation of its property without due process, be-

[4] Forty-three states as well as the District of Columbia, Alaska, Hawaii, the Philippine Islands and Puerto Rico impose a domestic incorporation fee measured by the authorized amount of capital or number of shares. Alabama Code (1928) § 6969; Arkansas Stat. (Pope, 1937) § 2213; California Pol. Code (1933) § 409, as amended L. 1935, c. 295; Colorado Stat. Ann. (1935) c. 41, § 70; Connecticut Gen. Stat. (1930) § 3478; Delaware Rev. Code (1935) §§ 95, 2104; Florida Comp. Gen. Laws (1927) § 6582; Idaho Code (1932) § 65–809; Indiana Stat. Ann. (Burns, 1933) § 25–602; Iowa Code (1935) § 8349; Kansas Gen. Stat. (1935) § 17–221; Kentucky Stat. (1936) § 4225; Louisiana Gen. Stat. (1932) § 1147; Maine Rev. Stat. (1930) c. 56, § 10, as amended L. 1931, c. 240; Maryland Code (Supp. 1935) art. 81, § 133; Massachusetts Gen. Laws (1932) c. 156, § 53; Michigan Comp. Laws (1929) § 10138; Minnesota Stat. (Mason, Supp. 1936) § 7475; Mississippi Code (1930) § 4137; Missouri Const. art. X, § 21, Rev. Stat. (1929) § 4539; Montana Rev. Code (1935) § 145, as amended L. 1935, c. 50; Nebraska Comp. Stat. (1929) § 33–103; Nevada Comp. Laws (1929) § 1676, as amended L. 1931, c. 224, § 10; New Hampshire Pub. Laws (1926) c. 225, § 91; New Jersey Comp. Stat. (Supp. 1925–1930) § 47–114; New Mexico Stat. (1929) § 32–223; New York Tax Law (McKinney, 1936) § 180, as amended L. 1937, c. 359, § 7; North Carolina Code (1935) § 1218, as amended L. 1937, c. 171; North Dakota Comp. Laws (1913) § 4509; Ohio

cause the amount is determined by reference to property beyond the taxing jurisdiction; and also that this charge is an arbitrary taking of property. As has been shown, the amount of the entrance fee is not measured by property, either within or without the jurisdiction; and it is not a tax upon property. It is payment for an opportunity granted. Nor is it a charge arbitrary in amount. The value of the privilege acquired is obviously dependent upon the financial resources of the corporation—not only upon the capital possessed at the time of its admission to do business, but also upon the capital which it will be in a position to secure later through its existing author-

---

Code (1936) § 176; Oklahoma Stat. (1931) § 3749; Oregon Code (1930) § 25–206; Pennsylvania Stat. Ann. (Purdon, 1929) tit. 72, § 1822; Rhode Island Gen. Laws (1923) c. 248, § 85, as amended L. 1925, c. 651, § 3; South Carolina Code (1932) § 7738; South Dakota Comp. Laws (1929) § 5334, as amended L. 1931, c. 225; Tennessee Code (Williams, 1934) § 1248.106; Texas Rev. Civ. Stat. (1925) art. 3914, as amended L. 1931, c. 120, § 1; Vermont Pub. Laws (1933) § 920; Virginia Tax Code (Michie, 1936) § 206; Washington Rev. Stat. (Remington, 1932) § 3836–1, as amended L. 1937, c. 70, § 1; Wisconsin Stat. (1935) § 180.02; Wyoming Rev. Stat. (1931) § 28–102; District of Columbia Code (1929) tit. 10, § 14; Alaska Comp. Laws (1933) § 1012; Hawaii Rev. Laws (1935) § 6753; Philippine Islands L. 1906, act 1459, § 8, as amended L. 1912, act 2135, § 1, L. 1915, act 2452, L. 1918, act 2728, § 3, L. 1928, act 3518, § 5; Puerto Rico L. 1911, act 30, § 63a, as amended L. 1912, act 25.

In Utah the incorporation fee is measured by that proportion of the corporation's stock "represented or to be represented by its property owned and business done" in the state. Utah Rev. Stat. (1933) § 28–1–2. In Illinois an "initial license fee" is payable at the time the corporation files its first report of issuance of shares, and is measured by the value of the entire consideration received for its shares so issued. Illinois Rev. Stat. (B. A. Ed. 1937) c. 32, §§ 157.128–157.130. In Arizona, Georgia and West Virginia there is no charter or incorporation fee other than small fixed charges for such services as issuing and filing the certificate of incorporation. Arizona Rev. Code (1928) § 1459; Georgia Code (1933) § 22–307; West Virginia Code (1937) § 5819.

ity to issue additional stock. Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located. Compare *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412. Great power may be exerted by the company in Virginia although it has little property located there. And the value to it of the privilege to exert that power is not necessarily measured by the amount of the property located, or by the amount of the local business done, in Virginia. Moreover, it is immaterial whether the opportunity is availed of or not. The State grants a large privilege. It may demand a corresponding price.

Fifth. It is contended that the statute by measuring the entrance fee solely by the authorized capital is void because it operates arbitrarily and unequally between the appellant and other foreign corporations seeking the same privilege within the State. The contention is unfounded. Even if a corporation which has not yet been admitted to do business were in a position to complain that the State denies it equal protection, there is here no basis for a claim of discrimination. Every foreign corporation with an authorized capital exceeding ninety million dollars which seeks admission to do an intrastate business is, and has been since 1910, required to pay the same entrance fee. Nor is there any discrimination between foreign corporations and domestic of which the company may complain. While the charter fees of domestic corporations are smaller than the entrance fees of foreign corporations, Virginia levies upon foreign corporations, after admission, less in taxes than it does upon domestic corporations. A domestic corporation with an authorized capital of $100,000,000 is required to pay a charter fee of only $600; but it must pay each year a franchise tax of $8,850. A foreign corporation of that authorized capital is required to pay an entrance fee of $5,000, but pays no franchise tax whatever.

The difference in the powers of a State over entrance fees and taxes was pointed out in *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 510–511: "In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind."

Sixth. The position of the company in the case at bar differs radically from that of the foreign corporation involved in *Cudahy Packing Co.* v. *Hinkle, supra,* and from those in the other decisions of this Court on which appellant relies. In each of those cases the corporation had, before the exaction held unconstitutional, entered the State with its permission to do local business and pursuant to that permission had acquired property and made other expenditures. Their property and the local business were found to be so closely associated with this interstate business done there that the exaction burdened it. The exaction, although called in some of those cases a filing fee, was in each case strictly a tax; for it was imposed after the admittance of the corporation into the

State.[5] In the case at bar the situation is different. In 1930, when the company applied for the permission to do local business, it had no property whatsoever within the State. It had never done any local business there. Its product had been marketed locally in Virginia by two other foreign corporations which had been duly admitted to do local business, and whose facilities the company had used in connection with its interstate business. The company wished to make a change. It wanted to acquire the property and business of the two corporations which were marketing its product and thereafter to carry on the local business itself. In order to do so it sought permission of the State to engage in local business. The State in no way attempted to impose an additional burden upon the company or otherwise to change the conditions under which it was operating. Virginia insisted merely that if the company wished to change the existing conditions, it should comply with the statute enacted fourteen years before the company began to do business there.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

---

[5] This is true of *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; and also of *Looney* v. *Crane Co.,* 245 U. S. 178, although there the admission had been under a Texas license, and the act challenged imposed a greatly increased filing fee applicable to the extension of the license. The exactions involved in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; and *Air-Way Elec. Appliance Corp.* v. *Day,* 266 U. S. 71, were annual franchise taxes applicable only after the corporation had been duly admitted. In *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, and *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, the foreign corporation was engaged exclusively in interstate business, so that the subject of the exaction was not taxable.

BOGARDUS *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 15. Argued October 18, 1937.—Decided November 8, 1937.

1. A conclusion by the Board of Tax Appeals which is but a conclusion of law or a determination of a mixed question of law and fact based upon other facts found, is subject to review. P. 38.
2. A payment can not be both "compensation for personal service" within the meaning of § 22 (a) of the Revenue Act of 1928 and a "gift" under (b) (3) of the same section. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, distinguished. P. 39.
3. Payments made to present and former employees of a corporation, by its former stockholders, acting through a new corporation which had taken over part of the property of the other,—*held* not "compensation for personal services," taxable to the recipients as income under § 22 (a) of the Revenue Act of 1928, but "gifts," exempted from taxation by subdivision (b) (3) of that section. P. 40.

   No connection subsisted between the old corporation or the recipients of the gifts, on the one hand, and the makers of the gifts and their new corporation, on the other. The gifts were made, without any legal or moral obligation, not for any services rendered or to be rendered or for any consideration given or to be given by any of the recipients to the donors or the new corporation, but were acts of spontaneous generosity in appreciation of the past loyalty of the recipients which had redounded to the profit of the donors when stockholders of the older company.
4. When all the facts and circumstances clearly prove an intent to make a gift, the erroneous use of the terms "honorarium" and "bonus" can not convert the gift into a payment for services. P. 42.
5. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient. P. 44.

88 F. (2d) 646, reversed.

REVIEW by certiorari, 301 U. S. 674, of a judgment which affirmed an order of the Board of Tax Appeals sustaining a deficiency assessment of income tax.

Mr. William D. Whitney, with whom *Mr. George G. Tyler* was on the brief, for petitioner.

Mr. A. F. Prescott, with whom *Solicitor General Reed, Assistant Attorney General Morris, Messrs. Sewall Key* and *John G. Remey* and *Miss Helen R. Carloss* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

The question for decision is whether a sum of money received by petitioner in January, 1931, was "compensation" subject to the federal income tax, or a "gift" exempt therefrom. The Commissioner held it to be compensation, constituting part of petitioner's gross income, and declared a deficiency. The Board of Tax Appeals sustained the determination of the Commissioner; and the court below, upon review, affirmed the order of the Board. 88 F. (2d) 646.

The decisions of other courts of appeal upon the question under review are conflicting. Upon the one side, the First Circuit, *Walker* v. *Commissioner,* 88 F. (2d) 61, Judge Morton dissenting, the Fourth, *Hall* v. *Commissioner,* 89 F. (2d) 441, and the Fifth, *Simpkinson* v. *Commissioner,* 89 F. (2d) 397, lend definite support to the decision of the court below. Upon the other side, more or less definitely to the contrary, are to be found the decisions of the Third Circuit, *Jones* v. *Commissioner,* 31 F. (2d) 755; *Cunningham* v. *Commissioner,* 67 F. (2d) 205, the Sixth, *Lunsford* v. *Commissioner,* 62 F. (2d) 740, and the Ninth, *Blair* v. *Rosseter,* 33 F. (2d) 286. No useful purpose would be served by reviewing these decisions; and we pass to a consideration of the case before us. The facts follow:

The amount ($10,000) received by petitioner was part of a distribution, aggregating over $600,000, made by the

Unopco Corporation at the instance of its stockholders to petitioner and others who had theretofore rendered service as employees or in some other capacity to the Universal Oil Products Company. The Universal company was a corporation organized in 1914. In the beginning, its only asset was an application for a patent for a process for refining petroleum and manufacturing gasoline. It thereafter acquired other patents, which it licensed to various producers on a royalty basis. Beginning in 1922, its business developed increasingly until by 1930 its royalties amounted to about $9,000,000. In January, 1931, its entire stock was sold to the United Gasoline Corporation for $25,000,000. Prior to the sale, and in contemplation of it, the Unopco Corporation had been organized for the purpose of acquiring, and it did acquire, certain assets of the Universal company of the value of over $4,000,000. Up to the time of this acquisition, the Unopco company had never engaged in any business activities, and thereafter its only business was the investment and management of the assets thus acquired.

All of the former stockholders of the Universal company became stockholders of the Unopco, with the same proportionate holdings. None of them, after the sale of the Universal stock, held any stock in the Universal, or in the United Gasoline Corporation. Under its new ownership, the Universal continued to carry on the same business, retaining a large part of its assets. A few days after the sale of the Universal company's stock, the former stockholders, then stockholders of the Unopco, held a meeting at which it was proposed that they show their appreciation of the loyalty and support of some of the employees of the Universal company by making them a "gift or honorarium." A resolution to that effect was adopted at a meeting of the board of directors of Unopco on

January 9, 1931, and by the stockholders the following day. By these resolutions, it was resolved that the sum of $607,500 be appropriated, paid and distributed, as a bonus, to 64 former and present employees, attorneys and experts of Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company. Payments ranged in amount from $100,000 to $500. Some of the recipients had been out of the employ of the Universal company for many years; and one of them was the sister of an employee killed in an explosion about the year 1919.

At the meeting of the former stockholders of Universal, the former president of that company, then president of the Unopco corporation, said that they had reason to congratulate themselves on their great good fortune in the Universal company, which started with nothing and had been built up in a phenomenal way; that they had profited largely; that during the years when they were struggling and moving forward they had had the loyal support of a number of employees, and he thought it would be a nice and generous thing to show their appreciation by remembering them in the form of a gift or honorarium. All of the stockholders acquiesced, with the result "that it was understood that we would come forward and make these presents or gifts to the employees that were to be slated for it." The matter had theretofore never been discussed among the old stockholders; and this was the first time it had been brought up for consideration. None of the recipients had ever been employed by Unopco or by any of the former stockholders of the Universal. The parties stipulated that neither the Universal company nor the United "was under any legal or other obligation to pay said employees . . . any additional . . . compensation" other than that which they were paid by the Universal

company*; and that neither Unopco nor any of its stockholders, nor any of the stockholders of Universal, was at any time under any legal or other obligation to pay any of said employees, attorneys or experts, including petitioner, any salary, compensation or consideration of any kind.

It was further stipulated—"said payments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders." None of the three corporations or their stockholders ever made or claimed any deduction for federal income-tax purposes in respect of the payments made to the petitioner and the others. Payments were charged, in January, 1931, not to expense but to surplus account on the books of the Unopco company.

The distribution was made to petitioner and the other employees, attorneys and experts by checks, delivered either personally or by mail; and in each instance with the accompanying statement that the moneys represented by such checks were given at the instance of the stockholders of the Unopco Corporation as a gift and gratuity, and were, therefore, not subject to income tax on the part of the recipients.

The Board of Tax Appeals concluded that, from a careful consideration of all the evidence, "the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts." This, as we re-

* The reference to additional compensation paid by the Universal company probably refers to a "bonus," which was clearly compensation, paid by that company to its various employees, some 400 in number, in 1930.

cently have pointed out, is "a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 491; *Helvering* v. *Rankin,* 295 U. S. 123, 131. If the conclusion of the board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts. The ultimate determination, therefore, should be overturned, under the doctrine of *Helvering* v. *Rankin, supra,* as a matter of law.

The statutory provisions involved are very plain and direct. Section 22 (a) of the applicable revenue Act (45 Stat. 791) provides that "gross income," among other things, includes "compensation for personal service, of whatever kind and in whatever form paid." Subdivision (b) (3), immediately following, provides that "the value of property acquired by gift, bequest, devise or inheritance" shall not be included in gross income and shall be exempt from taxation under the income-tax title.

The court below thought that payments such as are here involved "may be at once 'gifts' under § 22, subdivision (b) (3) and 'compensation for personal service' under subdivision (a)." Such a view of the statute is inadmissible and confusing. The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation. The court below went on to say that decisions like *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, proved that payments could be

both gifts and compensation for personal services. The most casual reading of that case shows that it is authority for no such doctrine. There, an employer had paid the income tax assessed upon the salary of an employee. The employee had entered upon the discharge of his duties for the year in question under an express agreement to that effect. Quite evidently the payment, so agreed upon in advance, was in consideration of services to be rendered and in no sense a gift. It was a part of the employee's compensation; and the court so held. The idea that it could be a gift in any sense was definitely rejected. We said (p. 730), "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute."

If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. To determine that question we turn to the facts, which we have already detailed.

From these we learn that the recipients of the bounty here in question never were employees of the Unopco company, or of any of its stockholders. The Universal company, in whose employ some of the recipients then were, was at the time in no way connected with the Unopco company or any of its stockholders. Some of the recipients had not been in the employ even of the Universal company for many years, and one of them

never had been an employee. Neither the Unopco company nor any one else was under any obligation, legal or otherwise, to pay any of the recipients, including petitioner, any salary, compensation or consideration of any kind. Such is the express stipulation of the parties. And most significant is the further stipulated fact that the disbursements were *not made or intended to be made* for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco corporation or to any of its stockholders. If the disbursements had been made by the Universal company, or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there might be ground for the inference that they were payments of additional compensation. Compare *Noel* v. *Parrott,* 15 F. (2d) 669. But such an inference, even upon one of these suppositions, well might strain the realities in the light of the foregoing facts. However that may be, the disbursements here were authorized and the burden borne by persons who were then strangers to the Universal company and its employees, under no obligation, legal or otherwise, to that company or to any of its present or former employees. There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act. The intent is shown by the appeal made at the stockholders' meeting to the effect that it would be a nice and generous thing for these former stockholders of the Universal to show their appreciation of the past loyalty of that company's employees by remembering them in the form of a "gift or honorarium," and by the common understanding then reached that the stockholders would make the suggested "presents or gifts" to these employees. Quite evidently, none of these stock-

holders had the slightest notion that a *payment* of compensation was to be made.

In sum, then, the case comes to this: The stockholders of the Unopco, having at the time no connection with the Universal company, but rejoicing in the fact of their own great good fortune, and mindful of the former loyal support of a number of employees of the Universal company, and desiring to remember them "in the form of a gift or honorarium," resolved to make through the Unopco company the distribution in question. In doing so, they were moved, as Judge Swan said in his dissenting opinion below, to an act of "spontaneous generosity." We agree with this dissenting opinion of Judge Swan, and the dissenting opinion of Judge Morton in *Walker* v. *Commissioner, supra,* as stating the correct view of the matter.

The only facts which even seem to militate against this view are (1) that the Unopco stockholders had benefited by the former services of the recipients; (2) that the stockholders at their meeting described the payment as a gift or "honorarium"; and (3) that the resolutions authorized the payment as a "bonus . . . in recognition of the valuable and loyal services" of the employees, etc.

1. Because the Unopco stockholders had benefited by the past services of the recipients, it by no means follows that the distribution in question was not a gratuity. It nowhere appears in the record that full compensation had not been made for these services. There would seem to be a natural inference to the contrary; and the inference is made determinate by the stipulated fact that no one was under any obligation, legal or otherwise (and this would include a moral obligation, however slight) "to pay any additional compensation." There is no ground for saying that the benefit received and the compensation then paid for it were not equivalents.

2. It is said that the word "honorarium" always denotes a compensatory payment. Without agreeing to this

broad generalization, it is enough to say that the word is not here used by itself, but coupled with the word "gift" in the phrase "gift or honorarium." Presumptively, the user of the phrase must have known that the word "gift" did not include a compensatory payment, and it is hardly to be supposed that he would consciously nullify that word by the immediate use of another meaning the opposite. The phrase was used in an informal speech at the stockholders' meeting made by the president of the Unopco company. The whole tone of the meeting indicates that the intention was to make gifts in recognition of, not payments for, former services. The conclusion in which the stockholders acquiesced was that they would come forward and make these "presents or gifts" to the employees. In the light of all the circumstances, the absence of moral or other obligation and of any expectation of future benefit, it is reasonable to conclude that the word "honorarium," if the court below correctly defined it, was loosely and inaccurately used.

3. The resolutions, which employ the word "bonus," were adopted to carry into effect the will of the stockholders expressed at their meeting. What occurred at that meeting, as we have already said, indicated their clear intention to make gifts. And since intention must govern, we must consider the word used in the light of the intention. A similar question was before the Court of Appeals for the District of Columbia in *Levey* v. *Helvering,* 62 App. D. C. 354; 68 F. (2d) 401. There, the corporate resolution characterized the payments to be made to reimburse certain officers for income taxes paid on salaries as "gifts." But the court held this characterization did not settle the matter. It reviewed the facts and reached the conclusion that in the light of them what was intended was not a gift but a bonus, and decided the case in accordance with that view. In other words, the thing that was decided upon and intended, in that case as in

this case, was misdescribed in the resolutions to carry the decision and intention into effect. In *Rogers* v. *Hill*, 289 U. S. 582, 591–592, we held, following the dissenting opinion in the court below, that a bonus payment having no relation to the value of services for which it is given is in reality a gift in part. Certainly, where all the facts and circumstances in the case, including the express stipulation of the parties, clearly show the making and the intent to make a gift, it cannot be converted into a payment for services by inaccurately describing it, in the consummating resolutions, as a bonus.

Some stress is laid on the recital to the effect that the bounty is bestowed in recognition of past loyal services. But this recital amounts to nothing more than the acknowledgment of an historic fact as a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient. Compare *Hobart's Admr.* v. *Vail*, 80 Vt. 152; 66 Atl. 820.

Judgment reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, MR. JUSTICE CARDOZO, and MR. JUSTICE BLACK, dissenting.

A payment received as compensation for services is taxable as income, though made without consideration, and hence for many purposes a gift. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 730. To hold, as the prevailing opinion seems to do, that every payment which in any aspect is a gift is perforce not compensation, and hence relieved of any tax, is to work havoc with the law. A large body of decisions, whose provenance is *Old Colony Trust Co.* v. *Commissioner*, would be annulled by such a test. See e. g. *Weagant* v. *Bowers*, 57 F. (2d) 679; *Fisher* v. *Commissioner*, 59 F. (2d) 192; *Bass* v. *Hawley*, 62 F. (2d) 721; *United States* v. *McCormick*, 67 F. (2d) 867; *Botchford* v. *Commissioner*, 81 F. (2d)

914; *Schumacher* v. *United States,* 55 F. (2d) 1007. Cf. *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115. Their teaching makes it plain that the categories of "gift" and "compensation" are not always mutually exclusive, but at times can overlap. What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481.

UNITED STATES *v.* WILLIAMS.

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

No. 11. Argued October 15, 1937.—Decided November 8, 1937.

1. Congress may accept, or require, the military services of minors, with or without the consent of their parents. P. 48.
2. Under 34 U. S. C. § 161 minors between the ages of 14 and 18 years are not accepted for enlistment in the Navy without their parents' consent; but the statute does not confer upon or leave with the parents any right to condition consent to their sons' enlistment. P. 49.
3. No Act of Congress permits enlistment of minors upon condition or upon the qualified consent of parents, nor does any Act authorize recruiting officers to bind the United States to carry, or to require an enlisted man to carry, War Risk insurance for his own protection or for the benefit of any person. P. 50.
4. Parents consented to the enlistment of their son on condition that he carry War Risk insurance of specified amount in behalf of his mother. Before his death, in the service, the son had taken out and later had canceled, such insurance. *Held* that the condition did not bind the United States; that the son had a right under the War Risk Insurance Act to cancel the insurance; and that the mother had no cause of action against the United States. P. 50.

86 F. (2d) 746, reversed.

CERTIORARI, 301 U. S. 673, to review the affirmance of a judgment against the United States on a War-Risk insurance policy.

Mr. Julius C. Martin, with whom *Solicitor General Reed* and *Messrs. Wilbur C. Pickett, Thomas E. Walsh* and *W. Marvin Smith* were on the brief, for the United States.

Mr. Frank C. Wade, with whom *Mr. Perry Smith* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent brought this suit in the federal court for the northern district of Illinois to recover war risk in-

surance on the life of her minor son, Benson Charles Williams, who died while serving in the navy. Trial by jury having been waived, the court made findings of fact, stated its conclusions of law and gave judgment for the plaintiff. The Circuit Court of Appeals affirmed. 86 F. (2d) 746.

The findings show: Plaintiff's son was born August 27, 1901, and January 13, 1919, enlisted in the navy for the period of his minority. At that time defendant issued a certificate of term insurance binding itself, in case of his death while insured, to pay plaintiff $10,000 in 240 equal monthly installments; he directed defendant to deduct premiums from his pay; his parents executed a writing by which they consented to the enlistment, released their claim to his pay, approved the transactions between him and defendant and declared that their consent was given on the condition that, during enlistment, he would carry war risk insurance in the sum of $10,000 in behalf of his mother. July 20, 1920, he made written request that his insurance be terminated. Thereafter, defendant made no deductions from his pay on account of premiums. The insured died June 30, 1921. At all times until his death his uncollected pay was more than enough to keep the insurance in force. Upon learning of her son's death plaintiff demanded payment of the insurance. When notified by defendant of her son's cancelation she repudiated it, offered to pay all premiums, reiterated her claim as beneficiary and, defendant having rejected it, brought this suit.

The Circuit Court of Appeals reasoned as follows: Plaintiff's consent was essential to the enlistment and was given on condition that the insurance be maintained. The minor and defendant could not set the condition at naught. Defendant could not avail itself of his services, to which it was entitled only if his mother so agreed, and ignore the condition upon which the agreement was obtained. Defendant was charged with notice of plain-

tiff's interest as beneficiary and, the cancelation not having been ratified by her, defendant was bound to collect the premiums and maintain the insurance by deductions from the pay of the insured. On that basis the court concluded that the insurance remained in force and that plaintiff is entitled to recover.

The opinion strongly puts the considerations that make in favor of plaintiff's claim, but neglects the distinction between private employment of minors and their service in army or navy, and fails to give effect to the law applicable to contracts of enlistment and to the terms upon which the Government granted the war risk insurance here in question. In virtue of its power to raise and support armies, to provide and maintain a navy and to make rules for the government of land and naval forces, the Congress may require military service of adults and minors alike.[1] The power of the United States may be exerted to supersede parents' control and their right to have the services of minor sons who are wanted and fit for military service.[2] And the Congress may confer upon minors the privilege of serving in land or naval forces, authorize them to enlist, or draft them upon such terms as it may deem expedient and just.[3]

---

[1] *Tarble's Case* (1871) 13 Wall. 397, 408. *In re Grimley* (1890) 137 U. S. 147, 153. *Selective Draft Law Cases* (1918) 245 U. S. 366, 377–378, 386. *Hamilton* v. *Regents* (1934) 293 U. S. 245, 262–264. *United States* v. *Blakeney* (1847) 3 Gratt. 405, 408. *Lanahan* v. *Birge* (1862) 30 Conn. 438.

[2] *United States* v. *Bainbridge* (1816) Fed. Cas. No. 14,497, p. 950, per Story, J. *Commonwealth* v. *Gamble* (1824) 11 Serg. & R. 93, 94, per Gibson, J. *Com. ex rel. Engle* v. *Morris* (1852) 1 Phila. 381. *In the matter of Beswick* (1863) 25 How. Pr. 149, 151. *Halliday* v. *Miller* (1887) 29 W. Va. 424, 439; 1 S. E. 821.

[3] *United States* v. *Bainbridge* (1816) Fed. Cas. No. 14,497, p. 950. *In re Riley* (1867) Fed. Cas. No. 11,834, p. 797, per Blatchford, D. J. *In re Davison* (1884) 21 Fed. 618, 622. *In re Cosenow* (1889) 37 Fed. 668, 670, per Henry Billings Brown, D. J. *United States* v. *Blakeney* (1847) 3 Gratt. 405, 416. *In re Gregg* (1862) 15 Wis. 531, 532.

The statute under which plaintiff's son was accepted declares that minors between ages of 14 and 18 years shall not be enlisted in the navy without the consent of their parents.[4] It means that, while minors over 18 may enlist without parental permission, the government elects not to take those between 14 and 18 unless their parents are willing to have them go. It is a determination by Congress that minors over 14 have capacity to make contracts for service in the navy.[5] And it is in harmony with rulings under the common law to the effect that enlistment of a minor for military service is not voidable by him or his parents.[6] Enlistment is more than a contract; it effects a change of status.[7] It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely to dispose of their pay.[8] Upon enlistment of plain-

---

[4] "No minor under the age of fourteen years shall be enlisted in the naval service; and minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians." 34 U. S. C., § 161. (See R. S., §§ 1419, 1420, as amended by Acts: May 12, 1879, c. 5, 21 Stat. 3; February 23, 1881, c. 73, § 2, 21 Stat. 338; August 22, 1912, c. 336, § 2, 37 Stat. 356.)

[5] *In re Morrissey* (1890) 137 U. S. 157, 159. *In re Davison* (1884) 21 Fed. 618, 623. *In re Gregg* (1862) 15 Wis. 531, 533. *United States* v. *Blakeney* (1847) 3 Gratt. 405, 414–415. *United States* v. *Bainbridge* (1816) Fed. Cas. No. 14,497, p. 951.

[6] *In re Morrissey* (1890) 137 U. S. 157, 159. *United States* v. *Blakeney* (1847) 3 Gratt. 405, 413.

[7] *In re Grimley* (1890) 137 U. S. 147, 151. *In re Morrissey* (1890) 137 U. S. 157, 159.

[8] *In re Morrissey* (1890) 137 U. S. 157, 159–160. *In re Miller* (1902) 114 Fed. 838, 842–843. *United States* v. *Reaves* (1903) 126 Fed. 127, 130. *United States* v. *Bainbridge* (1816) Fed. Cas. No. 14,497, p. 951. *Baker* v. *Baker* (1868) 41 Vt. 55, 57. *Halliday* v. *Miller* (1887) 29 W. Va. 424, 439; 1 S. E. 821. *Gapen* v. *Gapen* (1895)

tiff's son, and until his death, he became entirely subject to the control of the United States in respect of all things pertaining to or affecting his service.

The statute does not confer upon or leave with the parents any right to condition consent to their sons' enlistment. No Act of Congress permits enlistment of minors upon condition or upon the qualified consent of parents, nor does any Act authorize recruiting officers to bind the United States to carry, or to require an enlisted man to carry, war risk insurance for his own protection or for the benefit of any person. It follows that defendant was not bound by the condition on which the trial court found that the parents consented to the enlistment of their minor son.[9]

War risk insurance was made available to those in active military service for the greater protection of themselves and their dependents.[10] By the insurance contract, of which applicable provisions of statutes and regulations constitute a part,[11] the insured minor was authorized to allot a part of his pay for the payment of premiums,[12] to change beneficiaries without their consent[13] and to cancel the insurance in whole or in

41 W. Va. 422, 425; 23 S. E. 579. *Iroquois Iron Co.* v. *Industrial Com.* (1920) 294 Ill. 106, 109; 128 N. E. 289. 1 Schouler, Domestic Relations (6th ed.) § 754, p. 820.

[9] *Utah Power & Light Co.* v. *United States* (1917) 243 U. S. 389, 408–409. *Wilber Nat. Bank* v. *United States* (1935) 294 U. S. 120, 123–124.

[10] War Risk Insurance Act of October 6, 1917, § 400, 40 Stat. 409.

[11] *White* v. *United States* (1926) 270 U. S. 175. *Lynch* v. *United States* (1934) 292 U. S. 571, 577.

[12] War Risk Insurance Act of October 6, 1917, § 202, 40 Stat. 403.

[13] *Id.*, § 402, 40 Stat. 409: ". . . Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided . . ." Bulletin No. 1, promulgated October 15, 1917: "The insured may at any time, subject to the regulations of the

part.[14] It follows that the cancelation was valid and plaintiff is not entitled to recover.[15]

Reversed.

PENNSYLVANIA EX REL. SULLIVAN *v.* ASHE, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 25. Argued October 21, 22, 1937.—Decided November 8, 1937.

1. The law has long recognized a relation between punishment for breach of prison and the offense for which the prisoner is held, and it has more severely punished prison-breaking by one undergoing imprisonment for grievous crime than if done by one held for a lesser offense. P. 53.
2. A law of Pennsylvania classifying punishments to be imposed on convicts breaking out of the penitentiary by authorizing the court to imprison each for a period not exceeding his original sentence, *held* consistent with the equal protection clause of the Fourteenth Amendment. P. 52.

325 Pa. 305; 188 Atl. 841, affirmed.

REVIEW by certiorari, 301 U. S. 675, of a judgment of the court below denying a petition for a writ of *habeas corpus*.

---

bureau, change the beneficiary or beneficiaries to any person or persons within the classes permitted by the act, without the consent of the beneficiary or beneficiaries." Regulations and Procedure, U. S. Veterans' Bureau, 1928 (Washington, 1930) Part 2, pp. 1235, 1237.

[14] T. D. 48 W. R. provides: "The yearly renewable term insurance shall . . . lapse and terminate . . . (c) Upon written request . . . to the Bureau . . . for cancelation of the insurance, in whole or in part, and corresponding cessation or reduction of the payment of premiums . . ." Regulations and Procedure, U. S. Veterans' Bureau, 1928 (Washington, 1930) Part 1, pp. 19–20.

[15] *White* v. *United States* (1926) 270 U. S. 175, 180. *Von der Lippi-Lipski* v. *United States* (1925) 4 F. (2d) 168, 169. *United States* v. *Sterling* (1926) 12 F. (2d) 921, 922. *Lewis* v. *United States* (1932) 56 F. (2d) 563, 564. *Irons* v. *Smith* (1933) 62 F. (2d) 644, 646.

Messrs. William J. Hughes, Jr. and *Bernard T. Foley,* with whom *Mr. William E. Leahy* was on the brief, for petitioner.

Messrs. Adrian Bonnelly and *Burton R. Laub,* with whom *Mr. Charles J. Margiotti,* Attorney General of Pennsylvania, and *Messrs. Mortimer E. Graham, William F. Illig* and *Samuel Roberts* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question presented in this case is whether, consistently with the equal protection clause, a State may classify punishments to be imposed on convicts breaking out of the penitentiary by authorizing the court to imprison each for a period not exceeding his original sentence.

September 21, 1936, petitioner, asserting that he was illegally committed to the Western Penitentiary of Pennsylvania to serve a sentence for the crime of breaking out of that prison, applied to the highest court of the State for a writ of *habeas corpus.* The court granted a rule to show cause and, after hearing counsel for the parties, held petitioner lawfully sentenced and discharged the rule. 325 Pa. St. 305; 188 Atl. 841. The petition for writ of certiorari asserts that this decision conflicts with *State* v. *Lewin,* 53 Kan. 679; 37 P. 168; *In re Mallon,* 16 Idaho 737; 102 P. 374; and *State* v. *Johnsey,* 46 Okla. Cr. App. 233; 287 P. 729. The statutes condemned in the Kansas and Idaho cases differ essentially from the Pennsylvania statute upheld in this case. Finding conflict between the decision below and that in the Oklahoma case, we granted the writ. Judicial Code, § 237 (b); 28 U. S. C., § 344 (b).

The challenged provision, found in the Act of March 31, 1860, P. L. 382, declares (§ 3) that "if any prisoner

imprisoned in any penitentiary . . . upon a conviction for a criminal offense . . . shall break such penitentiary . . . such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped. . . ."

In 1929, petitioner pleaded guilty of the crimes of burglary and larceny and was sentenced to the Western Penitentiary for a term of from three to six years. In December, 1931, he broke out, and, after capture and conviction, was sentenced to imprisonment for a term of the same length as, and to commence at the expiration of, the original sentence.

To illustrate the inequalities between sentences permissible under the challenged provision, petitioner emphasizes the fact that, if two or more convicts escape together under the same circumstances, they may be sentenced for different terms. In fact, the record shows that petitioner escaped simultaneously with one McCann and that upon conviction for the same crime the latter was sentenced to serve a term equal to his original sentence, from one to two years.

But the fact that terms of imprisonment may differ as do original sentences does not warrant condemnation of the statute. The law has long recognized a relation between punishment for breach of prison and the offense for which the prisoner is held, and it has more severely punished prison breaking by one undergoing imprisonment for grievous crime than if done by one held for a lesser offense. Prior to the statute *de frangentibus prisonam* of 1 Edw. II (1307) every prison breaking by the offender himself, whatever the crime for which he was committed, was a felony, punishable by "judgment of life

or member." This severity was mitigated by the statute. It forbade that judgment unless the breaking was by one committed for a capital offense.[1] Breach and escape by one held for felony continued to be dealt with as felony; but, if committed by one confined for an inferior offense, was punishable as a high misdemeanor by fine and imprisonment.[2] In harmony with that idea a number of States deal with that offense more severely when committed by one imprisoned for a heinous offense or a long term.[3] Indeed, this Court has sustained classification for punishment of crimes by convicts upon the basis of the sentences being served at the time. In *Finley* v. *California,* 222 U. S. 28, it held that a statute prescribing the death penalty for the commission by life prisoners of assaults with intent to kill, lesser punishments being laid upon other convicts, was not repugnant to the equal protection clause.

The principle is similar to that under which punishment of like crimes may be made more severe if committed by ex-convicts. Persistence in crime and failure

[1] "That none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."

[2] See IV Blackstone, p. 130; I Hale's Pleas of the Crown, c. 54; II Hawkins' Pleas of the Crown, c. 18; II Wharton Criminal Law (12th ed.) § 2019. *Rex* v. *Haswell,* R. & R. 458. *Commonwealth* v. *Miller,* 2 Ashm. (Pa.) 61. Cf. *Rex* v. *Fell,* 1 Ld. Raym. 424; *Kyle* v. *State,* 10 Ala. 236; *Commonwealth* v. *Homer,* 5 Metc. 555, 558.

[3] Arizona, Revised Code 1928, § 4539. Connecticut, Gen. Stats. (1930 Revision) §§ 6173, 6175. Idaho, Code 1932, Title 17, §§ 803, 804. Indiana, Annotated Statutes, 1933, § 10–1807. Maine, Revised Statutes, 1930, c. 133, § 16; c. 152, § 45. Minnesota, Mason's Statutes, 1927, § 10007. New York, Penal Law, § 1694. North Dakota, Compiled Laws 1913, § 9351. Washington, Remington's Revised Statutes, § 2342. Wisconsin, Statutes 1935, §§ 346.40, 346.45.

of earlier discipline effectively to deter or reform justify more drastic treatment. *Graham* v. *West Virginia,* 224 U. S. 616, 623. *McDonald* v. *Massachusetts,* 180 U. S. 311. *Moore* v. *Missouri,* 159 U. S. 673, 677. *Plumbly* v. *Commonwealth,* 2 Metc. 413, 415. *People* v. *Sickles,* 156 N. Y. 541, 547; 51 N. E. 288. Save as limited by constitutional provisions safeguarding individual rights, a State may choose means to protect itself and its people against criminal violation of its laws. The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for its determination. *Collins* v. *Johnston,* 237 U. S. 502, 510. *Howard* v. *Fleming,* 191 U. S. 126, 135–136. It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

Presumably, the sentence being served at the time of prison breaking was determined upon due consideration of the pertinent facts. The judgment then pronounced is good evidence of the convict's natural or acquired bent of mind and his attitude toward the law and rights of others. The fact that he would and did break prison shows him still disposed to evil and determined to remain hostile to society. And that is sufficient to sustain the classification made by the Pennsylvania statute for punishment of prison breakers on the basis of their original sentences.

Affirmed.

McEACHERN, ADMINISTRATOR, *v.* ROSE, FORMER COLLECTOR.

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

No. 6. Argued October 14, 15, 1937.—Decided November 8, 1937.

1. Sections 607 and 609 (a) of the Revenue Act of 1928 require the Government to return the amount of a tax paid after it has been barred by limitation and preclude it from taking any benefit from a taxpayer's overpayment by crediting it against an unpaid tax, the collection of which has been barred by limitation. P. 59.
2. There can be no credit of an overpayment against an earlier unpaid tax until the former has been ascertained and allowed. P. 61.
3. Sections 322 and 609 of the Revenue Act of 1928 both contemplate that the time of credit of an overpayment in one year against a tax for another is to be marked by some definite administrative action; and under § 1104 of the Revenue Act of 1932, that action occurs when the Commissioner of Internal Revenue first signs the schedule of overassessments. P. 61.

   Where this occurs after the earlier tax has been barred, credit against it of the overassessment is prohibited by § 609 of the Act of 1928.
4. The similar treatment accorded by the statutes to credit against an overdue tax and to payment of it; the prohibition of credit of an overpayment of one year against a barred deficiency for another, and the requirement that payment of a barred deficiency be refunded, are controlling evidences of the Congressional purpose, by the enactment of §§ 607 and 609, to require refund to the taxpayer of an overpayment, even though he has failed to pay taxes for other periods, whenever their collection is barred by limitation. P. 62.
5. *Stone* v. *White*, 301 U. S. 532, distinguished. P. 62.

86 F. (2d) 231, reversed.

CERTIORARI, 300 U. S. 652, to review a judgment reversing a tax recovery secured by the petitioner in the District Court, in an action against the Collector.

Mr. William A. Sutherland, with whom *Mr. Joseph B. Brennan* was on the brief, for petitioner.

Mr. Guy Patten, with whom *Solicitor General Reed, Assistant Attorney General Morris* and *Messrs. Sewall Key, Harry Marselli* and *F. A. LeSourd* were on the brief, for respondent.

By leave of Court, a brief was filed by *Mr. Robert Ash,* as *amicus curiae,* supporting the petitioner.

Mr. Justice Stone delivered the opinion of the Court.

This petition for certiorari raises the question whether overpayments of income taxes for the calendar years 1929, 1930 and 1931 are so related to a tax on income which should have been but was not assessed against the taxpayer for the year 1928, as to preclude recovery of the overpayments although collection of the 1928 tax is barred by the statute of limitations.

In 1924 petitioner's decedent sold five hundred shares of the corporate stock of an insurance company for the sum of $300,000, at a net profit of $295,000 over 1918 cost. Ten per cent. of the purchase price was paid at the time of sale and the balance was to be paid in installments, aggregating annually 10% of the purchase price, in each of the nine succeeding years. As permitted by the applicable statutes (§ 202, Revenue Act of 1924, c. 234, 43 Stat. 255; §§ 202, 212, Revenue Act of 1926, c. 27, 44 Stat. 11, 23; § 44, Revenue Act of 1928, c. 852, 45 Stat. 805), decedent elected to return the profit for income taxation on the installment basis. After his death in 1928 petitioner, as his administrator, filed income tax returns in behalf of his estate for the calendar years 1928 to 1931 inclusive, showing in each year a sale of fifty shares of the stock of the insurance company at a net profit of $29,500. These returns were erroneous in point of fact and of law, as the petitioner sold no shares of the stock in any of those years, and since, by reason of the

provisions of § 44 (d) of the 1928 Act,[1] the capital gain included in the value of the unpaid installments at the time of decedent's death, was income taxable to decedent for the year 1928 and not in subsequent years.

By the provisions of § 44 (d), as construed by Treasury Regulations 74, Art. 355, the transmission of an installment obligation at the death of the payee capitalizes the unpaid installments of the contract and results in taxable gain to the estate of the decedent, measured by the difference between the fair market value of the obligation at the time of his death and its unrecovered cost. By § 113 of the 1928 Act the basis for computing the annual profit upon the installments paid after the decedent's death is the fair market value of the contract at the time of his death. The unpaid tax for 1928, computed as required by § 44 (d), exceeds the sum of the overpayments made in 1929, 1930 and 1931.

On the trial in the district court the collector contended that petitioner was estopped to deny that the sales of stock occurred and profit accrued as reported in his returns for the years in which refunds were claimed; and that, in any case, upon equitable principles, the petitioner was not entitled to recover the overpayments for those years, since they were less in amount than the tax which should have been assessed against him for 1928. See *Stone* v. *White,* 301 U. S. 532. The

[1] "Sec. 44. . . .

"(d) *Gain or loss upon disposition of installment obligations.*—If an installment obligation is . . . distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and . . . the fair market value of the obligation at the time of such distribution, transmission, or disposition. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full."

trial court overruled these contentions and gave judgment for petitioner. The Court of Appeals for the Fifth Circuit reversed, holding that petitioner was not in equity and good conscience entitled to recover the overpayments which, because of his failure to pay the 1928 tax, had resulted in no unjust enrichment of the Government. 86 F. (2d) 231. We granted certiorari because of the importance of the question in administration of the revenue laws.

The collector does not press here the contention that petitioner is estopped to challenge the correctness of his returns for the years of overpayment. The failure of the Government to assess the appropriate tax in 1928 is not shown to be attributable to the erroneous statements made in the returns for the later years, and it is not necessary for petitioner to show understatement of the income taxable in 1928 in order to show the correct amount of the different income derived from the installment contract in the years of overpayment. For, under § 113, the overpayments are established by showing that in each year the amount of income from the sale of the stock as reported exceeded the difference between the installments collected and so much of the value of the installment contract at the death as is allocable to the taxable year. But respondent insists, as the court below held, that petitioner is not equitably entitled to recover overpayments of taxes upon the profits derived from the contract in certain years because the overpayments are exceeded by a tax which he should have paid on the profits realized in an earlier year.

We may assume that, in the circumstances, equitable principles would preclude recovery in the absence of any statutory provision requiring a different result. But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpay-

ments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him. Section 607 of the 1928 Act declares that any payment of a tax after expiration of the period of limitation shall be considered an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim"; and § 609 (a) of the 1928 Act provides that "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607." These provisions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation.

It is plain that these provisions forbid credit of the overpayments of taxes for 1930 and 1931, which were made after collection of the 1928 tax was barred. If petitioner had then paid the 1928 tax there would have been an overpayment of the tax, refund of which is made mandatory by § 607. Credits against the tax of overpayments of taxes assessed for other years, if made at that time, could not stand on any different footing under the provisions of § 609. The right of the Government to credit the overpayments upon the earlier unpaid tax could arise only when the overpayments occurred; but since at that time collection of the 1928 tax was barred by limitation, and payment of it would be an overpayment, credit against it of the 1930 and 1931 overpayments was forbidden by § 609.

Different considerations apply to the 1929 overpayment. When it was made, collection of the 1928 tax was not barred and the commissioner was not then prevented by § 609 from crediting the overpayment upon the 1928 tax, although he did not do so. Section 322 of the 1928

Act,[2] continued without material change in the 1932 Act, authorizes the credit of an overpayment of any tax against any income tax "then due" from the taxpayer, and directs that any "balance shall be refunded immediately to the taxpayer." We need not inquire whether the 1928 deficiency was "due" within the meaning of this section before the tax was assessed, for in any case there could be no credit against the tax of the 1929 overpayment, before the amount of the latter was ascertained and allowed and at that time collection of the 1928 tax was barred and any credit of the overpayment against it was declared to be void by § 609.

Both § 322 and § 609 contemplate that the time of credit of an overpayment in one year against a tax for another is to be marked by some definite administrative action. This Court, upon an examination of the established practice in the Bureau of Internal Revenue, concluded that the time of allowance of a refund and the time of credit of an overpayment against a tax due, is the date of approval by the commissioner of the schedule of refunds and credits prepared by the collector, showing the amount due the taxpayer, rather than the earlier date of the certification by the commissioner to the collector, of the schedule of overassessments. See *United States* v. *Swift & Co.*, 282 U. S. 468; *Girard Trust Co.* v. *United States,* 270 U. S. 163. We accordingly held that approval of the schedule of refunds and credits fixes the date from which interest is allowed upon any balance refunded to the taxpayer, *Girard Trust Co.* v. *United States, supra,* and the date from which the statute of lim-

[2] Sec. 322.

"(a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer. . . ."

itations runs against the taxpayer's right to demand refund of a tax paid by the allowance of a credit. *United States* v. *Swift & Co., supra.*

After these decisions § 1104 of the Revenue Act of 1932, c. 209, 47 Stat. 287, changed the date which should be deemed to be the time of allowance of the credit or refund within the meaning of that and earlier revenue laws. It provided that "Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

The date of the claim for refund and the date of the allowance of the credit which, according to § 1104, was that of the approval by the commissioner of the schedule of overassessments, came after recovery of the 1928 tax was barred. If petitioner had then paid the tax he could have recovered it back as an overpayment under § 607; accordingly, credit against the tax of the 1929 overpayment is prohibited by § 609, as are like credits for the overpayments of 1930 and 1931.

The similar treatment accorded by the statutes to credit against an overdue tax, and to payment of it; the prohibition of credit of an overpayment of one year against a barred deficiency for another; and the requirement that payment of a barred deficiency shall be refunded, are controlling evidences of the Congressional purpose by the enactment of §§ 607 and 609 to require refund to the taxpayer of an overpayment, even though he has failed to pay taxes for other periods, whenever their collection is barred by limitation.

Sections 607 and 609 do not apply in the circumstances disclosed in *Stone* v. *White, supra.* There testamentary trustees had paid from income a tax upon it which should have been paid by the beneficiary, and it was held that

they were not equitably entitled to recover the tax after the statute had barred collection from the beneficiary. The assessment of a deficiency against the trustees and the payment of it by them were not barred by limitation. Hence § 607 did not compel a recovery. Section 609 did not require it. The commissioner neither sought, nor did § 322, regardless of any period of limitation, permit him to credit the amount which the one taxpayer had paid against the tax which another should have paid. Equitable considerations not within the reach of the statutes denied a recovery. It was enough, in the peculiar facts of the case, that the trustees had suffered no burden and that the Government was not unjustly enriched.

Reversed.

PALMER *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 19. Argued October 19, 1937.—Decided November 8, 1937.

1. By §§ 111, 112, 113 of the Revenue Act of 1928, profits derived from the purchase of property, as distinguished from exchanges of property, are ascertained and taxed as of the date of its sale or other disposition by the purchaser. Profit, if any, accrues to him only upon sale or disposition, and the taxable income is the difference between the amount thus realized and its cost, less allowed deductions. P. 68.
2. A sale by a corporation to its shareholders of part of its property which does not result in any diminution of its net worth, can not result in a distribution of profits and is not a "dividend" within the meaning of § 115 of the Revenue Act of 1928. P. 69.

The bare fact that a transaction, on its face a sale, has resulted in a distribution of some of the corporate assets to stockholders,

---

*Together with No. 59, *Helvering, Commissioner of Internal Revenue* v. *Palmer*, also on writ of certiorari to the Circuit Court of Appeals for the First Circuit.

gives rise to no inference that the distribution was of property worth more than the price received and was therefore, to that extent, a dividend within the meaning of § 115.

3. Mere issue by a corporation to its shareholders of "rights" to subscribe for stock which it owns in another corporation, and their receipt by shareholders, is not a dividend as defined in § 115. P. 71.

4. Where a corporation, through resolution of its board of directors, offers to its shareholders rights to subscribe, within a time limited, for shares which it owns in another company, intending a *bona fide* sale and fixing the price at the fair value of the shares at the time of the offer, the fact that, between the time of the offer and the exercise of the option by a shareholder, the rights were bought and sold at substantial prices on the exchange, or that the stock itself sold at prices substantially above the stipulated purchase price, did not convert the sale, *pro tanto*, into a dividend. P. 71.

5. Findings of the Board of Tax Appeals based on permissible inferences from the record are not to be set aside by a court even if upon examination of the evidence it might draw a different inference. P. 70.

88 F. (2d) 559, reversed.

REVIEW by certiorari, 301 U. S. 676, 680, of a judgment reversing the Board of Tax Appeals and sustaining a deficiency income tax assessment.

Mr. Robert G. Dodge, with whom *Mr. Harold S. Davis* was on the brief, for petitioner in No. 19 and respondent in No. 59.

Assistant Attorney General Morris, with whom *Solicitor General Reed* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for respondent in No. 19 and petitioner in No. 59.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether a purported sale by a corporation to its stockholders, of shares of stock issued by and acquired from another corporation, the sale being effected by means of an issue to the stockholders of rights to purchase the stock at a named price, is to be

treated as a distribution of corporate earnings taxable as a dividend to the stockholders when received, within the reach of §§ 22 and 115 of the Revenue Act of 1928, c. 852, 45 Stat. 791.

In January, 1929, The American Superpower Company, of which petitioner was a stockholder, acquired through consolidation of public utility corporations, in one of which it in turn was a stockholder, a large amount of the securities of The United Corporation, the latter being received in exchange for stock of the consolidated corporations owned by Superpower. The securities received included shares of the preference stock of United, 2,210,583 shares of its common stock, and 1,000,000 rights to subscribe for United common stock at any time for $27.50 a share. United was incorporated January 7, 1929. The consolidation was effected January 12th, when Superpower became entitled to its allotment of the securities. On January 23, 1929, the board of directors of Superpower, pursuant to a plan to strengthen its cash position and to create a wide market for the stock of United, adopted a resolution offering to its common stockholders of record January 26, 1929, the privilege of purchasing, at $25 a share, one-half share of United for each share of their common stock in Superpower. The privilege was evidenced by negotiable certificates distributed to stockholders about January 31. By their terms they were to become void unless the privilege was exercised by February 15, 1929. On that date petitioner exercised the privilege by purchasing his allotment of 3,198 shares of United at $25 a share. In its books, records and accounts, Superpower treated the transaction as a sale of the United stock, resulting in no change in its net assets or earnings.

The prices received by Superpower for shares distributed to its stockholders represented a substantial profit

to it over cost of the securities which it had exchanged for them. It reported the profit in its 1929 income tax return and paid the tax on it for that year. In computing the tax the commissioner, in allocating the cost of the three classes of securities received from United by Superpower, found it necessary to determine the value of each class of security when received. He did this by finding the total value of the securities and allocating to the common stock a value of $25 a share. On or about January 9th, bankers who were active in promoting the consolidation purchased from United 400,000 shares of its stock at $22.50 per share. Shortly after the adoption by Superpower, on January 23rd, of the plan for distribution of the United stock, an active market developed on the New York Curb Exchange for the sale of subscription rights. On January 25th, 11,000 rights were sold at prices ranging from 11⅝ to 12⅜, making the cost per share to purchasers of the rights, upon their exercise, about $50. On January 28th, 44,000 of them were dealt in on the exchange at prices ranging from 12⅝ to 17½, with a corresponding cost of the shares of from $50 to $60. On January 29th, 30th and 31st, Superpower sold about 9,200 shares of its United stock on the open market at from $50 to $63 per share.

On May 1, 1929, a like privilege to purchase one-fourth of a share of stock of United at $30 a share for each share of Superpower was extended to the stockholders of the latter, as of May 8, 1929, which petitioner similarly exercised on May 24, 1929. On June 5, 1929, a like privilege was given to the common stockholders of Superpower as of June 18, 1929, to purchase stock of Commonwealth and Southern Corporation at $15 a share, which petitioner exercised on July 2, 1929.

Petitioner did not, in 1929, sell or otherwise dispose of any of the shares for which he subscribed, or report their receipt in his income tax returns for that year. The com-

missioner ruled that the rights to subscribe were dividends, and assessed a deficiency against petitioner based on their market value on the respective dates when the stockholders were first entitled to exercise them. The cause was heard by the Board of Tax Appeals upon a stipulation of facts which it adopted as a finding and which specified the facts already detailed. The board held that the distributions were sales of the shares by Superpower to its stockholders, not dividends, and reduced the deficiency accordingly. In reaching this decision the board, upon consideration of all the facts and circumstances attending the issue of the rights by Superpower to its stockholders, found that there was no intention to distribute any of its earnings to stockholders and that the transaction was what it purported to be on its face—a sale to stockholders of part of the corporate assets. As a supporting fact it found that the fair value of the common stock of United during January, 1929, was $25 a share. It concluded that the facts as stipulated and as found by it did not show fair market value of the United stock in May, 1929, or of the Commonwealth and Southern stock in June or July of that year. Upon the entire record it was of the opinion that there was no reason to treat the transaction any differently than as the parties had treated it, as a sale of a part of the assets of Superpower from which no taxable gain would result before the taxpayer sold or otherwise disposed of the shares.

The Court of Appeals for the First Circuit reversed, holding that the distributions were taxable dividends measured by the difference between the value of the several allotments of shares on the respective dates when the rights were exercised and the prices paid for them. 88 F. (2d) 559. In reaching this conclusion the court recognized that the board had found the January, 1929, value of the stock of United to be $25 a share. But it thought that the board in making the finding had disre-

garded the substantial prices at which the rights were sold pending their exercise, denying to them persuasive weight because it had mistakenly assumed that the purported sale could not be treated as a dividend unless there was intention to distribute the corporate earnings. The court held that what was done, and not what was intended, was the decisive factor, and as there was substantial evidence that the stock, when distributed, was worth more than the price received, there was a distribution of corporate assets from earnings, taxable to stockholders as a dividend. It accordingly remanded the cause to enable the board to ascertain the value of the distributed shares on the dates when the rights were exercised (February 15, 1929, May 24, 1929, July 2, 1929).

Both the taxpayer and the commissioner petitioned for certiorari, the one challenging the ruling that the distributions were dividends, and the other assigning as error the failure to hold that the critical dates for fixing the value of the dividends for taxation were either those when the rights were received by the stockholders or when the stockholders first became entitled to exercise them, rather than the times when they were actually exercised. We granted certiorari, because of the importance of the questions in the administration of the revenue laws, and the doubts which have been raised as to their appropriate answers by the varying opinions of the circuit courts of appeals. Compare the opinions below, *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986 (C. C. A. 2d) and *Commissioner* v. *Mayer,* 86 F. (2d) 593 (C. C. A. 7th) with *Helvering* v. *Bartlett,* 71 F. (2d) 598 (C. C. A. 4th) and *Commissioner* v. *Cummings,* 77 F. (2d) 670 (C. C. A. 5th).

By §§ 111, 112 and 113 of the Revenue Act of 1928, profits derived from the purchase of property, as distinguished from exchanges of property, are ascertained and taxed as of the date of its sale or other disposition

by the purchaser. Profit, if any, accrues to him only upon sale or disposition, and the taxable income is the difference between the amount thus realized and its cost, less allowed deductions. It follows that one does not subject himself to income tax by the mere purchase of property, even if at less than its true value, and that taxable gain does not accrue to him before he sells or otherwise disposes of it. Specific provisions establishing this basis for the taxation of gains derived from purchased property were included in the 1916 and each subsequent revenue Act and accompanying regulations.

Section 22 of the Revenue Act of 1928 includes "dividends" in "gross income," which is the basis of determining taxable net income, and § 115 defines "dividend" as "any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits." While a sale of corporate assets to stockholders is, in a literal sense, a distribution of its property, such a transaction does not necessarily fall within the statutory definition of a dividend. For a sale to stockholders may not result in any diminution of its net worth and in that case cannot result in any distribution of its profits.

On the other hand such a sale, if for substantially less than the value of the property sold, may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend. The necessary consequence of the corporate action may be in substance the kind of a distribution to stockholders which it is the purpose of § 115 to tax as present income to stockholders, and such a transaction may appropriately be deemed in effect the declaration of a dividend, taxable to the extent that the value of the distributed property exceeds the stipulated price. But the bare fact that a transaction, on its face a sale, has resulted in a distribution of some of the corporate assets to stockholders, gives rise to no inference

that the distribution is a dividend within the meaning of § 115. To transfer it from the one category to the other, it is at least necessary to make some showing that the transaction is in purpose or effect used as an implement for the distribution of corporate earnings to stockholders.

The facts stipulated and the finding of the fair market value of the United stock at the time of the adoption of the first plan for its distribution abundantly sustain the board's conclusion that the transaction—in form a sale—was not intended to be the means of a distribution of earnings to stockholders. There may be cases in which market quotations, after the subscription rights have been issued, are persuasive evidence of value as of the time when the plan was adopted, and hence of its purpose and probable effect. But we cannot say that the board here, in finding the value of the shares of the newly organized United as of the time of adoption of the first plan, did not consider the market prices of the rights. The findings are inferences which the board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference. *Helvering* v. *Rankin,* 295 U. S. 123, 131, 132; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37. We accept the findings as at least establishing that the plan was adopted by Superpower in good faith as a means of effecting a sale of its assets to stockholders at fair market value. Hence the issue for decision, in so far as the first allotment of stock is concerned, is narrowed to the question of law whether the commitment of Superpower, by formal action of its board, to the sale of United stock at its then fair market value and the ensuing distribution to stockholders is taken out of the category of sales and placed in that of dividends by the fact that, pending execution of the

project, rights to subscribe sold on the exchange at substantial prices, or that the stock itself sold at prices substantially above the stipulated purchase price.

First. The mere issue of rights to subscribe and their receipt by stockholders, is not a dividend. No distribution of corporate assets or diminution of the net worth of the corporation results in any practical sense. Even though the rights have a market or exchange value, they are not dividends within the statutory definition. Cf. *Miles* v. *Safe Deposit & T. Co.*, 259 U. S. 247; *Helvering* v. *San Joaquin Co.*, 297 U. S. 496; *Helvering* v. *Bartlett, supra.* They are at most options or continuing offers, potential sources of income to the stockholders through sale or the exercise of the rights. Taxable income might result from their sale, but distribution of the corporate property could take place only on their exercise. The question, then, is whether the distribution which results from the exercise of the rights must be regarded as a dividend if the reasonable value of the property at the time of exercise is more than the purchase price.

Second. We think that a distribution of assets by a corporation to its stockholders by means of a sale, to which it is committed by appropriate corporate action at a time when their sale price represents their reasonable value, is not converted into a dividend by the mere circumstance that later, at the time of their delivery to stockholders, they have a higher value. The meaning of § 115 must be sought in the light of the situations to which it must be applied. It does not purport to withdraw corporations and their stockholders wholly from the operation of §§ 111, 112 and 113, taxing the profits of purchasers. It cannot be taken to withhold from corporations the power at their own election to effect, by workable means, sales of their assets to stockholders at fair value, subject to that incidence of taxing statutes which usually attends sales. The distribution contem-

plated and defined by it as a dividend is one to be effected by corporate action. Hence, in determining whether a given transaction is "sale" or "dividend," the corporate action which results in one or the other must be scrutinized in the light of the circumstances at the time when the action is taken, and of the conditions under which in practice it must be taken.

The only feasible method by which a corporation of large membership can effect a sale of its assets to stockholders is by tendering to them rights to subscribe, a method whose indispensable first step is the adoption, by appropriate corporate action, of the terms of the offer. Between the dates of the first step and of subscription a substantial period of time must elapse, during which the rights may, and often do, become the subject of violent market fluctuations. Any vendor who offers property for sale at a named price similarly carries the burden of risk that the property may increase in value between offer and acceptance. If the sale is by executory contract he also carries the risk between promise and performance. It is an inseparable incident of every sale except those in which conditions admit of payment for the property simultaneously with its tender for sale, a procedure which may not be available to a corporation seeking to sell its property to stockholders.

It is a solecism to speak of a corporation as distributing its profits for the sole reason that, after it has unavoidably assumed that risk in order to effect a sale of its property to stockholders at a fair price, the property increases in value. Price, which in the present case is decisive of the issue, must be determined in the light of the situation existing when price is fixed. If the option price is fair when fixed the transaction is a tender for a sale and not for a distribution of profits—a dividend as defined by § 115. If, pending execution of the plan, there were no change in value of the stock the transac-

tion would throughout concededly retain its character as a sale. Its character is not altered by the fluctuations of a speculative market, after the corporate action which defines the character of the transaction has been taken.

When the corporation has committed itself to a sale of its assets to stockholders at present market value the effect on its balance sheet is the same as in the case of other vendors who in various ways assume the risk of rising prices pending the consummation of the sale. In every case purchasers may, as a result of market change, acquire property at less than its value at the date of acquisition. But in the case of the corporation it does not follow that there has been a distribution of its profits. It can hardly be said that profits accrue to a corporation from a fortuitous gain in market value, the benefits of which it has relinquished before the gain occurs. Distribution of profits is neither the purpose nor effect of the action taken by the corporation and there is no adequate basis for saying that the transaction to which the directors committed their corporation was the distribution of earnings, and hence a dividend rather than a fairly conducted sale of corporate property with all the incidents which usually attend a sale when the price is fixed in advance of performance. It is decisive of the present case, so far as the first allotment of United shares is concerned, that distribution of corporate assets, effected by the sale, was not intended to be a means of distributing earnings, and that the price when fixed represented the fair market value of the property to be distributed.

There has been no finding, either by the commissioner or the board, of the fair market value of the United stock in May or of the Commonwealth & Southern in June, the months when the plans for the second and third allotments of the shares were adopted. The finding of the board that the facts as stipulated were not

sufficient to establish fair market value of the shares on those dates furnish sufficient support for its conclusion that there was no basis for treating the transactions, which were on their face sales, as distributions of earnings and hence dividends as defined by § 115.

The writ in No. 59 is dismissed and in No. 19 the judgment is

Reversed.

DODGE ET AL. *v.* BOARD OF EDUCATION OF CHICAGO ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 5. Argued April 28, 1937. Reargued October 14, 1937.—Decided November 8, 1937.

1. An Act merely fixing the terms or the tenures of public employees is presumptively not intended to create a vested right in the incumbent, but merely to declare a policy to be pursued until the legislature shall ordain otherwise. P. 78.
2. He who asserts the creation of a contract with the State in such a case has the burden of overcoming the presumption. P. 79.
3. While this Court, in applying the contract clause of the Constitution, is required to reach an independent judgment as to the existence and nature of the alleged contract, great weight is given to the views of the highest court of the State. P. 79.
4. Decision of Supreme Court of Illinois construing "An Act to provide for compulsory and voluntary retirement of teachers, . . . and the payment of retirement annuities," in *pari materia* with earlier laws and decisions, as not intending to create contracts or vested rights,—*held* a reasonable construction to be accepted by this Court when questioned under the contract clause of the Constitution. P. 79.
5. Interchangeability of the terms "pensions," "benefits," and "annuities," in Acts of Illinois dealing with retirement of teachers. P. 81.

364 Ill. 547; 5 N. E. (2d) 84, affirmed.

APPEAL from a decree affirming the dismissal of the bill in a suit to prevent the enforcement of a law alleged to

impair the contract rights of school teachers in respect of retirement privileges and pay.

Mr. Allan J. Carter, with whom *Messrs. Alfred R. Bates, Karl D. Loos,* and *Preston B. Kavanagh* were on the brief, for appellants.

Mr. Frank S. Righeimer, with whom *Messrs. Richard S. Folsom, Barnet Hodes, Ralph W. Condee,* and *Frank R. Schneberger* were on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

The appellants challenge an Act of Illinois which they assert impairs the obligation of contracts in contravention of Article I, Section 10, of the Constitution of the United States and deprives them of a vested right without due process contrary to the Fourteenth Amendment. The statute decreased the amounts of annuity payments to retired teachers in the public schools of Chicago.[1]

Since 1895 the State has had legislation creating a teachers' pension and retirement fund, originally the fruit of teachers' contributions and gifts or legacies, but later augmented by allotments from interest received and from taxes. With this fund and the benefit payments thereunder we are not concerned.

Prior to 1917 teachers in the Chicago schools were employed for such terms as the Board of Education might fix.[2] In that year an Act was passed providing for a probationary period of three years and prohibiting removal thereafter except for cause.[3]

---

[1] The Act embraces teachers, principals, district superintendents, and assistant superintendents, and retired members of those classes are among the appellants. For the sake of brevity all will be denominated teachers.

[2] Act of June 12, 1909, § 133, Laws of 1909, p. 380.

[3] Act of Apr. 20, 1917, §§ 138 and 161, Laws of 1917, pp. 730, 731; Smith-Hurd Ill. Rev. Stats., 1925, c. 122, par. 186, § 161.

In 1926 an Act known as the "Miller Law," [4] became effective. This provided for compulsory retirement and for the payment of annuities to retired teachers. By § 1 the Board of Education was directed to retire teachers from active service on February 1 and August 1 of each year according to the following program: In 1926 those seventy-five years of age or over, in 1927 those seventy-four years of age or over, in 1928 those seventy-three years of age or over, in 1929 those seventy-two years of age or over, and in 1930, and in each year thereafter, those seventy years of age or over. Section 2 provided:

"Each person so retired from active service who served in the public schools of such city for twenty or more years prior to such retirement, shall be paid the sum of fifteen hundred dollars ($1,500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes . . ."

There were two provisos, the one requiring that the annuitant should be subject to call by the superintendent of schools for consultation and advisory service, and the other declaring that the annuity granted by the Act was not to be in lieu of, but in addition to, the retirement allowance payable under existing legislation.

In 1927 a third section was added [5] permitting teachers who had served for twenty-five years or more, and were sixty-five years of age or over, who had not reached the age of compulsory retirement, to be retired upon request and to be paid from One thousand dollars to Fifteen hundred dollars per annum depending upon age at retirement.

---

[4] Cahill's Ill. Rev. Stats, 1927, c. 122, par. 269.

[5] Act of June 24, 1927, Laws of 1927, p. 792; Cahill's Ill. Rev Stats. 1927, c. 122, par. 269 (3).

The appellants fall into three classes: those who were compulsorily retired under the Miller Law; those who voluntarily retired under the law as amended; and those eligible for voluntary retirement who had signified their election to retire prior to July 1935.

July 12, 1935, a further amendment of the Miller Law was adopted [6] requiring the Board presently to retire teachers then in service who were sixty-five years of age or over and in the future to retire teachers as they attained that age. Each person so retired was to be paid Five hundred dollars annually for life from the date of retirement. The provisions that such teachers should hold themselves available for advisory service and consultation and that the annuity payments should be in addition to those made to retired teachers pursuant to other legislation were retained. Section 3 of the Miller Law, permitting voluntary retirement between the ages of sixty-five and seventy, was repealed. As construed by the State Supreme Court, the new law reduced to $500 the annuities of teachers theretofore retired, or eligible for retirement under the Miller Law, as well as those to be retired subsequent to its enactment.

Some of the appellants filed a class bill, in which the others intervened as co-plaintiffs, alleging that their rights to annuities were vested rights of which they could not be deprived; that the Miller Law constituted an offer which each of them had accepted by remaining in service until compulsory retirement or by retiring; that the obligation of the contract had thus been perfected and its attempted impairment by the later enactment was ineffective; and praying that the Board be commanded to rescind action taken pursuant to the Act of 1935 and enjoined from complying with its provisions. The appellee

[6] Act of July 12, 1935, Laws of 1935, p. 1378; Smith-Hurd Ill. Rev. Stats. 1935, c. 122, §§ 614a–614c.

Board of Education filed an answer in which it denied the existence of a contract and asserted that the payments to be made to appellants were pensions, subject to revocation or alteration at the will of the legislature. The appellee City of Chicago filed a motion to dismiss for want of equity. After a hearing, at which testimony was taken on behalf of the appellants, the trial court dismissed the bill.

The Supreme Court of the State affirmed, holding that, notwithstanding the payments under the Miller Law are denominated annuities, they cannot be differentiated from similar payments directed by law to be made to other retired civil servants of the State and her municipalities, and are in fact pensions or gratuities involving no agreement of the parties and subject to modification or abolition at the pleasure of the legislature.[7]

The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. The point of controversy is as to the category into which the Miller Law falls.

In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear.[8] Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms.[9] On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may

[7] 364 Ill. 547; 5 N. E. (2d) 84.

[8] *Hall* v. *Wisconsin*, 103 U. S. 5.

[9] *New Jersey* v. *Wilson*, 7 Cranch 164; *New Jersey* v. *Yard*, 95 U. S. 104.

be altered at the will of the legislature.[10] This is true also of an act fixing the term or tenure of a public officer or an employe of a state agency.[11] The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.[12] If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right.[13]

The Supreme Court of Illinois concluded that neither the language of the Miller Law, nor the circumstances of its adoption, evinced an intent on the part of the legislature to create a binding contract with the teachers of the State. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters.[14]

The Miller Law is entitled "An Act to provide for compulsory and voluntary retirement of teachers, . . . and the payment of retirement annuities." The relevant words of § 1 are: "In every city in this state . . . the board of education of such city shall retire from active

---

[10] *Butler* v. *Pennsylvania,* 10 How. 402; *United States* v. *Fisher,* 109 U. S. 143; *Fisk* v. *Jefferson Police Jury,* 116 U. S. 131, 133; *Mississippi ex rel. Robertson* v. *Miller,* 276 U. S. 174, 178.

[11] *Crenshaw* v. *United States,* 134 U. S. 99; *Phelps* v. *Board of Education,* 300 U. S. 319.

[12] *Rector of Christ Church* v. *County of Philadelphia,* 24 How. 300, 302; *Tucker* v. *Ferguson,* 22 Wall. 527, 575; *New Jersey* v. *Yard, supra; Newton* v. *Commissioners,* 100 U. S. 548, 561; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387.

[13] *Pennie* v. *Reis,* 132 U. S. 464; *Lynch* v. *United States,* 292 U. S. 571, 577, and cases cited.

[14] *Larson* v. *South Dakota,* 278 U. S. 429, 433; *Phelps* v. *Board of Education, supra,* and cases cited.

service . . . all teachers, [of a given age] . . . ." Section 2 provides: "Each person so retired . . . shall be paid the sum of fifteen hundred dollars ($1,500) annually and for life from the date of such retirement . . . ." Section 3 provides that persons sixty-five years of age or over "shall upon their own request, be retired . . . and thereafter be paid annuities for life . . . ." Appellants admit that this is not the normal language of a contract but rely on the circumstance that they, as teachers, especially those who voluntarily retired when otherwise they would not have been required so to do, rightly understood the State was pledging its faith that it would not recede from the offer held out to them by the statute as an inducement to become teachers and to retire and that the use of the term "annuities" rather than "pensions" was intended as a further assurance of a vested contractual right. The Supreme Court answered this contention by referring to the fact that for years prior to the adoption of the Miller Law, and by a uniform course of decision, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights and that the State was free to alter, amend, and repeal such laws even though the effect of its action was to deprive the pensioner or annuitant, for the future, of benefits then enjoyed. The cases to which the court refers so decide.[15]

[15] *Eddy* v. *Morgan,* 216 Ill. 437, 449; 75 N. E. 174; *Pecoy* v. *Chicago,* 265 Ill. 78–80; 106 N. E. 435; *Beutel* v. *Foreman,* 288 Ill. 106; 123 N. E. 270. The same principles have been consistently announced since 1926. *People* v. *Retirement Board,* 326 Ill. 579; 158 N. E. 220; *People* v. *Hanson,* 330 Ill. 79; 161 N. E. 145; *McCann* v. *Retirement Board,* 331 Ill. 193; 162 N. E. 859. Appellants urge that the authority of the foregoing cases has been shaken by *Porter* v. *Loehr,* 332 Ill. 353; 163 N. E. 689; and *DeWolf* v. *Bowley,* 355 Ill. 530, but these cases did not deal with the question presented in the instant case, and what was said with respect to the nature of pensions was in connection with provisions of the State Constitution.

The court further held that the legislature presumably had the doctrine of these cases in mind when it adopted the act now under review and that the appellants should have known that no distinction was intended between the rights conferred on them and those adjudicated under like laws with respect to other retired civil servants. We cannot say that this was error.

The appellants urge that the Miller Law, contrary to most of the acts that preceded it, omitted to use the word "pension" and instead used the word "annuity," a choice of terminology based on contract rather than on gift, and implying a consideration received as well as offered. The State Supreme Court answered the contention by saying:

"We are unable to see the distinction. The plan of payment is the same, the purposes are evidently the same, and the use of the term 'annuity' instead of 'pension'—which is but an annuity—does not seem to us to result in the distinction for which counsel for appellants contend."

We are of the same opinion, particularly as an examination of the Illinois statutes indicates that, in acts dealing with the subject, the legislature has apparently used the terms "pensions," "benefits," and "annuities" interchangeably as having the same connotation.[16]

The judgment is

Affirmed.

[16] In acts creating funds through enforced contributions of state and municipal employes, or out of taxes, or both, the titles and the substantive provisions for benefits to retired employes disclose the use of the terms "pensions" and "annuities" interchangeably to describe the payments to be made from the fund. Act of May 24, 1877, Laws, p. 62; Act of May 10, 1879, Laws, p. 72; Act of May 12, 1905, Laws, p. 309; Act of May 24, 1907, Laws, p. 529; Act of June 14, 1909, Laws, p. 133; Act of June 27, 1913, Laws, p. 598; Act of June 29, 1915, Laws, p. 465; Act of May 27, 1915, Laws, p. 649; Act of June 14, 1917, Laws, p. 748; Act of July 11, 1919, Laws, p. 700; Act of July 11, 1919, Laws, p. 743; Act of June 29, 1921, Laws, p. 203.

GROMAN *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 21. Argued October 21, 22, 1937.—Decided November 8, 1937.

1. Section 112 (i) (2) of the Revenue Act of 1928 declaring that the term party to a reorganization "includes" a corporation resulting from a reorganization, and both corporations when one acquires specified proportions of stock of another, is not an exclusive definition, but rather is intended to enlarge the meaning of the term beyond its ordinary connotation. P. 85.
2. Pursuant to an agreement between a corporation (G) and shareholders of another corporation (I):—G formed a new corporation (O), subscribing for its common stock and paying for it with cash and G's own preference shares; I's shareholders sold their shares to O and received from O a consideration made up of preference shares of G, and of O and cash; I then transferred its assets to O and was dissolved. *Held* that G was not "a party" to the reorganization and that the shares of G's preference stock received by I shareholders from O were a basis for computing taxable gain. Revenue Act of 1928, § 112. P. 88.

86 F. (2d) 670, affirmed.

CERTIORARI, 301 U. S. 677, to review a judgment overruling an order of the Board of Tax Appeals and sustaining an income tax deficiency assessment.

Mr. Egbert Robertson, with whom *Mr. James C. Spence* was on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Maurice J. Mahoney* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case involves the meaning and scope of the phrase "a party to a reorganization" as used in § 112 of the Revenue Act of 1928.[1]

January 29, 1929, the petitioner, and all other shareholders of Metals Refining Company, an Indiana corporation, hereinafter designated Indiana, entered into a contract with the Glidden Company, an Ohio corporation, reciting that the shareholders of Indiana were desirous of merging and consolidating the properties of their company with Glidden and with a corporation Glidden was to organize under the laws of Ohio, which corporation we shall call Ohio. The shareholders covenanted that they would assign their shares to Ohio, which was to have a specified capital structure divided into preferred and common shares, and Glidden covenanted that it would issue and deliver, or cause to be issued and delivered, to the shareholders a stated number of shares of its own prior preference stock at an agreed valuation, a stated number of shares of the preferred stock of Ohio, also at an agreed valuation, and sufficient cash to equal the appraised value of Indiana's assets as of March 1, 1929, and that, after the exchange of stock, Glidden would cause Indiana to transfer its assets to Ohio.

Glidden organized Ohio and became the owner of all its common stock but none of its preferred stock. Pursuant to the contract the shareholders of Indiana transferred their stock to Ohio and received therefor a total consideration of $1,207,016 consisting of Glidden prior preference stock valued at $533,980, shares of the pre-

[1] Ch. 852, 45 Stat. 791, 816.

ferred stock of Ohio valued at $500,000, and $153,036 in cash. Indiana then transferred its assets to Ohio and was dissolved.

As a result of the reorganization petitioner received shares of Glidden stock, shares of Ohio stock, and $17,293 in cash. In his return for 1929 he included the $17,293 as income received but ignored the shares of Glidden and of Ohio as stock received in exchange in a reorganization. The respondent ruled that Glidden was not a party to a reorganization within the meaning of the Revenue Act, treated the transaction as a taxable exchange to the extent of the cash and shares of Glidden, and determined a deficiency of $7,420. Upon receipt of notice to this effect the petitioner appealed to the Board of Tax Appeals which reversed the Commissioner, holding that Glidden was a party to a reorganization. The Circuit Court of Appeals reversed the Board.[2] We granted the writ of certiorari because of an alleged conflict of decision.[3]

Section 112 (b) (3) of the Revenue Act of 1928 declares that "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization." If the transaction involves the receipt of such stock or securities and "also of other property or money" then the gain, if any, is to be recognized in an amount not in excess of the sum of such money and the fair market value of such other property. Section 112 (c) (1).

Section 112 (i) (1) declares: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the

[2] 86 F. (2d) 670.

[3] See *Sage* v. *Commissioner*, 83 F. (2d) 221; *Commissioner* v. *Fifth Avenue Bank*, 84 F. (2d) 787; *Commissioner* v. *Bashford*, 87 F. (2d) 827.

voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." Subsection (2) is: "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

It is agreed that under the plain terms of the statute the cash received by the petitioner was income, and that as the stock of Ohio was obtained in part payment for that of Indiana, the exchange, to that extent, did not give rise to income to be included in the computation of petitioner's tax.

The question is whether that portion of the consideration consisting of prior preference shares of Glidden should be recognized in determining petitioner's taxable gain. The decision of this question depends upon whether Glidden's stock was that of a party to the reorganization for, if so, the statute declares gain or loss due to its receipt shall not be included in the taxpayer's computation of income for the year in which the exchange was made.

If § 112 (i) (2) is a definition of a party to a reorganization and excludes corporations not therein described, Glidden was not a party since its relation to the transaction is not within the terms of the definition. It was not a corporation resulting from the reorganization; and

it did not acquire a majority of the shares of voting stock and a majority of the shares of all other classes of stock of any other corporation in the reorganization. The Circuit Court of Appeals thought the section was intended as a definition of the term party as used in the Act and excluded all corporations not specifically described. It therefore held Glidden could not be considered a party to the reorganization.

The petitioner contends, we think correctly, that the section is not a definition but rather is intended to enlarge the connotation of the term "a party to a reorganization" to embrace corporations whose relation to the transaction would not in common usage be so denominated or as to whose status doubt might otherwise arise. This conclusion is fortified by the fact that when an exclusive definition is intended the word "means" is employed, as in the section we have quoted defining reorganization and in § 112 (j), defining the term "control," whereas here the word used is "includes." If more were needed § 701 (b) declares: "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."

The Treasury, in its regulations, has construed the section as not embodying an exclusive definition.[4] The administrative construction of an identical section in the Revenue Acts of 1924 and 1926 has been the same.[5]

[4] Treasury Regulations 74, promulgated under the Revenue Act of 1928, Art. 577: "The term 'a party to a reorganization' . . . includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise."

[5] Regulations 65, Art. 1577, applicable to § 203 (h) (2) of the Revenue Act of 1924; Regulations 69, Art. 1577, applicable to § 203 (h) (2) of the Revenue Act of 1926.

If the shareholders of A, and those of B, should agree to convey their stock to a new corporation C, in exchange for C's stock, a reorganization, as defined in § 112 (i) (1) would be effected. But it might well be contended, were it not for § 112 (i) (2), that the shareholders of the old corporations had not received stock in a non-taxable exchange, as specified in § 112 (b) (3), since the new corporation C was not a party to the exchange. In the present instance, Indiana had no part in the transaction. The shareholders agreed to transfer their stock to Ohio in exchange for securities. Indiana, as such, was not a party to any agreement and took no corporate action. If the plan had contemplated the continued existence of Indiana, and part payment of its shareholders in bonds or preferred stock of that company, and part in shares of Ohio, while this would clearly have constituted a reorganization as defined by the Act, it might, with reason, be urged that, as respects the bonds or preferred stock of Indiana, the exchange was taxable since Indiana was not a party to the reorganization. Section 112 (i) (2) precludes the contention.[6]

Plainly, however, there may be corporate parties to reorganizations, within the meaning of the statute, other than those enumerated in § 112 (i) (2). Thus if corporations A and B transfer all their assets to C, a new corporation, in exchange for all C's stock, the stock received is not a basis for calculation of gain on the exchange.[7] A and B are so evidently parties to the reorganization that we do not need § 112 (i) (2) to inform us of the fact.

Again, if company A transfers all its assets to company B, a going concern, upon the agreement of B to issue to A's shareholders its stock in such amount that they

[6] Compare *Helvering* v. *Watts*, 296 U. S. 387.

[7] Compare *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *G. & K. Manufacturing Co.* v. *Helvering*, 296 U. S. 389.

will own eighty per cent. of every class of B's outstanding stock, the consummation of the agreement will be a reorganization under the Act.[8] Unquestionably the gain ensuing upon the exchange of stock by A's shareholders will not be taxable since the stock received by them is that of B, a party to the reorganization, though B is not described as such in § 112 (i) (2). We must, therefore, irrespective of Glidden's failure to qualify as a party under that section, determine whether its relation to the reorganization is that of a party within the ordinary connotation of the term.

Glidden was a party to an agreement with the shareholders of Indiana and the agreement envisaged a reorganization as defined by § 112 (i) (1) (A) for it contemplated that Ohio should acquire all of the stock of Indiana. The agreement was fulfilled. But the crucial question is whether Glidden was a party to the reorganization thus effected. Glidden received nothing from the shareholders of Indiana. The exchange was between Indiana's shareholders and Ohio. Do the facts that Glidden contracted for the exchange and made it possible by subscribing and paying for Ohio's common stock in cash, so that Ohio could consummate the exchange, render Glidden a party to the reorganization? No more so than if a banking corporation had made the agreement with Indiana's shareholders and had organized the new corporation, and, by subscription to its stock and payment therefor in money and the banking company's stock put the new company in position to complete the exchange. Not every corporate broker, promoter, or agent which enters into a written agreement effectuating a reorganization, as defined in the Revenue Act, thereby becomes a party to the reorganization. And, if it is not a party, its stock received in exchange, pursuant to the plan, is

[8] Section 112, Subsections (i) (1) (B) and (j).

"other property" mentioned in § 112 (c) (1) and must be reckoned in computing gain or loss to the recipient. Glidden was, in the transaction in question, no more than the efficient agent in bringing about a reorganization. It was not, in the natural meaning of the term, a party to the reorganization.

It is argued, however, that Ohio was the *alter ego* of Glidden; that in truth Glidden was the principal and Ohio its agent; that we should look at the realities of the situation, disregard the corporate entity of Ohio, and treat it as Glidden. But to do so would be to ignore the purpose of the reorganization sections of the statute, which, as we have said, is that where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss.[9] If cash or "other property,"—that is, property other than stock or securities of the reorganized corporations,—is received, present gain or loss must be recognized. Was not Glidden's prior preference stock "other property" in the sense that its ownership represented a participation in assets in which Ohio, and its shareholders through it, had no proprietorship? Was it not "other property" in the sense that *qua* that stock the shareholders of Indiana assumed a relation toward the conveyed assets not measured by a continued substantial interest in those assets in the ownership of Ohio, but an interest in the assets of Glidden a part of which was the common stock of Ohio? These questions we think must be answered in the affirmative. To reject the plain meaning of the term "party,"

[9] *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462, 470; *Nelson Co.* v. *Helvering*, 296 U. S. 374, 377; *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 385; *G. & K. Manufacturing Co.* v. *Helvering*, 296 U. S. 389, 391.

and to attribute that relation to Glidden, would be not only to disregard the letter but also to violate the spirit of the Revenue Act.

We hold that Glidden was not a party to the reorganization and the receipt of its stock by Indiana's shareholders in exchange, in part, for their stock was the basis for computation of taxable gain to them in the year 1929.

The judgment is

Affirmed.

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

PUGET SOUND STEVEDORING CO. *v.* STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 68. Argued October 13, 14, 1937.—Decided November 8, 1937.

1. The business of a stevedoring corporation, acting as an independent contractor, in so far as it consists of the unloading or discharge of cargoes of vessels engaged in interstate or foreign commerce by longshoremen subject to its own direction and control, is interstate or foreign commerce, and the privilege of doing it can not be taxed by the State. P. 92.
2. In so far as the business of a stevedoring corporation consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, it is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the State. P. 94.

189 Wash. 131; 63 P. (2d) 532, modified.

APPEAL from a judgment affirming the dismissal of a suit to enjoin collection of a tax on the business of the appellant measured by gross receipts.

Mr. John Ambler, with whom *Messrs. Ben C. Grosscup* and *Bernard H. Levinson* were on the brief, for appellant.

Mr. E. P. Donnelly for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts, has been sustained against the protest of the taxpayer that an unlawful burden is imposed thereby upon interstate and foreign commerce. We are to determine whether the tax is valid either altogether or in part.

A statute of the State of Washington provides that for the privilege of engaging in business activities within the state a tax shall be payable by persons so engaged, payment to be made according to a designated measure. As to certain forms of business, as, for example, manufacturing and sales at retail or wholesale, the measure is a specially prescribed percentage of the value of the products or the gross receipts of sales. As to all other forms of business there is a general provision that the tax shall be equal to the gross income of the business multiplied by the rate of one half of one per cent. Washington Laws 1935, c. 180. This general provision is broad enough to cover the business of a stevedore.

Appellant, the Puget Sound Stevedoring Company, is a Washington corporation. It is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. At times it contracts with a shipowner or shipmaster to load or discharge a vessel through its own employees, controlling and directing the work itself. The great mass of its business, as we were informed upon the argument, is done in that way. At times, however, even though comparatively infrequently, it makes a different kind of contract which changes essentially its relation to the ship. In this second form of contract it does not undertake to control, direct, or supervise the work. It "merely collects the longshoremen and supplies them to the vessel," advancing their pay at the completion of the

job and "billing the ship and her owner the amount of the pay-roll plus a commission for services." All vessels served by the appellants are engaged exclusively in interstate or foreign commerce.

A suit by the taxpayer to enjoin the tax officials of the state from proceeding to collect the tax was dismissed by the trial court after a hearing upon bill and answer, the answer not disputing the allegations of the bill. The Supreme Court of Washington affirmed the dismissal, its judgment being placed upon the ground that the taxpayer was an independent contractor engaged in a local business. 189 Wash. 131; 63 P. (2d) 532. The case is here upon appeal. 28 U. S. C. § 344.

1. The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O. S. W. R. Co.* v. *Burtch,* 263 U. S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a "seaman." *International*

Stevedoring Co. v. *Haverty,* 272 U. S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here.

What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. Cf. *Baltimore & O. S. W. R. Co.* v. *Burtch, supra.* True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the "first place of rest," which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. Sometimes, though not, it seems, under appellant's contracts, the work in the hold is done by members of the crew, and the work upon the dock by employees of the dock company. Sometimes the cost is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee. The fact is stipulated, however, that no matter by whom the work is done or paid for, "stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the 'first place of rest,' and vice versa." In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in *New York ex rel. Pennsylvania R. Co.* v. *Knight,* 192 U. S. 21, 26, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being "contracted and paid for in-

dependently of any contract or payment for strictly interstate transportation."

The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 341–342; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Matson Navigation Co.* v. *State Board of Equalization,* 297 U. S. 441, 444; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655. The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself.

2. The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state.

What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in *Williams* v. *Fears,* 179 U. S. 270, 278, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby. Cf. *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21, 22; *Chassaniol* v. *Greenwood,* 291 U. S. 584. Little analogy exists between the activities now

in question and those reviewed in *McCall* v. *California,* 136 U. S. 104; *Texas Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150; and *Di Santo* v. *Pennsylvania,* 273 U. S. 34. The contractors there considered were found to be acting as agents of foreign steamship companies with authority to make contracts binding on the principals and even running in their names. If appellant stands in that relation to the vessels that it serves in this branch of its activities, it has failed to make the fact apparent by the allegations of its bill. The effect of such a showing is not before us now.

The decree of the Supreme Court of Washington being erroneous to the extent here indicated and no farther is modified accordingly, the cause being remanded for further proceedings not inconsistent with the opinion of this court.

Decree modified.

HALE ET AL. *v.* STATE BOARD OF ASSESSMENT AND REVIEW.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 16. Argued October 18, 19, 1937.—Decided November 8, 1937.

1. In determining the extent of a contractual obligation alleged to have been impaired by a state law, this Court will accept the judgment of the highest court of the State unless manifestly wrong. P. 100.

2. Iowa legislation, in effect when state and municipal bonds were issued and acquired, declared that such bonds should not be taxed. Later, a tax on the net income of residents in the State was imposed for the first time, and income taxes were assessed to the bondholders, the interest derived from their bonds being included in the computation of net income. The state court assumed without deciding that the statutes of exemption should be treated as giving rise to contracts, but interpreted those statutes as limited to taxes laid directly upon property in proportion to its value, and not as touching taxes in the nature of an excise upon the net

income of the owner. This Court follows the state court's conclusion, finding that at the least it is not plainly wrong and that it has support (a) in the State's statutory system of taxation viewed in its entirety (P. 101), (b) in decisions of Iowa and other States before the bonds were bought and afterwards (P. 103), and (c) in decisions of this Court. P. 104.

3. Contracts of tax exemption are strictly construed. P. 103.
4. The classification of a tax upon net income as something different from a property tax, if not substantially an excise, is not unreasonable. P. 106.
5. The tax complained of in this case is not laid upon the obligation to pay the principal or the interest, at all events not within the meaning of the contract of exemption; but is laid upon the yield, if any, of an aggregate of occupations and investments. P. 107.

271 N. W. 168, affirmed.

APPEAL from a decree sustaining the dismissal by the State District Court of a petition in equity praying annulment of an income tax assessment.

Messrs. Alan Loth and *William L. Hassett,* with whom *Mr. Denis M. Kelleher* was on the brief, for appellants.

The statutory exemption is contractual within the protection of the Federal Constitution.

The scope of the exemption, and whether this tax violates it, are questions for this Court to determine independently.

An income tax on interest derived from securities is in practical incidence and effect a tax upon the securities; and so a property tax within the exemption contract.

The contractual exemption is not confined to property taxes; it forbids any tax on the bonds, including this tax on their interest, which always has been held a tax on the bonds. The exemption is broad and general, and cannot be construed to exclude only one sort of tax on the bonds.

The exemption cannot be construed thus narrowly in order to save the constitutionality of the later income tax statute.

Previous Iowa cases do not justify construing the exemption to permit the present tax.

Whether or not income is itself "property," the exemption is violated for this tax still taxes the bonds. *City of Dubuque* v. *Northwestern Life Ins. Co.,* 29 Iowa 9, does not involve nor apply to our question.

Decisions as to whether a graduated income tax is forbidden by state constitutions requiring property taxes to be uniform do not apply here.

The exemption cannot be avoided by treating the tax as "in the nature of an excise." Even an excise on receiving income under a preëxisting contract impairs the obligation of that contract. There is no excise here, for appellees exercise no taxable privilege which can be the subject of an excise, or of any tax other than one in the nature of a property tax. The things mentioned below to show that appellants "engaged in business" are simple acts of ownership, not taxable as privileges, and a tax because of them is a tax on property-ownership and not an excise. The statute does not pretend to impose an excise or privilege tax.

Declaring the tax to be one on the recipient of income rather than on the income is of no avail. Taxing one because of ownership of property or receipt of such income as this is tantamount to taxing the property or its income. This tax is explicitly imposed on the income as well as on the recipient.

Macallen v. *Massachusetts,* 279 U. S. 620, and *Gillespie* v. *Oklahoma,* 257 U. S. 501, have not been overruled or made inapplicable by any subsequent decisions of this Court, and cases believed to overrule them actually uphold them; and show that whenever the tax is an income tax (as here) rather than a tax upon corporate franchises, it may not include income from exempt securities.

The case of *People* v. *Gilchrist,* 262 U. S. 94, does not permit this tax or control this case.

The power of the State to levy income taxes can not override the exemption.

Mr. Clair E. Hamilton, with whom *Mr. Leon W. Powers* was on the brief, for appellee.

The statutory exemption from taxation is not contractual, and therefore not protected by the Federal Constitution.

To bind a State by a statutory exemption from taxation there must be a binding contract supported by consideration. A mere gratuity or bounty is not a contract, and a general statutory exemption from taxation is a gratuity not a contract. Here there was no consideration for the exemptions, hence no contract.

The statutes under which the exemptions are claimed apply to *general property taxes* only, and not to an excise.

The exemption statute had been construed by the Supreme Court of Iowa to apply only to general property taxes, prior to the time when it was amended to include municipal, county, state and school bonds. Therefore, the legislature knew that it was amending a statute which exempted only from general property taxes.

A general income tax is not a property tax but an excise tax. Income is not property, as the Iowa Supreme Court has held.

People v. *Gilchrist,* 262 U. S. 84, is authority for the proposition that the Iowa income tax statute does not violate the contract clause of the Federal Constitution.

Cases on which appellants rely, as holding that to tax the interest is to tax the bonds, are not authority for the questions involved in this case. Most of those cases deal with the power of a State to tax the Federal Government or its instrumentalities. None of them deals with the right of a State to tax its own citizens, under a general income tax statute.

Macallen v. *Massachusetts,* 279 U. S. 620, is not applicable. The exemption statute involved there exempted persons as well as property, and the taxing statute, by amendment, was aimed directly at interest from the tax-exempt bonds. Moreover, the Massachusetts taxing statute construed in that case did not impose a general income tax, but applied only to domestic business corporations.

The Iowa income tax is not aimed at interest from tax-free bonds. It is a tax on the recipient of the income measured by his income from all sources.

Mr. Justice Cardozo delivered the opinion of the Court.

The question is whether interest upon bonds of the State of Iowa or its political subdivisions may be included in the assessment of a tax on the net income of the owners without detracting from earlier exemptions in respect of taxes upon property and without an unconstitutional impairment of the obligation of contract.

Appellants, residents of Iowa, were the owners in 1934 and afterwards of Iowa School District bonds, Iowa Road bonds, Iowa County bonds, and an Iowa Soldiers' Bonus bond, of the face value, aside from interest, of $752,900. The statutes of the state in force when the bonds were issued and when the appellants acquired ownership provide in varying but equivalent terms that such bonds "are not to be taxed," [1] "shall not be taxed," [2] or "shall be

[1] "The following classes of property are not to be taxed: 1. The property of the United States and this state. . . . municipal, school, and drainage bonds or certificates hereafter issued by any municipality, school district, drainage district or county within the state." Iowa Code Supplement of 1915, § 1304, subd. 1; Code 1935, § 6944, subd. 5.

[2] "Bonds and road certificates . . . shall not be taxed." Acts 38th G. A. c. 237, § 28; Code 1935, § 4753–a13.

exempt from taxation." [3] Iowa was without an income tax when these exemptions were declared. A "Personal Net Income Tax" upon persons resident within the state was imposed for the first time by a statute enacted in 1934. Code 1935, §§ 6943–f4 *et seq.* In the assessment of that tax for 1935 interest on appellants' bonds in the sum of $36,893.75 was included by the State Board of Assessment and Review against appellants' protest that the law, if so applied, impaired the obligation of contracts of exemption. Constitution of the United States, Article I, Sec. 10. By appropriate proceedings the controversy was brought to the Supreme Court of Iowa, where the assessment was upheld. 271 N. W. 168. The court assumed, without deciding, that the statutes of exemption should be treated as giving rise to contracts, and not merely as declarations of a legislative policy subject to revocation at the legislative pleasure. Proceeding on that assumption, the court interpreted the contracts as limited to taxes laid directly upon property in proportion to its value, and not as touching taxes in the nature of an excise upon the net income of an owner. This conclusion was supported by an analysis of the Iowa statutes and a review of Iowa decisions as well as the decisions of this and other courts. The case is here upon appeal. 28 U. S. C. § 344.

We make the same assumption that was made in the state court as to the existence of a contract, without indicating thereby how we would rule upon the point if a ruling were essential. Cf. *New York ex rel. Clyde* v. *Gilchrist,* 262 U. S. 94, 98; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 489; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 386; *Dodge* v. *Board of Education, ante,* p. 74. Essential it is not for the decision of this case if the con-

[3] "All bonds issued hereunder [the Soldiers' Bonus Act] shall be exempt from taxation." Acts 39th G. A. c. 332, § 10; Code 1935, § 6944, subd. 22.

tract to be assumed is limited in scope and operation as it was limited below. Whether the limitation should be accepted is thus the pivotal inquiry. The power is ours, when the impairment of an obligation is urged against a law, to determine for ourselves the effect and meaning of the contract as well as its existence. *U. S. Mortgage Co.* v. *Matthews,* 293 U. S. 232, 236; *Funkhouser* v. *Preston Co.,* 290 U. S. 163, 167. Even so, we lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong. *Phelps* v. *Board of Education,* 300 U. S. 319, 322, 323; *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120; *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243, 244; *Dodge* v. *Board of Education, supra.* For reasons to be developed, obvious error is not discernible in the ruling of the highest court of Iowa that the statutory exemptions invoked by the appellants were not intended to include taxes upon the net income derived from business or investments. To the contrary the decision has support in the statutory system of taxation viewed in its entirety, in state decisions both in the courts of Iowa and elsewhere before the bonds were bought and afterwards, and even indeed in decisions of this court. Our search is for something more than the meaning of a property tax or an excise in the thought of skilled economists or masters of finance. It is for the meaning that at a particular time and place and in the setting of a particular statute might reasonably have acceptance by men of common understanding.

1. The limitation affixed to the contracts of exemption has support, first of all, in the statutory system of taxation considered as a whole.

Of the total interest ($36,893.75) collected on appellants' bonds, the greater portion ($32,776.25) is protected, if at all, by reason of the exemption given to bonds issued by any school district or county within the state. That exemption may best be studied as it stood in the Supple-

mental Code of 1915.[4] It was then subdivision 1 of § 1304. There were other subdivisions exempting other items:—the grounds and buildings for public libraries; household furniture up to a prescribed value; the farming utensils of any person who makes his livelihood by farming; and many other kinds of property. The section opens with the statement that "the following classes of property are not to be taxed," and then enumerates the classes. But the scope of the exemption is likely to be exaggerated unless the next preceding section (1303) is read at the same time. "The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county," a mandate clearly addressed to the levy of *ad valorem* taxes only. The inference is a fair one that § 1304 did not exempt the items there enumerated from taxation of every form and for every purpose. It withdrew them from the operation of the levy commanded by the section next preceding.[5] True, in later compilations of the statutes, the sections have been rearranged, though with substance unaffected. Cf. Code, 1935, § 6953. In the Code of 1935, subdivision 1 of § 1304 is subdivision 5 of § 6944; § 1303 is § 7171. There can be little doubt that the meaning remains what it was before. *United States* v. *Ryder*, 110 U. S. 729, 740; *United States* v. *Sischo*, 262 U. S. 165, 168, 169; *Warner* v. *Goltra*, 293 U. S. 155, 161; *Davis* v. *Davis*, 75 N. Y. 221,

[4] Compare Code of 1851, § 455; Code of 1873, § 797; Code of 1897, § 1304.

[5] An earlier form of the same statute, after providing, like the later one, that "the following classes of property are not to be taxed," adds the significant words, "and they may be omitted from the assessments herein required." Code of 1873, § 797. The opinion in *Sioux City* v. *Independent School District*, 55 Iowa 150, 151, 152; 7 N. W. 488, refers to these words as emphasizing the conclusion that exemption relates to taxes on the value of the property. The 1851 Code provision is almost identical.

225, 226; *Fifth Avenue Bldg. Co.* v. *Kernochan,* 221 N. Y. 370, 375; 117 N. E. 579; *Mitchell* v. *Simpson,* L. R. 25 Q. B. D. 183, 189.

Besides the school and county bonds, appellants were the owners of a Soldiers' Bonus bond in the sum of $1,000, and Road bonds or certificates to the amount of $82,000. The exemption of the Bonus bond was declared by the statute authorizing the issue. 39th G. A., c. 332, § 10, adopted March 23, 1921. The exemption is now subdivision 22 of § 6944 of the Code of 1935, and should be given the same meaning as the exemption conferred by the other subdivisions. The Road bonds or certificates have their exemption under a different statute (§ 4753a13, Codes of 1931 and 1935), but the bonds are expressly declared to be obligations of the county (§ 4753a14), and, as the court below observed, there is no reason to suppose that the exemption given them was broader than that of county obligations generally.

2. The meaning of the Iowa statutes is clarified, if otherwise uncertain, by the opinions of the Iowa court in this and other cases.

The court in its opinion in this case applied the general principle that contracts of tax exemption must receive a strict construction. The teaching of this court has been always to the same effect. "Grants of immunity from taxation in derogation of a sovereign power of the state, are strictly construed." *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491, citing many cases. Adhering to that principle, the Iowa court held that the tax exemption was limited to taxes upon property, and could not be extended to taxes in the nature of an excise. For this restriction it found support in its own earlier decisions, rendered many years before appellants' bonds were purchased. Thus, *Sioux City* v. *Independent School District,* 55 Iowa 150; 7 N. W. 488, decided in 1880, and *E. & W. Construction Co.* v. *Jasper County,* 117 Iowa 365; 90 N. W. 1006, de-

cided in 1902, held the exemption inapplicable to special assessments, limiting it at the same time "to the taxes contemplated in title 6 of the Code." [6] So also *Iowa Mutual Tornado Ins. Assn.* v. *Gilbertson,* 129 Iowa 658; 106 N. W. 153, decided in 1906, interpreting a different subdivision of the exemption statute, but a cognate one, again limited the exemption to taxes upon property, and refused to apply it to an excise or license tax measured by receipts. The ruling was reiterated in *State* v. *City of Des Moines,* 221 Iowa 642; 266 N. W. 153, decided in 1936, upon facts not greatly different. Cf. *Plummer* v. *Coler,* 178 U. S. 115. From these precedents the Iowa court advanced to the holding, announced in the case at bar, that a tax upon net income was substantially an excise, and hence did not come within the scope of an exemption confined to taxes upon property. The result was conceived to be latent in the precedents if effect was to be given to their fair implications. "So the state court has told us," construing its own decisions, "and the good faith of its declaration is not successfully impeached." *Stockholders* v. *Sterling,* 300 U. S. 175, 183.

3. The ruling that a tax upon net income is without the scope of the exemption cannot be adjudged unreasonable, for it will be found to be supported by decisions in many other states, and even, indeed, by decisions of this court.

(a) The question as to the nature of such a tax has come up repeatedly under state constitutions requiring taxes upon property to be equal and uniform, or imposing similar restrictions. Many, perhaps most, courts hold that a net income tax is to be classified as an excise.[7]

[6] The Code in force at that time was the one of 1873.

[7] *Sims* v. *Ahrens,* 167 Ark. 557; 271 S. W. 720; *Stanley* v. *Gates,* 179 Ark. 886; 19 S. W. (2d) 1000; *Waring* v. *Savannah,* 60 Ga. 93, 100; *Featherstone* v. *Norman,* 170 Ga. 370, 379; 153 S. E. 58; *Diefendorf* v. *Gallet,* 51 Idaho 619, 627; 10 P. (2d) 307; *Miles* v. *Department of Treasury,* 199 N. E. 372 (Ind.); *Opinion of the Justices,*

"The tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it." *Featherstone* v. *Norman,* 170 Ga. 370, 382; 153 S. E. 58; *Purnell* v. *Page,* 133 N. C. 125, 129; 45 S. E. 534. As early as 1870, the Supreme Court of Iowa had written an opinion which foreshadows the same thought. *Dubuque* v. *Northwestern Life Ins. Co.,* 29 Iowa 9. Cf. *Vilas* v. *Iowa State Board of Assessment and Review,* 273 N. W. 338. True, there are courts in other states that teach a different doctrine.[8] Our duty does not call upon us to determine which view we would accept as supported by the better reason if the choice were an original one for us, unaffected by the view accepted in the court below. Enough for present purposes that with authority so nearly balanced the Iowa construction of the contract is at least not plainly wrong. The propriety of our keeping to it is the clearer when we bear in mind that there were Iowa

---

133 Me. 525, 528; 178 Atl. 820; *Hattiesburg Grocery Co.* v. *Robertson,* 126 Miss. 34, 52; 88 So. 4; *Ludlow-Saylor Wire Co.* v. *Wollbrinck,* 275 Mo. 339, 351; 205 S. W. 196; *Bacon* v. *Ranson,* 331 Mo. 985, 990; 56 S. W. (2d) 786; *O'Connell* v. *State Board of Equalization,* 95 Mont. 91, 112; 25 P. (2d) 114; *Mills* v. *State Board of Equalization,* 97 Mont. 13, 17; 33 P. (2d) 563; *Maxwell* v. *Kent-Coffey Mfg. Co.,* 204 N. C. 365, 371; 168 S. E. 397; *Hunton* v. *Commonwealth,* 166 Va. 229, 243; 183 S. E. 873; *Van Dyke* v. *State Tax Comm'n,* 217 Wis. 528, 535; 259 N. W. 700; 4 Cooley on Taxation, 4th ed., § 1743. Many cases are collected in Brown, The Nature of the Income Tax, 17 Minn. L. Rev. 127, 130, 139.

[8] *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492; 86 So. 56; *Bachrach* v. *Nelson,* 349 Ill. 579, 595; 182 N. E. 909; *Opinion of the Justices,* 220 Mass. 613, 624; 108 N. E. 570; 266 Mass. 583, 585; 165 N. E. 900; *Harrison* v. *Commissioner of Corporations,* 272 Mass. 422, 427; 172 N. E. 605; *Redfield* v. *Fisher,* 135 Ore. 180, 192; 292 Pac. 813; *Kelley* v. *Kalodner,* 320 Pa. St. 180, 185; 181 Atl. 598; *Culliton* v. *Chase,* 174 Wash. 363; 25 P. (2d) 81; *Jensen* v. *Henneford,* 185 Wash. 209, 216; 53 P. (2d) 607.

decisions pointing the same way before appellants became owners.

(b) Finally, and even more conclusively, decisions of our own court forbid us to stigmatize as unreasonable the classification of a tax upon net income as something different from a property tax, if not substantially an excise. *New York ex rel. Clyde* v. *Gilchrist,* 262 U. S. 94; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, all point in that direction. We will consider them in the order stated.

The taxpayer in *New York ex rel. Clyde* v. *Gilchrist* claimed the benefit of an exemption under a statute of New York to the effect that, upon payment of a recording tax, debts and obligations secured by mortgages of real property should be exempt from other taxation by the state and local subdivisions. The question was whether the exemption thus accorded was applicable to an income tax enacted long afterwards. The state court ruled against the taxpayer (*People ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131; 188 N. Y. S. 344; *People ex rel. Clyde* v. *Wendell,* 197 App. Div. 913; 187 N. Y. S. 949; 232 N. Y. 550; 134 N. E. 567), assuming the existence of a contract of exemption, but holding that it was not intended to apply to taxes upon income. This court, considering the fact that at the date of the exemption statute "no one thought of an income tax," and recalling that "any contract of exemption must be shown to have been indisputably within the intention of the Legislature," sustained the judgment of the state court. "The conclusion does not seem to us very difficult to reach." 262 U. S. at p. 98.

The controversy in *New York ex rel. Cohn* v. *Graves,* decided at the last term, evoked a ruling by this court that a state tax upon net income which included rents derived from land in another state, was not equivalent to a property tax imposed upon the land itself. "The inci-

dence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income." 300 U. S. at p. 314. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, was considered and distinguished. Two rulings emerge as a result of the analysis. By the teaching of the *Pollock* case an income tax on the rents of land (157 U. S. 429) or even on the fruits of other investments (158 U. S. 601) is an impost upon property within the section of the Constitution (Art. I, sec. 2, cl. 3) governing the apportionment of direct taxes among the states. 300 U. S. at p. 315. By the teaching of the same case an income tax, if made to cover the interest on government bonds, is a clog upon the borrowing power such as was condemned in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Collector* v. *Day*, 11 Wall. 113, 124. 300 U. S. at pp. 315, 316. There was no holding that the tax is a property one for every purpose or in every context. We look to all the facts.

In line with that conception of the *Pollock* case is *Brushaber* v. *Union Pacific R. Co.*, *supra*, where the court pointed out (240 U. S. at pp. 16, 17) that "the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property," but that to the contrary such taxes were enforcible as excises except to the extent that violence might thus be done to the spirit and intent of the rule governing apportionment.

The doctrine of these decisions, we think, is applicable here. We do not overlook the argument that the promise to pay interest may be part of the obligation of a contract as much as the promise to pay principal. To concede this counts for little if the distinction between an

excise and a property tax, or between the different meanings of a property tax, is not permitted to escape us. Unless the foregoing analysis is faulty, the tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assesssed. Cf. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. In the light of all the precedents brought together in this opinion, we cannot say that a tax assessed on such a base is a plain violation of any contract of exemption to be discovered in the laws of Iowa.

Doubtless a contract of exemption can be phrased in such terms as to forbid the imposition of a net income tax or indeed a tax of any sort. Bonds issued by the Government of the United States are sometimes exempt by their express terms from income taxes to any degree (40 Stat. 35, § 1), sometimes from income taxes other than surtaxes or excess profits taxes. 40 Stat. 288, 291, § 7. Such were the Liberty Bonds considered by this court in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620. Broad also was the exemption given to the Federal Farm Loan bonds considered in the same case, at least in respect of taxes levied by the states, for the bonds were declared expressly to be federal instrumentalities. 39 Stat. 360, 380, § 26. Less clear and comprehensive was the exemption of the Massachusetts bonds declared by a Massachusetts statute (Mass. G. L. c. 59, § 5) and dealt with more or less summarily at the end of the opinion. 279

U. S. at p. 634. However, the courts of Massachusetts had already rejected the contention that an income tax was to be classified as an excise rather than a tax on property. *Opinion of the Justices,* 220 Mass. 613, 624; 108 N. E. 570; 266 Mass. 583, 585; 165 N. E. 900; *Harrison* v. *Commissioner of Corporations,* 272 Mass. 422, 427; 172 N. E. 605. The meaning of the exemption was properly ascertained in subjection to that ruling. Cf. *Educational Films Corp.* v. *Ward,* 282 U. S. 379, and *Pacific Co.* v. *Johnson, supra.*

Nothing in this opinion is at war with *Weston* v. *Charleston,* 2 Pet. 449, or other cases declaring the immunities of governmental agencies. In the case cited and its congeners the problem for decision was whether a tax upon income, even though not a property tax in strictness or for every purpose, was one in such a sense or in such a measure as to hamper the freedom of the central government through the interference of the states or the freedom of the states through the interference of the central government. The limitations declared in those decisions were gathered by implication from the structure of our federal system, and were accommodated, as the court believed, to the public policy at stake. What the court is now concerned with, however, is not the preservation or protection of any governmental function. Iowa cannot be held to cripple in an unconstitutional way her own privileges and powers when she levies an income or even a property tax upon bonds issued by herself. The court is now concerned with the meaning and effect of particular contracts of exemption to be read narrowly and strictly. There is no room at such a time for the freer and broader methods that have been thought to be appropriate in the development of the doctrine of implied restraints.

The judgment is

Affirmed.

(Dissenting opinion, p. 110.)

MR. JUSTICE SUTHERLAND, dissenting.

I think the judgment should be reversed.

At the time the bonds here involved were purchased, the statutes of Iowa expressly provided that they "are not to be taxed" or "shall not be taxed" or "shall be exempt from taxation." These are plain words, and there is no room for construction. When the language is clear, it is conclusive. "There can be no construction where there is nothing to construe." This has been held so often by this court that it has become axiomatic. That the provisions with respect to the non-taxability of the bonds constitute a statutory contract with the purchaser of the bonds, and that any subsequent statute which violates these provisions impairs the obligation of the contract, is not a matter of dispute. The sole question is whether the imposition of an income tax in respect of the interest derived from the bonds is a tax upon the bonds.

We are not concerned with the name given to the tax. The exemption is in unqualified terms, and includes *all* taxes. And I see no warrant for saying that the exemption must be limited to so-called *ad valorem* taxes. The exemption is not in the form or nature of a proviso to the section fixing the time and providing for the levy of such taxes, but is a substantive enactment standing independently and complete in itself. Nor do I see any ground for confining it to taxes then known to the Iowa law. Such an all-embracing exemption cannot be avoided by the invention of a new tax. To me, it seems evident that if any tax be imposed upon the bonds, the contract is impaired. It likewise seems evident that the tax here is imposed on the bonds themselves.

Of what does a bond for the payment of money consist? Certainly not the principal alone; for the promise to pay interest is as much a part of the obligation of the bond as the promise to pay the principal. A bond, for example, promises to pay the bearer at the end of ten years the sum of $1,000, and also interest at the rate of 5% per

annum, to be paid semi-annually; that is to say, promises to pay $25 at the end of every six-months' period, and $1,000 at the end of ten years. There is no difference between the two promises in respect of their binding or legal quality. Both are obligations of the bond. If one cannot be violated, neither can the other.

There is no difference in principle between such a bond and one where the bond is issued upon a discount basis, as in the case of United States Savings Bonds (Treasury Department Circular No. 529, February 25, 1935). A United States Savings Bond for $1,000, payable in ten years "without interest," may be purchased for the sum of $750—the remaining $250 being deferred interest. Plainly, the $250 deferred interest is as much a part of the bond as the $750 originally invested; and a contractual obligation exempting the bond from taxation is equally applicable to each. Is the case different if the bond shall provide for the payment of $750, together with interest in the sum of $250 to be paid in installments or at the end of ten years? Certainly not, unless form is to be exalted and substance ignored.

The force of what has been said cannot be avoided by merely calling the tax an excise. If a tax falls upon the bond and lessens its proceeds, either in respect of principal or interest, it is a tax on the bond, and cannot be made something else by resort to the vocabulary or by employing some circuitous method of imposing it. It is well settled, at least generally, that "what cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank* v. *United States,* 181 U. S. 283, 294, 300, and cases cited. I am unable to subscribe to that philosophy which seems to teach that a forbidden result may nevertheless be achieved if only some delusive and devious way of achieving it can be found.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER join in this opinion.

FEDERAL TRADE COMMISSION *v.* STANDARD EDUCATION SOCIETY ET AL.

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

No. 14. Argued October 18, 1937.—Decided November 8, 1937.

1. The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. P. 116.
2. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. *Id.*
3. Findings of the Federal Trade Commission are conclusive if supported by evidence. P. 117.
4. As part of a scheme for selling an encyclopedia and a loose leaf extension service, respondents falsely represented to prospective purchasers that the books would be given to them free and that they would pay only for the extension service at a reduced price; whereas, in truth, the price charged them was the same as the regular, standard price for both the books and the extension service. *Held*—violative of § 5 of the Federal Trade Commission Act. Pp. 115, 117.
5. An order of the Federal Trade Commission forbade, in the advertising of a revised encyclopedia, the use of the names of persons, as contributors or editors, who had not consented to such use and who had neither actually contributed to the publications nor helped to edit them. *Held* properly inclusive of contributors to an earlier work no part of whose contributions had been carried into the revision. P. 117.
6. The Commission's findings, supported by evidence, sustain its order forbidding, in advertisements of a publication, the use of testimonials attributed to persons who did not give them. P. 118.
7. A cease-and-desist order of the Federal Trade Commission directed to a corporation binds those who are in control of its affairs and may properly include them as individuals when there is reason to believe that, if directed to the corporation alone, they will endeavor to evade it. P. 119.

86 F. (2d) 692, reversed in part.

CERTIORARI, 301 U. S. 674, to review the judgment of the court below which modified in part, and reversed in part, an order of the Federal Trade Commission.

Assistant Attorney General Jackson, with whom *Solicitor General Reed* and *Messrs. Hugh B. Cox, Robert L. Stern, W. T. Kelley, Martin A. Morrison,* and *James W. Nichol* were on the brief, for petitioner.

Mr. Henry Ward Beer for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Upon application by the Federal Trade Commission this Court granted certiorari to review that part of a decree of the Circuit Court of Appeals for the Second Circuit which modified in part and reversed in part a "cease and desist" order of the Commission. 86 F. (2d) 692. The Commission, after service of a complaint, and extensive hearings, made a finding of facts from the testimony and ordered two corporation respondents, and three individuals controlling these corporations, to desist from certain practices used by respondents in furthering the sale of encyclopedias and other books in interstate commerce. The Commission not only found the practices to be "unfair" but also "false, deceptive and misleading." The court below modified and weakened the Commission's order in material aspects, and the questions here are whether the testimony supported all the findings of the Commission, and whether these findings justified the entire order as against all the respondents.

All "unfair" practices found by the Commission related wholly to methods of sale. The Commission's order against respondents was based, in part, upon the following findings:

That fictitious testimonials and recommendations had been used by respondents; that authorized testimonials and recommendations had been exaggerated and garbled; that authorized testimonials for a "previous work" were later used to further the sale of another "work, quite different in form, in material and in purpose." "For the purpose of selling their publications, Standard Reference Work and New Standard Encyclopedia," respondents advertised "a list headed 'Contributors and Reviewers' and . . . In such list they include many who have not been either contributors or reviewers to either the Standard Reference Work or the New Standard Encyclopedia." Respondents sold "their publications at retail to the public by salesmen on the subscription plan" and in carrying out said plan they represented to prospects that they were selecting a small list of "well connected representative people" in various localities, in order to present them with an "artcraft de luxe edition" of the encyclopedia. Further carrying out respondents' scheme, their agents represented that "they are giving away a set of books; that they are not selling anything; that the books are free; that the books are being given free as an advertising plan . . . that the prospect has been specially selected, and that the only return desired for the gift is permission to use the name of the prospect for advertising purposes and as a reference"; that the "said prospects are paying only for the loose leaf extension service; . . . that the price of $69.50 is a reduced price and that the regular price of the books and the extension service is $150.00, sometimes even as high as $200.00." The statements that the encyclopedia is being given away; that payment is only being made "for the loose leaf extension service"; and that "$69.50 is a reduced price . . . are false, deceptive and misleading, as $69.50 is the regular, standard price" for both the encyclopedia and the loose leaf extension and research privileges.

The Court of Appeals reversed clauses one and three of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers of their publications that the publishing company was giving encyclopedias to them as a gift, and that purchasers were paying only for loose leaf supplements.

The Court of Appeals affirmed clauses two and six of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers that sets of books had "been reserved to be given away free of cost to selected persons" and that the usual price at which respondents' publications are sold is higher than the price "at which they are offered to such purchasers."

It is clear, both from the findings of the Commission, and the testimony upon which they rest, that the practices forbidden in clauses one, two, three and six are all tied together as parts of the same sales plan. As a first step under this plan, salesmen obtained an audience with prospective purchasers by representations made to them that by reason of their prestige and influence they had been selected by the Company to receive a set of books free of costs for advertising purposes. After respondents' agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose leaf supplement alone was $69.50, and that the usual price of both books and loose leaf supplements was much in excess of $69.50. The Commission ordered respondents not to engage in carrying out any part of this entire sales plan. However, as the Court of Appeals reversed clauses one and three of the Commission's order, a part of the sales scheme which the Commission condemned as unfair, can yet be carried out by respondents. That is to say—respondents by that reversal, are left free to continue to obtain audiences with prospects and to sell encyclopedias and loose leaf supple-

ments to them, by false representations that the Company gives them a set of encyclopedias free, and that $69.50 paid by them to the Company, is for the loose leaf supplement alone.

In reaching the conclusion that respondents should be left free to engage in that part of the sales scheme prohibited by clauses one and three of the Commission's order, the court below reasoned as follows:

"We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' 'extension service,' will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second. . . . Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils."

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose leaf supplements alone sell for $69.50, when in reality both books and supplement regularly sell for $69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they

were given an encyclopedia, and that they paid only for the loose leaf supplement. That representations were made justifying this belief; that the plan was outlined in letters going directly from the companies; that men and women were deceived by them—there can be little doubt. Certainly the Commission was justified from the evidence in finding that customers were misled. Testimony in the record from citizens of ten States—teachers, doctors, college professors, club women, business men—proves beyond doubt that the practice was not only the commonly accepted sales method for respondents' encyclopedias, but that it successfully deceived and deluded its victims.

The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony.[1] The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with evidence of witnesses under oath which support the Commission's findings. Clauses one and three of the Commission's order should be sustained and enforced.

The seventh clause of the Commission's order forbade the use of names of persons as contributors or editors who had not consented to such use and who had neither actually contributed to the publications nor helped to edit them.

The Court of Appeals upheld this clause except as it might apply to the original contributors to Aiton's encyclopedia saying that "it seems to us not 'unfair' to announce as contributors to the derived works those who have been contributors to the original." Aiton's encyclopedia was published about 1909, and respondents' works represent the result of periodic revisions and expansions of the prior work. The Government concedes in

[1] Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 717, U. S. C. Title 15, § 45.

its brief that this clause of the Commission's order does not prevent respondents from representing a person who contributed to the original, as a contributor to their revised publication, if "some of the material originally in Aiton's encyclopedia remained in the new Edition of the revised work." Respondents agree with this interpretation. As between these parties, therefore, this clause permits respondents to represent any person as a contributor to their present revised encyclopedia, if a part of his original material has been carried forward to it. If no part of his contribution to Aiton's encyclopedia has been brought forward, he is not a contributor and should not be represented as such. This clause as originally declared by the Commission would, under this interpretation, properly forbid respondents from falsely representing as contributors or editors those who had actually neither contributed to, nor edited, the publications. The decree of the court below modifying this clause is not in accordance with our conclusion, and clause seven of the Commission's order should be enforced.

The Court of Appeals reversed the eighth clause of the order of the Commission. The reason given by the court below for this action was as follows:

"For the eighth, which forbad the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; . . ."

We are convinced that the Commission's findings of fact justified this clause of the order and that the testimony supports these findings.[2]

[2] From paragraphs fourteen and fifteen of the Commission's findings it appears that respondents used the names of various individuals in testimonials and that

"None of these men or this woman ever wrote any testimonial or recommendation of or concerning the New Standard Encyclopedia. The representations that these men and this woman wrote the recommendations for the so-called 'New Standard Encyclopedia' are false, deceptive and misleading."

The Court of Appeals entirely excluded respondent Greener from the operation of the Commission's order, and partially excluded respondents Stanford and Ward. The Commission had found from the testimony that

"Respondents H. M. Stanford, W. H. Ward, and A. J. Greener are the managers and sole stockholders of respondent Standard Education Society and the managers and sole incorporators of Respondent Standard Encyclopedia Corporation . . . . The Commission concludes and infers from the record in this case and so finds that this corporation was organized by the individual respondent for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent the Standard Education Society."

There was ample support in the testimony for this finding of the Commission.

The Federal Trade Commission Act (*supra*) gives the Commission power to "prevent persons, partnerships or corporations, . . . from using unfair methods of competition in Commerce."

This Court has held that

"a command to the Corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance . . . they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." *Wilson* v. *United States,* 221 U. S. 361, 376.

Respondents Stanford, Ward and Greener, who are in charge and control of the affairs of respondent corporations, would be bound by a cease and desist order rendered against the corporations. Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation had existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Stanford, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order.

The decree below will be reversed except as to modification of clause ten of the Commission's order, and the cause is remanded with instructions to proceed in conformity with this opinion.

Reversed.

CHICAGO TITLE AND TRUST CO. *v.* FORTY-ONE THIRTY-SIX WILCOX BLDG. CORP.

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

Nos. 23 and 24. Argued October 21, 1937.—Decided November 15, 1937.

1. A corporation, dissolved and put out of existence by the State which created it, may not invoke the powers of a court of bankruptcy under § 77B of the Bankruptcy Act. P. 124.

   The record does not present a case where creditors are the moving parties, or where there has been any act of bankruptcy committed by the corporation, or where any pertinent law of the State is in conflict with the federal bankruptcy laws.

2. A private corporation can exist only under the express law of the State or sovereignty by which it was created. Its dissolution puts

an end to its existence; and there must be some statutory authority for the prolongation of its life, even for litigation purposes. P. 125.

3. Under the Illinois law a corporation is without corporate capacity to initiate any legal proceedings after two years from the date of its dissolution, and this includes a proceeding for reorganization under Bankruptcy Act § 77B. P. 126.
4. State laws in conflict with the laws of Congress on the subject of bankruptcies are suspended only to the extent of actual conflict. P. 126.
5. How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. P. 127.
6. Section 77B of the Bankruptcy Act does not enable stockholders to resuscitate, in any other guise, a corporation the powers and existence of which, save for the winding up of pending litigation, have been extinguished by the State that created it. P. 129.

86 F. (2d) 667, reversed.

CERTIORARI, 301 U. S. 676, to review the affirmance by the court below of an order of the District Court entered in a reorganization proceeding under § 77B of the Bankruptcy Act. The order confirmed the report of a special master and commanded a receiver in possession of property in foreclosure proceedings in a state court to turn over to a temporary trustee, and restrained further prosecution of the foreclosures.

Mr. Frank H. Towner, with whom *Messrs. Silas H. Strawn* and *George W. Ott* were on the brief, for petitioner.

Mr. George I. Haight, with whom *Mr. Lewis E. Pennish* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Respondent was organized as a corporation under the laws of Illinois; and pursuant to those laws it was dissolved. The only property it ever owned or possessed was a building, and the land upon which it stood, situated at

No. 4136 Wilcox Avenue in the City of Chicago. This property, when acquired, was subject to the lien of a first mortgage, securing bonds aggregating $95,000, and, subsequent to the acquisition of the property, to a junior mortgage to secure the payment of $15,000. The corporation was organized on April 10, 1929. On May 22, 1931, the Superior Court of Cook County, Illinois, in a proceeding regularly before it, and in accordance with a statute of Illinois, entered a decree dissolving the corporation and declaring its charter and authority as such to be null and void. The decree has never been appealed from or otherwise challenged or assailed. That it became and is now effective cannot be doubted.

On July 10th, certain mechanics' liens were foreclosed, and a sale of the property was thereafter made pursuant to the foreclosure decree. Certificate of sale was issued, entitling the holder thereof to a conveyance of the property upon the expiration of the period of redemption. The right of redemption expired as to respondent on August 5, 1932, and as to creditors on November 5, 1932. No redemption has ever been made or attempted. On October 24, 1931, suit was brought in a state court to foreclose the lien of the first mortgage; and on November 10, 1931, suit was brought in the same court to foreclose the lien of the junior mortgage. A receiver was appointed, who took possession of the property, and was in possession thereof at the time this case was heard in the federal district court. Respondent appeared in both foreclosure suits, but apparently offered no defense.

By the statutes of Illinois (Smith-Hurd Rev. Stat., 1929, c. 32) it is provided:

"§ 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property

and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity.

. . . . . .

"§ 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporation, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

The two-year period, within which the corporation could sue, acquire property, or perform any corporate function apart from suits then pending, expired May 22, 1933.

Thus matters remained until May, 1935, when three persons, namely, Mrs. Fay Fischel, her father Hyman Schulman, and her brother Sam Schulman, acquired all the shares of the respondent from the then stockholders. Meetings purporting to be stockholders' and directors' meetings were then held, officers and directors elected, and a resolution was passed authorizing the filing of a petition for the reorganization of respondent under § 77B of the Bankruptcy Act, 48 Stat. 912; 11 U. S. C. § 207.

On June 13, 1935, respondent filed a petition for reorganization under § 77B; and on June 21st, filed a petition praying for an order directing the receiver in the state foreclosure suits to turn over property in his possession and restraining the further prosecution of such suits. Petitioner answered, denying that respondent was a corporation, setting up the corporate dissolution, the foreclosure proceedings and the sale of the corporate property. It also averred that the bankruptcy petition was not filed in good faith.

The special master, to whom the case was referred, found and reported that the bankruptcy petition had been filed in good faith; that respondent had legal capacity to

file the petition, and that the petition was sufficient to confer jurisdiction upon the court over respondent and the property in question. The master further found that no deed ever issued under the mechanics' lien foreclosure certificate; and that such certificate was purchased and now is the property of the debtor. However, it appears from the record that the certificate was purchased in connection with the acquisition of the stock by the three persons already mentioned, more than two years after the period of redemption had expired.

The federal district court confirmed the report of the master, appointed a temporary trustee, required the state court receiver to turn over the property to the trustee, and restrain further prosecution of the foreclosure proceedings. On appeal, the court below affirmed the order of the district court, Judge Briggle dissenting. 86 F. (2d) 667.

In the decisions of other circuit courts of appeal, cited by respondent, support may be found for involuntary proceedings in bankruptcy against a dissolved corporation, brought by creditors and based upon an act of bankruptcy committed within four months. The question presented here differs substantially from the questions presented in those cases; and we put them aside as inapplicable, without either approval or disapproval. The sole question now for determination is whether under the facts just detailed, a corporation, dissolved and put out of existence by the state which created it, may, nevertheless, itself invoke the powers of a court of bankruptcy under § 77B. The record does not present a case where creditors are the moving parties, or where there has been any act of bankruptcy committed by the corporation, or where any pertinent law of the state is in conflict with the federal bankruptcy laws.

The decisions of this court are all to the effect that a private corporation in this country can exist only under

the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257; *National Bank* v. *Colby,* 21 Wall. 609, 615; *Oregon Ry. & Nav. Co.* v. *Oregonian Ry. Co.,* 130 U. S. 1, 20. See, also, *Greeley* v. *Smith,* 3 Story 657, 10 Fed. Cas. p. 1075; *Board of Councilmen* v. *Deposit Bank,* 120 Fed. 165, 166 *et seq.; Dundee Mtg. & Tr. Inv. Co.* v. *Hughes,* 77 Fed. 855.

Sections 14 and 79 of the Illinois statute seem plain enough on their face; but if any doubt as to their meaning and effect would otherwise exist, that doubt has been set at rest by the decisions of the Illinois appellate courts. In *Life Ass'n of America* v. *Fassett,* 102 Ill. 315, decided before the sections under consideration were enacted, the state supreme court held that it was the settled policy of the state that upon the dissolution of domestic corporations, however effected, they were to be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts. See *Singer & Talcott Co.* v. *Hutchinson,* 176 Ill. 48, 51; 51 N. E. 622. In *American Exchange Bank* v. *Mitchell,* 179 Ill. App. 612, 615–616, the general rule was announced that after a corporation is dissolved, it is incapable of maintaining an action; and that all such actions pending at the time of dissolution abate, in the absence of a statute to the contrary. The state decisions following the enactment of these sections make it clear that this general rule still remains in force in Illinois except for the specific modifications in respect of time and circumstance set forth in §§ 14 and 79. See *Dukes* v. *Harrison & Reidy,* 270 Ill. App. 372; *Consolidated Coal Co.* v. *Flynn Coal Co.,* 274 Ill. App. 405. See, also, *A. J. Bates Co.* v. *United States,* 3 F. Supp. 245,

248; *Charles A. Zahn Co.* v. *United States,* 6 F. Supp. 317, where the Court of Claims held that under these sections of the Illinois statute an Illinois corporation ceased to exist and became incapable of transacting any business whatever in its corporate capacity; and that a suit purporting to be brought by a dissolved corporation after two years to recover internal-revenue taxes paid by the corporation could not be maintained.

It is plain enough, under the Illinois statute, that after the expiration of two years from the date of its dissolution, respondent was without corporate capacity to initiate any legal proceeding—including a proceeding under § 77B, unless we are able to say that the statute, in its terms or in its application, is in conflict with § 77B. While state laws in conflict with the laws of Congress on the subject of bankruptcies are suspended, they are suspended "only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress." *Stellwagen* v. *Clum,* 245 U. S. 605, 613. The dissolution effected under Illinois law is in no way related to a state of insolvency or bankruptcy. Insolvency or bankruptcy as a ground for dissolution is not within the terms or contemplation of the law. Liquidation of a corporation is no part of the purpose of the dissolution; nor is insolvency or liquidation involved in the proceedings to enforce the mechanics' liens or foreclose the mortgages. Quite evidently, the latter were simply ordinary proceedings to enforce liens against the property subject thereto. *Straton* v. *New,* 283 U. S. 318, 327–330. The state receivership was purely incidental to the foreclosure suits, and therefore limited and special. It was not an equity receivership within the meaning of § 77B of the Bankruptcy Act. *Duparquet Co.* v. *Evans,* 297 U. S. 216, 219–221.

The principle recently announced in *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315, 337, is applicable here.

That case dealt with an intrusion by the Federal Government on the powers of the State over state building-and-loan associations. Speaking of these associations, this court said: "How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred." It is not reasonably possible to find any conflict between § 77B and the Illinois statute or the dissolution proceedings or the lien-foreclosure suits.

The court below relied upon its former decision in the case of *In re 211 East Delaware Place Bldg. Corp.,* 76 F. (2d) 834. That was a case, however, where the bankruptcy petition had been filed by creditors, not by the dissolved corporation; and, therefore, the capacity of the defunct corporation to institute proceedings was not involved. We express no opinion as to the correctness of this decision; but Judge Evans, who wrote the opinion, apparently regarded the distinction as important. For in a later proceeding in the case, 14 F. Supp. 96, 100, he said that the forfeiture of the charter of the corporation did not prevent such a proceeding by *creditors,* and then added, "The only effect which this loss of corporate existence may have upon a bankruptcy proceeding is in respect to the inability of the *corporation* to admit acts of bankruptcy or state of insolvency *or to file a voluntary petition.*" (Italics supplied.)

How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 312–313; *Ashley* v. *Ryan,* 153 U. S. 436, 441, 443; *New Jersey* v. *Anderson,* 203 U. S. 483, 493. The circumstances under which the power shall be exercised

and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. Compare *Packard* v. *Banton*, 264 U. S. 140, 145; *Davis* v. *Massachusetts*, 167 U. S. 43, 47; *Rippey* v. *Texas*, 193 U. S. 504, 509–510. And since the Federal Government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the State attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority.

It is suggested that the state cannot keep the corporation alive for its own purposes and deny it life for federal purposes. The proposition need not be challenged, since it is perfectly evident that here the state has reserved nothing for itself which it has denied to the federal authority. The only relevant provisions are those relating to legal proceedings. The state law permits such proceedings to be instituted on behalf of a dissolved corporation within two years; but these proceedings may be brought either in the state courts, or, when appropriate, in the federal courts. After two years, no proceedings may be *initiated* on behalf of the corporation in either state or federal courts, but such proceedings as

have been instituted during that period in any of these courts may be prosecuted to completion. *Singer & Talcott Co.* v. *Hutchinson, supra,* pp. 52–53. The right of resort to the courts of the state, and to those of the Nation having jurisdiction, both in respect of the initiation of proceedings and the completion of proceedings already initiated, so far as Illinois law is concerned, stands upon an exact parity.

The aim of this proceeding under § 77B is to bring about a reorganization of a corporation which has been dissolved and shorn of its capacity to initiate any legal proceeding by the state which possesses, in respect of the corporation, the power of life and death. It is not a proceeding on behalf of creditors. It is not a liquidation proceeding having for its object the distribution of the corporate assets. The dissolution was adjudged because the corporation had disobeyed the laws of the state. For that reason the state prohibited the continuance of the corporate enterprise. The stockholders, however, now seek to escape the penalty for this dereliction by resuscitating and continuing the corporation, and, to that end, invoke the aid of a federal statute. This is simply an attempt to thwart a valid state law. Whether the enterprise be continued under the original name and charter of the corporation, or in some new corporate name or guise, can make no difference. Either course would contravene the legislatively-declared policy of the state. Section 77B cannot be regarded as countenancing such a result.

The only power left to the corporation when this proceeding was brought was to finish pending cases begun within two years after its dissolution. With that exception, its corporate powers were ended for all time and for all purposes. It was without authority to purchase the certificate issued at the mechanic's-lien foreclosure sale, or to adopt resolutions authorizing proceedings under

§ 77B, or to bring a proceeding to effectuate a reorganization under that section. In respect of these matters the corporation was nonexistent.

Decree reversed.

MR. JUSTICE CARDOZO, dissenting.

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

1. Respondent, though dissolved, was still a corporation in such a sense and to such a degree as to have capacity to maintain a proceeding in bankruptcy for the liquidation of its assets.

By Bankruptcy Act § 4, 11 U. S. C. § 22 (a), any corporation, with exceptions not now material, may become a voluntary bankrupt.

By Bankruptcy Act § 1 (6), 11 U. S. C. § 1 (6), " 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships. . . ."

Respondent, when it filed its petition in the bankruptcy court, was still in possession of some of the privileges and powers of private corporations not possessed by individuals or partnerships. True, a decree of dissolution had been entered by a court of Illinois, the place of its domicile. True, two years had gone by since the making of that decree. None the less, the corporation still had the power, if suits were then pending either in its favor or against it, to litigate in its corporate name and through its corporate officials. *Life Assn. of America* v. *Fassett,* 102 Ill. 315; *Singer & Talcott Stone Co.* v. *Hutchinson,* 176 Ill. 48; 51 N. E. 622. *Commercial Loan & Trust Co.* v. *Mallers,* 242 Ill. 50; 89 N. E. 661; *Graham & Morton Transp. Co.* v. *Owens,* 165 Ill. App. 100; *Griggsville State Bank* v. *Newman,* 275 Ill. App. 11. With the license of Illinois, respondent was actively defending suits for the foreclosure of mortgages on its property when it went into the federal court. A fragment of corporate power was

thus untouched by dissolution. Within the definition of the Bankruptcy Act, the body that retained this power, and indeed exercised it too, was still a corporation. There are suggestions in the books that even in the absence of a statute preserving corporate capacities after a decree of dissolution, the bankruptcy power to distribute the assets of an insolvent debtor is not subject to destruction by a withdrawal, possibly a precipitate one, of corporate existence. See, e. g., *Hammond* v. *Lyon Realty Co.*, 59 F. (2d) 592, 594, 595. Cf. *In re Thomas*, 78 F. (2d) 602; *In re American & British Mfg. Corp.*, 300 Fed. 839, 847; *Cresson & Clearfield Coal Co.* v. *Stauffer*, 148 Fed. 981. The case at hand does not charge us with a duty to decide whether that is so. Here the State has elected to keep the corporation in existence, maimed but still alive. In choosing to create or continue an artificial entity, though with limited and narrow powers, the state subjects its creature to the bankruptcy power of the Congress in so far as that power is directed at juristic beings of that order. Congress has said to Illinois: "If an association with any corporate capacities exists under your laws, bankruptcy—either voluntary or involuntary—is a proper form of liquidation." To this the state responds, or is figured as responding: "An association with corporate capacities does exist under our laws, but it may not go into a court of bankruptcy because we will not give it the capacity to go there. Winding up proceedings for one in its position are in the state tribunals only." The response, even if taken to be authentic, must be held of no avail. It is not within the competence of Illinois by any form of words to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law.

2. If respondent has capacity to maintain a bankruptcy proceeding to liquidate its business through the medium of a sale for cash, it has capacity also to maintain a bankruptcy proceeding under § 77B.

A proceeding under § 77B is styled one to give effect to a corporate reorganization. Whatever its form or label, it derives its origin and vitality from the bankruptcy power. *Continental Illinois National Bank Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648; *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947; *In re New Rochelle Coal & Lumber Co.*, 77 F. (2d) 881. Only because the remedy is traceable to that power is it constitutional and valid. The notion is baseless that reorganization, even when initiated on the petition of the debtor, is solely or chiefly for the benefit of shareholders. It is even more distinctively and commonly for the benefit of creditors. Cf. *In re Central Funding Corporation*, 75 F. (2d) 256, 261. The old form of bankruptcy had in view a liquidation of the assets for cash and nothing else, a method of disposing of them that might result in needless sacrifice. The new form of bankruptcy is more flexible and often more efficient, permitting as it does, a disposition of the assets upon credit as well as for cash, and in consideration of shares of stock or bonds to be issued by the buyer. Whoever, being a corporation, may resort to the old form, is at liberty, acting in good faith, to resort to the new. This is so by the express mandate of the statute, which tells us, § 77B; 11 U. S. C. § 207 (a), that "any corporation which could become a bankrupt under § 4 (11 U. S. C. § 22) of this Act" may petition in the new proceeding. By that test a dissolved corporation with capacity requisite to apply to a court of bankruptcy for a liquidation of its assets has the capacity requisite to apply for a reorganization of its business. As to this, the lower federal courts are in general accord. *Old Fort Improvement Co.* v. *Lea*, 89 F. (2d) 286; *In re 4136 Wilcox Bldg. Corp.*, 86 F. (2d) 667; *Capital Endowment Co.* v. *Kroeger*, 86 F. (2d) 976; *In re 211 East Delaware Place Bldg. Corp.*, 76 F. (2d) 834, 836. Their opinions vindicating that conclusion are instructive and convincing.

This is not to say that every method of reorganization appropriate or permissible for a corporation whose life is unimpaired is appropriate or permissible for one already doomed. The plan of reorganization will be unlawful if it attempts to authorize the debtor, following a decree of dissolution, to do business thereafter in defiance of state law. In general there will be little difficulty in so adapting a decree to the necessities of the particular case as to attain the needed harmony. The opinions already cited suggest appropriate expedients. *Old Fort Improvement Co.* v. *Lea, supra,* p. 290; *Capital Endowment Co.* v. *Kroeger, supra,* p. 979. Instead of continuing the business through the petitioning debtor or its agents, the decree may permit the formation of another corporation which will take over the assets, issuing shares of stock or bonds to creditors or others. There may be new capital, new shareholders, new directors and officers. Neither in the record nor in the precedents does one find a basis for a holding that the formation of such a corporation will be in conflict with any public policy of the State of Illinois. The old corporation was dissolved for failure to pay franchise taxes and file an annual report. The new one, if created, may promote the welfare of the state both financially and otherwise. Be that as it may, the state will be amply competent to vindicate her own dignity if there is a fraud upon her laws. No plan of reorganization is before us at this time. So far as appears, none has been prepared. Whether the plan to be submitted later will be worthy of confirmation is a question for the future.

Cases may indeed arise where a court will be satisfied upon the filing of the petition that reorganization is not feasible. In that event the proceeding may be dismissed as not brought in good faith. *Tennessee Pub. Co.* v. *American Bank,* 299 U. S. 18, 22. At times a decree of dissolution may be a circumstance along with others point-

ing to that conclusion. Here the good faith of the debtor has been found by the courts below after inquiry by a Master to whom the cause had been referred. The single question presented to us by the petition for certiorari is one of jurisdiction. Did a court of bankruptcy have power to entertain the proceeding at the instance of such a suitor? I hold that power did not fail.

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

JAMES, STATE TAX COMMISSIONER, *v.* DRAVO CONTRACTING CO.

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

No. 3. Argued April 26, 27, 1937. Reargued October 12, 1937.—Decided December 6, 1937.

1. A State can not lay a gross receipts tax on business carried on in another State. P. 138.
2. A State has no power to tax in a place within the State over which the United States has acquired exclusive jurisdiction. P. 140.
3. The title to beds of navigable streams within a State is vested in the State, subject to the right of the United States to use the land for the improvement of navigation. P. 140.

   Occupation of the river bed by the United States for the purpose of improving navigation does not divest the State of its title.
4. Locks and dams erected by the United States for the improvement of navigation are "needful buildings" within the meaning of the Const., Art. I, § 8, Cl. 17. P. 141.

   Clause 17 provides that Congress shall have power "to exercise exclusive legislation" over "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." "Exclusive legislation" is consistent only with exclusive jurisdiction.

5. West Va. Code of 1931, Art. 1, Ch. 1, § 3, gives the consent of the State to acquisition by the United States of land within the State for locks, dams, needful buildings, works for improvement of the navigation of any water course, or for any other purpose for which the same may be required by the Government of the United States; authorizes gifts of land to the United States by municipalities for such described purposes; cedes to the United States "concurrent jurisdiction with this State in and over any land so acquired . . . for all purposes"; provides that the jurisdiction so ceded is to continue only during the ownership of the United States and is to cease if the United States fails for five consecutive years to use any such land for the purposes of the grant; and reserves to the State the right to execute process within the limits of the land acquired "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition." *Held:*

   (1) The provision as to concurrent jurisdiction qualifies the provision giving consent, and applies to lands acquired by purchase or condemnation as well as to lands given by municipalities. P. 143.

   (2) The provision reserving merely the right to execute process, repeated from an earlier statute, does not derogate from the broader reservation of jurisdiction in the statute as amended. P. 145.

6. When a State gives the legislative consent as contemplated by the Const., Art. I, § 8, Cl. 17, to purchase of land by the United States for "needful buildings," as when after prior purchase or condemnation by the United States it cedes jurisdiction, it may reserve such a concurrent jurisdiction as will not operate to deprive the United States of the enjoyment of the property for the purposes for which it is acquired. P. 146.

   West Virginia, by a reservation qualifying her consent to their acquisition, retained her jurisdiction to tax, over lands purchased or condemned by the United States for navigation improvements on a river.

7. An independent contractor, engaged under his contract with the Government in the construction of locks and dams for the improvement of navigation, is not an instrumentality of the Government. P. 149.

8. As applied to such a contractor, a non-discriminatory state tax on his gross receipts under the contract is not unconstitutional as a

tax laid on the contract itself or as otherwise directly burdening the Government. P. 149.

9. Application of the principle that governmental instrumentalities of the United States are immune from taxation by the States, and *vice versa*, requires close distinctions, in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system. P. 150.

   Decisions on immunity of government bonds and of government purchases of commodities, *held* inapplicable in case of tax on earnings of independent contractor rendering services to the Government. Pp. 150–153.

10. The question of the taxability of a contractor upon the fruits of his services to the Government is closely analogous to that of the taxability of his property used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits. P. 153.

11. The fact that the tax in this case was on gross rather than net receipts does not prove it an unconstitutional burden on the Government. P. 157.

    Distinguished from cases where taxes on gross receipts of individuals engaged in interstate commerce have been held invalid under the commerce clause.

12. Assuming, (what is not necessarily so) that a state tax on contractor's gross receipts may increase cost of service to the Government, that fact would not invalidate the tax, any more than it would a tax on the contractor's property equipment used in the performance of the contract. P. 159.

13. *Semble* that Congress has power to prevent interference with the operations of the Government through state taxation laid on receipts of those who render it services under contracts. P. 160.

16 F. Supp. 527, reversed.

APPEAL from a final decree of the three-judge District Court enjoining the collection of a State tax.

Mr. Clarence W. Meadows, Attorney General of West Virginia, for appellant, on the original argument and the reargument. *Messrs. Homer A. Holt,* former Attorney General, and *W. Holt Wooddell,* Assistant Attorney General, were with him on the briefs.

Mr. William S. Moorhead for appellee, on the original argument and the reargument. *Messrs. Lawrence D. Blair, W. Chapman Revercomb,* and *W. Elliott Nefflen* were with him on the briefs.

Solicitor General Reed, with whom *Attorney General Cummings, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch, Arnold Raum,* and *Francis A. LeSourd* were on the brief, for the United States as *amicus curiae,* by special leave of Court, on the reargument.

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

This case presents the question of the constitutional validity of a tax imposed by the State of West Virginia upon the gross receipts of respondent under contracts with the United States.

Respondent, The Dravo Contracting Company, is a Pennsylvania corporation engaged in the general contracting business, with its principal office and plant at Pittsburgh in that State, and is admitted to do business in the State of West Virginia. In the years 1932 and 1933, respondent entered into four contracts with the United States for the construction of locks and dams in the Kanawha River and locks in the Ohio River, both navigable streams.[1] The State Tax Commissioner assessed respondent for the years 1933 and 1934 in the sum of $135,761.51 (taxes and penalties) upon the gross amounts received from the United States under these contracts.

Respondent brought suit in the District Court of the United States for the Southern District of West Virginia

[1] See Act of July 3, 1930, c. 847, 46 Stat. 928; H. Doc. No. 190, 70th Cong., 1st sess.; Act of August 30, 1935, c. 831, 49 Stat. 1035; H. Doc. No. 31, 73d Cong., 1st sess.

to restrain the collection of the tax. The case was heard by three judges (28 U. S. C. 380) and upon findings the court entered a final decree granting a permanent injunction. 16 F. Supp. 527. The case comes here on appeal.

The statute is known as the Gross Sales and Income Tax Law. Code of West Virginia 1931, c. 11, Art. 13, amended effective May 27, 1933. Acts of 1933, c. 33. It provides for "annual privilege taxes" on account of "business and other activities." The clause in question here is as follows:

"Upon every person engaging or continuing within this state in the business of contracting, the tax shall be equal to two per cent. of the gross income of the business."[2]

The tax was in addition to other state taxes upon respondent, to wit, the license tax on foreign corporations (Code of West Virginia, c. 11, Art. 12, §§ 69, 71) and *ad valorem* taxes upon real and personal property of the contractor within the State.

The questions presented are (1) whether the State had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden upon the operations of the Federal Government.

After hearing we directed reargument and requested the Attorney General of the United States to present the views of the Government upon the two questions above stated. Reargument has been had and the Government has been heard.

First. As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the State had no jurisdiction to impose the tax. *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 133, 134; *Shaffer* v.

[2] Prior to May 27, 1933, the tax was three-tenths of one per cent, and the assessment on receipts prior to that date was at that rate. Two of the contracts of respondent were made before the rates were changed.

Carter, 252 U. S. 37, 57; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647. The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia and (2) as to work done within those limits but (a) in the bed of the rivers, (b) on property acquired by the Federal Government on the banks of the rivers, and (c) on property leased by respondent and used for the accommodation of his equipment.

1. A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at respondents' shops at Pittsburgh and were there inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed. The United States knew at the time the contracts were made that the above described work was to be performed at the plaintiff's main plant. The contracts provided for partial payments as the work progressed and that all the material and work covered by the partial payments should thereupon become "the sole property of the Government." Payments by the Government were made from time to time accordingly.

It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respond-

ent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly. *Hans Rees' Sons* v. *North Carolina, supra.*

2. As to work done within the exterior limits of West Virginia, the question is whether the United States has acquired exclusive jurisdiction over the respective sites. Wherever the United States has such jurisdiction the State would have no authority to lay the tax. *Surplus Trading Co.* v. *Cook, supra.*

(a) *As to the beds of the Kanawha and Ohio rivers.* The present question is not one of the paramount authority of the Federal Government to have the work performed for purposes within the federal province (*Scranton* v. *Wheeler,* 179 U. S. 141, 163; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 61, 62; *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, 88), or whether the tax lays a burden upon governmental operations; it is simply one of territorial jurisdiction.

The title to the beds of the rivers was in the State. *Pollard* v. *Hagan,* 3 How. 212, 230; *Shively* v. *Bowlby,* 152 U. S. 1, 26; *Port of Seattle* v. *Oregon-Washington R. Co.,* 255 U. S. 56, 63; *Borax Consolidated* v. *Los Angeles,* 296 U. S. 10, 15, 16. It was subject to the power of Congress to use the lands under the streams "for any structure which the interest of navigation in its judgment may require." *Lewis Blue Point Oyster Co.* v. *Briggs, supra.* But, although burdened by that servitude, the State held the title. *Gibson* v. *United States,* 166 U. S. 269, 271, 272; *Port of Seattle* v. *Oregon-Washington R. Co., supra; Borax Consolidated* v. *Los Angeles, supra.* There does not appear to have been any acquisition by the United States of title to those lands, unless, as respondent urges, the occupation of the beds for the purpose of the improvements constituted an acquisition of title. But as the occupation was simply the exercise of the dominant

right of the Federal Government (*Gibson* v. *United States, supra,* p. 276) the servient title continued as before. No transfer of that title appears. The Solicitor General conceded in his argument at bar that the State of West Virginia retained its territorial jurisdiction over the river beds and we are of the opinion that this is the correct view.

(b) *As to lands acquired by the United States by purchase or condemnation for the purposes of the improvements.* Lands were thus acquired on the banks of the rivers from individual owners and the United States obtained title in fee simple. Respondent contends that by virtue of Article I, Section 8, Clause 17, of the Federal Constitution the United States acquired exclusive jurisdiction.[3]

Clause 17 provides that Congress shall have power "to exercise exclusive legislation" over "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." "Exclusive legislation" is consistent only with exclusive jurisdiction. *Surplus Trading Co.* v. *Cook, supra,* p. 652. As we said in that case, it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands "remain part of her territory and within the operation of her laws, save that

[3] That provision is as follows:

"The Congress shall have power . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *Id.*, p. 650. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the federal jurisdiction. *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 527, 538, 539; *Palmer* v. *Barrett,* 162 U. S. 399, 402, 403; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, 451; *United States* v. *Unzeuta,* 281 U. S. 138, 142; *Surplus Trading Co.* v. *Cook, supra.*

Are the locks and dams in the instant case "needful buildings" within the purview of Clause 17? The State contends that they are not. If the clause were construed according to the rule of *ejusdem generis,* it could be plausibly contended that "needful buildings" are those of the same sort as forts, magazines, arsenals and dockyards, that is, structures for military purposes. And it may be that the thought of such "strongholds" was uppermost in the minds of the framers. Elliot's Debates, Vol. 5, pp. 130, 440, 511; Cf. Story on the Constitution, Vol. 2, § 1224. But such a narrow construction has been found not to be absolutely required and to be unsupported by sound reason in view of the nature and functions of the national government which the Constitution established.

In *Sharon* v. *Hill,* 24 Fed. 726, 730, 731, Justice Field (sitting with Judge Sawyer) considered the provision to be applicable to a court building and custom house on land which had been purchased with the consent of the State. In *Battle* v. *United States,* 209 U. S. 36, 37, we held that "post offices are among the 'other needful

buildings' " within Clause 17. See, also, *United States* v. *Wurtzbarger,* 276 Fed. 753, 755; *Arlington Hotel* v. *Fant, supra.* Locks and dams for the improvement of navigation, which are as clearly within the federal authority as post offices, have been regarded as "needful buildings." *United States* v. *Tucker,* 122 Fed. 518, 522. We take that view. We construe the phrase "other needful buildings" as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government.

The legislature of West Virginia by general statute had given its consent to the acquisition by the United States, but questions are presented as to the construction and effect of the consent. The provision is found in § 3 of Chapter 1, Article 1, of the Code of West Virginia of 1931. The full text is set out in the margin.[4] By the first paragraph the consent of the State is given "to the

[4] "Sec. 3. *Acquisition of Lands by United States; Jurisdiction.*—The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever, or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases.

"Any county, magisterial district or municipality, whether incorporated under general law or special act of the legislature, shall have power to pay for any such tract or parcel of land and present the same to the government of the United States free of cost, for any of the purposes aforesaid, and to issue bonds and levy taxes for the purpose of paying for the same; and, in the case of a municipal corporation, the land so purchased and presented may be within the

acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for . . . locks, dams, . . . or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse . . . or for any other purpose for which the same may be needed or required by the government of the United States." By the second paragraph provision is made for gifts by municipalities to the United States of land for any of the purposes described in the first paragraph. The third paragraph cedes to the United States "concurrent jurisdiction with this State in and over any land so acquired . . . for all purposes." The jurisdiction so ceded is to continue only during the ownership of the United States and is to cease if the United States

---

corporate limits of such municipality or within five miles thereof: *Provided, however,* That no such county, magisterial district or municipality shall, by the issue and sale of such bonds, cause the aggregate of its debt to exceed the limit fixed by the Constitution of this State: *Provided, further,* That the provisions of the Constitution and statutes of this State, or of the special act creating any municipality, relating to submitting the question of the issuing of bonds and all questions connected with the same to a vote of the people, shall, in all respects, be observed and complied with.

"Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall reinvest in this State. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. Jurisdiction heretofore ceded to the United States over any land within this State by any previous acts of the legislature shall continue according to the terms of the respective cessions."

fails for five consecutive years to use any such land for the purposes of the grant.

By a further provision in § 4[5] the State reserves the right to execute process within the limits of the land acquired "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition."

The contention is made that the third paragraph of § 3 as to "concurrent jurisdiction" was not in the Code of 1923, but was a later addition (1931), and should not be taken as qualifying the first paragraph. But the third paragraph was added before the acquisition here in question and "any land so acquired" manifestly refers to the acquisitions previously described which expressly embraced all such acquisitions in the future. The suggestion that the third paragraph applies only to the lands given by municipalities to the United States under the second paragraph is without force. The third paragraph appears to have been taken from the provision, in the same language, of § 19 of the Code of Virginia of 1919 which was not qualified by any intervening provision as to municipalities. See Code of West Virginia, 1931, c. 1, Art. 1, § 3, Revisers' Note. The revisers say it was added to "make more definite the provisions as to jurisdiction." *Id.* We are not referred to any decision of the Supreme Court of West Virginia construing this paragraph.

Reference is also made to the provision of § 4 as to service of process. This is said to be unnecessary if only concurrent jurisdiction is granted. But this provision

[5] "Sec. 4. *Execution of Process and Other Jurisdiction as to Land Acquired by United States.*—The State of West Virginia reserves the right to execute process, civil or criminal, within the limits of any lot or parcel of land heretofore or hereafter acquired by the United States as aforesaid, and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition."

32094°—38——10

was a part of the former statute (1923) and cannot be taken as derogating from the force of the explicit amendment by the later addition in the third paragraph of the present § 3. And apparently to prevent misunderstanding, there was an amendment at the same time of the provision now in § 4 by the addition of the last clause [6] in order to make the reservation of the State's jurisdiction "more comprehensive." Code of West Virginia, 1931, c. 1, Art. 1, § 4, Revisers' Note.

The third paragraph of § 3 carefully defines the jurisdiction ceded by the State and there is no permissible construction which would ignore this definite expression of intention in considering the effect upon jurisdiction of the consent given by the first paragraph.

But it is urged that if the paragraph be construed as seeking to qualify the consent of the State, it must be treated as inoperative. That is, that the State cannot qualify its consent, which must be taken as carrying with it exclusive jurisdiction by virtue of Clause 17. The point was suggested by Justice Story in *United States* v. *Cornell,* Fed. Cas. No. 14,867; 2 Mason 60, 65, 66, but the construction placed upon the consent in that case made decision of the point unnecessary. There the place (Fort Adams in Newport Harbor) had been purchased with the consent of the State, to which was added a reservation for the service of civil and criminal process. Justice Story held that such a reservation was not incompatible with a cession of exclusive jurisdiction to the United States, as the reservation operated "only as a condition" and "as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process." Reservations of that sort were found to be frequent in grants made by the States to the United States in order to avoid the granted places being made a sanctuary for fugitives from justice.

[6] See note 5.

Story on the Constitution, Vol. 2, § 1225. Reference is made to statements in the general discussion in the opinion in *Fort Leavenworth R. Co.* v. *Lowe, supra*, but these are not decisive of the present question. The decision in that case was that the State retained its jurisdiction to tax the property of a railroad company within the Fort Leavenworth Military Reservation, as federal jurisdiction had not been reserved when Kansas was admitted as a State and, when the State subsequently ceded jurisdiction to the United States, there was saved to the State the right "to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." The terms of the cession in this respect governed the extent of the federal jurisdiction. See *Surplus Trading Co.* v. *Cook, supra.* There are *obiter dicta* in other cases but the point now raised does not appear to have been definitely determined.

It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. *Kohl* v. *United States,* 91 U. S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses. Story on the Constitution, Vol. 2, § 1227; *Kohl* v. *United States, supra,* p. 374; *Fort Leavenworth R. Co.* v. *Lowe, supra; Surplus Trading Co.* v. *Cook, supra; United States* v. *Unzeuta, supra.* The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like

qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.

Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. Thus, as a State may not be sued without its consent and "permission is altogether voluntary," it follows "that it may prescribe the terms and conditions on which it consents to be sued." *Beers* v. *Arkansas,* 20 How. 527, 529; *Smith* v. *Reeves,* 178 U. S. 436, 441, 442. Treaties of the United States are to be made with the advice and consent of the Senate, but it is familiar practice for the Senate to accompany the exercise of this authority with reservations. Hyde, International Law, Vol. 2, § 519. The Constitution provides that no State without the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions. See *Arizona* v. *California,* 292 U. S. 341, 345.

Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse

or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.

(c) *As to property leased by respondent and used for the accommodation of its equipment.* There can be no question as to the jurisdiction of the State over this area.

We conclude that, so far as territorial jurisdiction is concerned, the State had authority to lay the tax with respect to the respondent's activities carried on at the respective dam sites.

Second. Is the tax invalid upon the ground that it lays a direct burden upon the Federal Government? The Solicitor General speaking for the Government supports the contention of the State that the tax is valid. Respondent urges the contrary.

The tax is not laid upon the Government, its property or officers. *Dobbins* v. *Commissioners,* 16 Pet. 435, 449, 450.

The tax is not laid upon an instrumentality of the Government. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of the United States,* 9 Wheat. 738; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Clallam County* v. *United States,* 263 U. S. 341; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. Respondent is an independent contractor. The tax is non-discriminatory.

The tax is not laid upon the contract of the Government. *Osborn* v. *Bank of the United States, supra,* p. 867; *Weston* v. *Charleston,* 2 Pet. 449, 468, 475; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 581, 582, 586; *Telegraph Company* v. *Texas,* 105 U. S. 460, 464, 466;

Leloup v. *Port of Mobile,* 127 U. S. 640, 646; *Williams* v. *Talladega,* 226 U. S. 404, 418, 419; *Federal Land Bank* v. *Crosland, supra; Willcuts* v. *Bunn,* 282 U. S. 216; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, 222; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 574; *Graves* v. *Texas Company,* 298 U. S. 393, 401. The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system. In *Weston* v. *Charleston, supra,* and *Pollock* v. *Farmers' Loan & Trust Co., supra,* taxes on interest from government securities were held to be laid on the government's contract—upon the power to borrow money—and hence were invalid. But we held in *Willcuts* v. *Bunn, supra,* that the immunity from taxation does not extend to the profits derived by their owners upon the sale of government bonds. We said (*Id.,* p. 225): "The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government." Many illustrations were given.

In *Telegraph Company* v. *Texas, supra,* a specific state tax was imposed on each message sent by an officer of the United States on public business over the lines of the Telegraph Company. In holding the tax to be invalid the Court leaned heavily upon the fact that the Company had accepted the terms of the Act of Congress of 1866 (14 Stat. 221) authorizing the use of the military and

post roads and requiring in return that government messages have priority over all other business and be transmitted at rates fixed annually by the Postmaster General. The Court considered that the Company had thus become an agent of the Government for the transmission of messages on public business. See to the same effect *Leloup* v. *Port of Mobile, supra.* The same point was taken in *Williams* v. *Talladega, supra,* involving a local license fee applicable to the same Telegraph Company. The Court said that the tax was laid upon "the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business—communication between the officers and departments of the Federal Government." The emphasis put in these cases upon the effect of the acceptance of the obligation of the Act of Congress shows that they cannot be regarded as sustaining the broad claim of immunity here advanced.

In *Panhandle Oil Co.* v. *Mississippi ex rel. Knox, supra,* and *Indian Motocycle Co.* v. *United States, supra,* the taxes were held to be invalid as laid on the sales to the respective governments, the one being a state tax on a sale to the United States, and the other a federal tax on the sale to a municipal corporation of Massachusetts. A similar result was reached in *Graves* v. *Texas Company, supra.* These cases have been distinguished and must be deemed to be limited to their particular facts. Thus, in *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, 579, the federal tax on transportation as applied to lumber which the vendor had engaged to sell to a county for public bridges and to deliver f. o. b. at the place of destination at a stated price, was held to be laid not on the sale but on the transportation. Although the transportation was with a view to a definite sale, it was held to be not part of the sale but preliminary to it and

"wholly the vendor's affair." In *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, 386, the federal tax as applied to tobacco purchased by a State for use in a state hospital was sustained as a tax upon the manufacture of the tobacco and not upon the sale. Hence, the Court said, "the effect upon the purchaser was indirect and imposed no prohibited burden."

In *Alward* v. *Johnson,* 282 U. S. 509, 514, the Court sustained a state tax upon the gross receipts of an independent contractor carrying the mails. The taxpayer operated an automotive stage line. Two-thirds of his gross receipts, upon the whole of which he was taxed, were derived from carriage of United States mails and the remainder from carriage of passengers and freight. The Court found that the property used in earning these receipts was devoted chiefly to carrying the mails and that without his contract with the Government the stage line could not be operated profitably. In upholding the tax upon his gross receipts we distinguished *Panhandle Oil Co.* v. *Mississippi ex rel. Knox, supra,* saying: "There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely . . . The facts in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, and *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

These decisions show clearly the effort of the Court in this difficult field to apply the practical criterion to which we referred in *Willcuts* v. *Bunn, supra,* and again in *Graves* v. *Texas Company, supra.* There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Gov-

ernment. That doctrine recognizes the direct effect of a tax which "would operate on the power to borrow before it is exercised" (*Pollock* v. *Farmers' Loan & Trust Co., supra*) and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors. And in dealing with the question of the taxability of such contractors upon the fruits of their work, we are not bound to consider or decide how far immunity from taxation is to be deemed essential to the protection of Government in relation to its purchases of commodities or whether the doctrine announced in the cases of that character which we have cited deserves revision or restriction.

The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits. Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States. "Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means." *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 591. In expounding the grounds for the conclusion that the property of the contractor was taxable, the Court envisaged the serious consequences which would follow if immunity

were maintained. In *Railroad Company* v. *Peniston,* 18 Wall. 5, 33, 36, the Court said:

"It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited. . . .

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the

government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal power."

The dissenting opinion of Justice Bradley (with whom Justice Field concurred) while considering that the state tax was invalid as applied to property of the Union Pacific Railroad because of its special relation to the Government which had chartered it, emphasized the distinction between such a situation as he conceived it and one where the Government has entered into a contract for services to aid in the discharge of governmental functions. His observations are strikingly pertinent here (*id.* pp. 41, 42):

"The case differs *toto cælo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government."

The question of immunity from taxation of the earnings of an independent contractor under a government contract arose in *Metcalf & Eddy* v. *Mitchell,* 269 U. S.

514. The services were rendered to a political subdivison of a State and the contractors' earnings were held to be subject to the federal income tax. That was a pivotal decision, for we had to meet the question whether the earnings of the contractor stood upon the same footing as interest upon government securities or the income of an instrumentality of government. It is true that the tax was laid upon net income. But if the tax upon the earnings of the contractor had been regarded as imposing a direct burden upon a governmental agency, the fact that the tax was laid upon net income would not save it under the doctrine of *Gillespie* v. *Oklahoma, supra.* And if the doctrine of the immunity of interest upon government bonds had been deemed to apply, the tax would have been equally bad whether the tax was upon net or gross income. The ruling in *Pollock* v. *Farmers' Loan & Trust Co., supra,* related to net income. The uniform ruling in such a case has been that the interest upon government securities cannot be included in gross income for the purpose of an income tax computed upon net income. The pith of the decision in the case of *Metcalf & Eddy* is that government bonds and contracts for the services of an independent contractor are not upon the same footing. The decision was a definite refusal to extend the doctrine of cases relating to government securities, and to the instrumentalities of government, to earnings under contracts for labor.

The reasoning upon which that decision was based is controlling here. We recognized that in a broad sense "the burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and *vice versa.*" "Taxation by either the state or the federal government affects in some measure the cost of operation of the other." As "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers," we said that the limi-

tation upon the taxing power of each, so far as it affects the other, "must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." *Metcalf & Eddy* v. *Mitchell, supra,* pp. 523, 524.

We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government "that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power." And it was on that principle that "any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function," was prohibited. We concluded that a non-discriminatory tax upon the earnings of an independent contractor derived from services rendered to the Government could not be said to be imposed "upon an agency of government in any technical sense" and could not "be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way." *Id.,* pp. 524, 525.

While the *Metcalf* case was one of a federal tax, the reasoning and the practical criterion it adopts are clearly applicable to the case of a state tax upon earnings under a contract with the Federal Government.

As we have observed, the fact that the tax in the present case is laid upon the gross receipts, instead of

net earnings, is not a controlling distinction. Respondent invokes our decisions in the field of interstate commerce, where a tax upon the gross income of the taxpayer derived from interstate commerce has long been held to be an unconstitutional burden. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 297; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328, 329; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655, 656.

But the difference is plain. Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce or the privilege of engaging in it or the receipts as such derived from it. *Minnesota Rate Cases,* 230 U. S. 352, 400. Interstate commerce is not an abstraction; it connotes the transactions of those engaged in it and they enjoy the described immunity in their own right. Here, respondent's activities at the dam sites are local and not in interstate commerce. Respondent has no constitutional right to immunity from nondiscriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims.

In *Alward* v. *Johnson, supra,* as already noted, the tax was upon gross receipts and these were derived from a contract for carrying the mails, but the tax was upheld. It there appeared that the tax was in lieu of taxes upon the property and had been treated by the state court as a property tax. But if the tax as actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized. See

Hanover Insurance Co. v. *Harding,* 272 U. S. 494, 509, 510.

In *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319, we sustained the tax upon the gross premiums received by a company as surety upon bonds running to the United States for "internal revenue, customs, United States government officials, United States government contracts and banks for United States deposits," and "bonds given in courts of the United States in litigation there pending." While the challenged tax was "an exaction for the privilege of doing business," we held it to be valid as "mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control." *Id.,* pp. 320, 323. The premiums, of course, were paid by those who were required to obtain the bonds, but the fact that the contracts were with the United States and that the tax was laid upon gross receipts from the writing of such contracts, did not make the tax an invalid exaction.

In both the *Alward* case and that of the *Fidelity & Deposit Company,* the argument, pressed here, that the State withheld for its use "a part of every dollar" received by the taxpayer, was equally pertinent and equally unavailing.

The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated cost of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts

tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include "compensation and liability insurance, construction bond and property taxes."

But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466, the taxpayer entered into a contract with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer "affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax on the gross receipts of the contractor in the *Alward* case, *supra,* might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity.

There is the further suggestion that if the present tax of two per cent. is upheld, the State may lay a tax of twenty per cent. or fifty per cent. or even more, and make it difficult or impossible for the Government to obtain

the service it needs. The argument ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action. In *Thomson* v. *Pacific Railroad, supra,* the Court pointedly referred to the authority of Congress to prevent such an interference through the use of the taxing power of the State. "It cannot," said the Court, "be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection." See *Van Allen* v. *Assessors,* 3 Wall. 573, 585; *Fidelity & Deposit Co.* v. *Pennsylvania, supra.*

We hold that the West Virginia tax so far as it is laid upon the gross receipts of respondent derived from its activities within the borders of the State does not interfere in any substantial way with the performance of federal functions and is a valid exaction. The decree of the District Court is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

I regret that I am unable to concur in the Court's opinion. I should not set forth my views in detail were I not convinced the decision runs counter to the settled rule that a State may not, by taxation, burden or impede the United States in the exercise of its delegated powers. The judgment seems to me to overrule, *sub silentio,* a century of precedents, and to leave the application of the rule uncertain and unpredictable.

The doctrine which forbids a state to interfere with the exercise of federal powers does not have its origin in the

common law exemption of the sovereign from regulation or taxation. It springs from the necessity of maintaining our dual system of government.[1] "The attempt to use it [the power of taxation] on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find, then, on just theory, a total failure of this original right [of the states] to tax the means employed by the government of the Union, for the execution of its powers." [2] "The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words." [3]

This immunity was defined by Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 436:

" . . . the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

In its application the principle forbids taxation by a state of property of the federal government,[4] or of the office or salary of any of its officers.[5]

---

[1] *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575; *Board of Trustees* v. *United States,* 289 U. S. 48, 59; *Helvering* v. *Powers,* 293 U. S. 214, 225.

[2] *M'Culloch* v. *Maryland,* 4 Wheat. 316, 430; *Weston* v. *Charleston,* 2 Pet. 449, 467.

[3] *Clallam County* v. *United States,* 263 U. S. 341, 344.

[4] *McGoon* v. *Scales,* 9 Wall. 23, 27; *Tucker* v. *Ferguson,* 22 Wall. 527, 572; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Wisconsin Central R. Co.* v. *Price County,* 133 U. S. 496, 504; *Irwin* v. *Wright,* 258 U. S. 219, 228. But property acquired from the Government, upon its severance, loses the immunity in the hands of the transferee. *Forbes* v. *Gracey,* 94 U. S. 762; *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279; *Indian Territory Oil Co.* v. *Board,* 288 U. S. 325.

[5] *Dobbins* v. *Commissioners,* 16 Pet. 435; *Collector* v. *Day,* 11 Wall. 113. But the exemption does not extend to taxes laid upon his pri-

I agree that the gross receipts tax laid by West Virginia upon the appellee's transactions with the United States is not upon the government as such, upon its property or upon its officers.

The government need not perform all its functions by the use of its property and the activity of its officers, but may establish agencies to these ends. Such an agency, created not for private gain but wholly devoted to governmental purposes and wholly owned by the United States, is as free from state taxation on its property and its activities as the government itself; and the exemption extends to the salaries of its officers.[6] In the exertion of the powers conferred upon it by the Constitution, the United States may, in its discretion, erect corporations for private gain and employ them as its instrumentalities.[7] No tax can be laid upon their franchises or operations,[8] but their local property[9] is subject to non-discriminating state taxation. In contrast, the bestowal of benefits, rights, privileges, or immunities or the imposition of duties by federal law upon a natural person or a corporation does not convert him or it into a federal agency exempt from uniform state excise or

---

vately owned property or a sales tax on his personal purchases, even though they be of articles he uses in connection with his performance of his government work. *Dyer* v. *City of Melrose,* 215 U. S. 594; *Tirrell* v. *Johnston,* 293 U. S. 533; 86 N. H. 530.

[6] *Clallam County* v. *United States,* 263 U. S. 341; *New Brunswick* v. *United States,* 276 U. S. 547; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. For the same reason a state tax which burdens the fiscal operations of a territory must fall: *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516.

[7] Interstate railroad: *Railroad Company* v. *Peniston,* 18 Wall. 5. National banks: *M'Culloch* v. *Maryland,* 4 Wheat. 316; *Smith* v. *Kansas City Title & T. Co.,* 255 U. S. 180.

[8] *Osborn* v. *Bank,* 9 Wheat. 738; *Railroad Company* v. *Peniston,* 18 Wall. 5; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664.

[9] *Railroad Company* v. *Peniston,* 18 Wall. 5; *Indian Territory Oil Co.* v. *Board,* 288 U. S. 325, 327, 328.

property taxes.[10] Where the United States, by contract, constitutes a person or corporation its agent to fulfil a governmental obligation, a state tax upon such an agent is forbidden if it falls upon the avails of the operation in which the government has an interest, or is an excise or privilege tax upon the agent's operations; [11] but a general and uniform state property tax which falls only upon the agent's property used in the performance of the contract is valid.[12] The opinion of the court adverts to these distinctions, but, since admittedly the appellee is not an agency or instrumentality of the United States, a discussion of taxes laid upon the operations as contrasted with those imposed upon the property of such an agency or instrumentality is beside the point upon which the case turns.[13]

I agree that the challenged tax is not, in terms, laid upon the contract of the government, but I am of opinion that it directly burdens and impedes the operations of the United States within the reason and scope of the principle of immunity and according to the application of that principle in numerous decisions of the court. If this be so, the facts that the exaction is not in terms upon the contract with the government, that the appellee

---

[10] *Thomson* v. *Pacific Railroad,* 9 Wall. 579; *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530; *Massachusetts* v. *Western Union Tel. Co.,* 141 U. S. 40; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531; *Susquehanna Power Co.* v. *Tax Commission,* 283 U. S. 291; *Broad River Power Co.* v. *Query,* 288 U. S. 178; *Federal Compress Co.* v. *McLean,* 291 U. S. 17.

[11] *Choctaw & Gulf R. Co.* v. *Harrison,* 235 U. S. 292; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.

[12] *Indian Territory Oil Co.* v. *Board,* 288 U. S. 325; *Taber* v. *Indian Territory Oil Co.,* 300 U. S. 1.

[13] The Solicitor General's argument, noticed later, would, however, validate a tax of any description imposed upon federal instrumentalities, provided the exaction were non-discriminatory.

is an independent contractor, that the tax is non-discriminatory, or that it is not excessive in amount cannot serve to exculpate the statute from the charge that it transgresses the rule. These considerations, as repeatedly held, are irrelevant where the tax falls directly, immediately, and palpably upon an operation of the federal government or a means chosen for the exercise of its powers. Many illustrations are available of exactions which plainly burden and impede in some degree the lawful operations of the United States. As the opinion of the court indicates, a tax in terms laid upon the contract would do so,—such as an excise for the privilege of making the contract or performing it,[14] a stamp tax upon the documents evidencing the contract, or a requirement that the contract be recorded and a tax be paid upon its recordation.[15]

The court has, moreover, repeatedly held a tax nominally upon one who contracts with the government was in effect and in fact imposed upon the operations of the latter. Thus an excise upon a telegraph company which, under contract with the United States, transmits government messages, whether the tax be at a given sum per message [16] or in the form of a license tax upon all business, private and governmental,[17] is prohibited because it imposes a burden upon the operations of the United States. The cases so holding are sought to be distinguished by the circumstance that the telegraph companies carrying the messages of the United States were by federal statute given the privilege of using the post roads; and it is said that this in some way gave them a peculiar status which rendered their gross receipts un-

---

[14] *Osborn* v. *Bank*, 9 Wheat. 738, 867.

[15] *Federal Land Bank* v. *Crosland*, 261 U. S. 374.

[16] *Telegraph Co.* v. *Texas*, 105 U. S. 460.

[17] *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Williams* v. *Talladega*, 226 U. S. 404.

taxable. But that was not the basis of decision. The ground of immunity was that the tax was in effect on the government's transactions in the exertion of its lawful powers. Thus in *Telegraph Co.* v. *Texas,* 105 U. S. at p. 465, it was said "The tax is the same on every message sent, and because it is sent, . . . Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. . . . As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in *McCulloch* v. *Maryland,* (4 Wheat. 316) and has never been doubted since."

That the privileges granted telegraph companies by federal law, had no bearing upon the validity of the tax is shown by *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530 and *Massachusetts* v. *Western Union Telegraph Co.,* 141 U. S. 40, in which state taxes on the property and franchises of companies, operating under the same statute as the Telegraph Company in the *Texas* case were sustained because not on the transactions between the carrier and the United States.

Stock issued by the United States evidencing indebtedness to the holder cannot be taxed *ad valorem* by a state.[18] A tax upon the assets of a corporation is bad if obligations of the United States are included in the assessment.[19] A gross income tax is invalid to the extent

---

[18] *Weston* v. *Charleston,* 2 Pet. 449, 465.

[19] *Bank of Commerce* v. *New York City,* 2 Black 620; *Bank Tax Case,* 2 Wall. 200; *Bank* v. *Supervisors,* 7 Wall. 26; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Missouri* v. *Gehner,* 281 U. S. 313.

that it is laid on income from federal securities.[20] The reason is that "the tax . . . is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract." The government's obligation is for the payment both of principal and interest, and an exaction which bears upon either of these features of the obligation is prohibited.

Certificates of indebtedness issued by the United States, payable at a future date, with interest, issued to creditors for supplies furnished by them to the nation, cannot be taxed by a state. They differ from the gross receipts here taxed only in the respect that they were issued to secure payment of past-due contractual obligations, whereas the cash paid the appellee was in solution of a present obligation of like nature. Of the taxability of these certificates it was said: [21]

" . . . But we fail to perceive . . . that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money."

Many sorts of imposts, however, which bear merely upon the obligee of a government contract for the exercise of a privilege having no relation to the contractual nexus between him and the government have been sus-

---

[20] *Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *National Life Ins. Co.* v. *United States,* 277 U. S. 508. And no form of words or subterfuge can save an act the intent of which is to reach the income from federal bonds. *Miller* v. *Milwaukee,* 272 U. S. 713; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 629.

[21] *The Banks* v. *The Mayor,* 7 Wall. 16, 25.

tained. So, a franchise or privilege tax measured by assets or by income is not rendered void by the circumstance that the taxpayer's assets or income include federal securities or interest thereon.[22] And a law which imposes an excise upon the privilege of transmission of property at death may include federal securities in the estate by which the tax is measured.[23] Upon the like reasoning a tax upon moneys and credits in the assessment of which uncollected government checks are included is valid.[24]

There can be no difference in reason, or in practical effect, between taxation of government contracts to repay borrowed funds or written promises to pay for goods previously furnished and a contract to pay for goods and services as furnished, or any other form of contract whereby the government exercises its granted powers. The federal power to contract for supplies or services is as necessary and as fundamental as the power to borrow money. Thus it has been said, speaking of a tax upon government obligations: [25]

"If the states and corporations throughout the union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?"

If the government, as guardian of an incompetent Indian, leases land to a mining company on a royalty consisting of a percentage of the gross proceeds derived from the sale of ores mined, a state *ad valorem* tax assessed to the lessee on the ores mined and in storage upon the

---

[22] *Home Ins. Co.* v. *New York,* 119 U. S. 129; *Home Ins. Co.* v. *New York,* 134 U. S. 594.

[23] *Plummer* v. *Coler,* 178 U. S. 115; *Greiner* v. *Lewellyn,* 258 U. S. 384.

[24] *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310.

[25] *Weston* v. *Charleston,* 2 Pet. 449, 465.

leased land before any sale or segregation of the equitable interests of the government as guardian, is void as burdening and impeding an operation of the government.[26] A sales tax on commodities sold to the government, though laid upon the seller at a given rate per unit sold, is also bad as directly burdening the government's transactions.[27] A tax on storage or withdrawal from storage essential to the sale of a commodity contracted to be delivered to the United States is in the same class as a tax on sales to the government.[28] On the other hand, a sales tax upon articles purchased by a government contractor,[29] or a net income tax laid upon his income, is valid.[30] The reason is that exactions of the latter sort do not impinge upon or directly affect the transaction between him and the government; do not affect the government's choice of means for executing its powers.

While a gross income tax upon receipts derived from a government contract would in itself be bad, if the exaction is in lieu of all property taxes and intended as a property tax, measured by receipts of the property, it is valid.[31]

Over a century ago the court said:[32]

"Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be

[26] *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.

[27] *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218; *Graysburg Oil Co.* v. *Texas,* 278 U. S. 582; 3 S. W. (2d) 427. Compare *Brown* v. *Maryland,* 12 Wheat. 419, 440.

[28] *Graves* v. *Texas Company,* 298 U. S. 393.

[29] *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466.

[30] *General Construction Co.* v. *Fisher,* 295 U. S. 715; 149 Ore. 84; 39 P. (2d) 358; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508.

[31] *Alward* v. *Johnson,* 282 U. S. 509.

[32] *Osborn* v. *Bank,* 9 Wheat. 738, 867.

fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; . . . But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control."

There is no distinction between a sales tax on goods sold to the federal government and a gross receipts tax upon the furnishing of goods and services under a contract with the government. As was said in *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218, 221:

"The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the State and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

As in the *Panhandle* case, so in the present, the receipt of the thing contracted for constitutes the transaction by which the tax is measured and on which the burden rests. We may thus paraphrase what was there said: to use the value and amount of the goods and services furnished to the United States as a measure of the tax is in substance and effect to tax the transaction itself. The amount of the tax rises and falls in direct ratio to the contract value of the goods and services rendered to the government. This is to tax the sale; and that is to tax the United States.

The Solicitor General as *amicus curiae* proposes a single test of the constitutionality of a state tax upon the operations of the United States, or the means chosen for

the execution of its powers. That test is whether the taxing statute discriminates against the government and in favor of other taxpayers. He frankly admits that if the proposed criterion be adopted we must overrule *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox, supra;* and *Graves* v. *Texas Company,* 298 U. S. 393. He professes himself, as I am, unable to distinguish a sales tax or a tax upon storage preliminary to sale to the United States from a gross receipts tax upon goods and services furnished the government. In a brief filed as *amicus curiae* in *Graves* v. *Texas Company, supra,* he urged the court to hold such a tax imposed on gasoline under contract to the United States invalid as an unconstitutional impediment and burden upon the operations of the government.[33] It is said that these cases have been distinguished. But in the cases distinguished from them the tax was found to be one on the property of a contractor with the United States, or on his net income, not on the gross receipts of his contract with the government. To distinguish them from the present case is not to rely upon any principle but upon the mere name or label given to a tax. Such distinctions only serve to confuse.

I do not think the Solicitor General in brief or argument answered the question propounded by the court in the present case: whether the tax is invalid as laying a burden upon the operations of the federal government. He responds that the tax is valid in spite of the fact that it lays such a burden. Thus he states: "We have indicated that a tax upon the contractor, the sole result of which is to increase the cost to the sovereign by the

[33] In this brief the Solicitor General stated that figured upon the estimated purchases of the Government for the then current fiscal year, state sales taxes on gasoline of four cents per gallon, imposed by all the states, would impose an added burden upon the United States of $4,479,661.

amount of the normal tax burden, presents no interference with its operations." Again he says that the imposition of the tax in question "is in no sense a threat to the capacity of the government to perform its functions."

Thus it appears that, in his view, a non-discriminatory state tax is to be judged not by the "burden" it imposes, but by the extent of its "interference" with the functioning of government. If this be the test, no tax, however great, can prevent such functioning, so long as the United States' taxing and borrowing powers remain adequate to meet the ordinary expenses of its operations and the added cost of state taxes thereon. The adoption of any such theory would require the overruling not only of the three decisions the Solicitor General singles out for deletion, but literally scores of others, beginning with *M'Culloch* v. *Maryland* and ending with *Graves* v. *Texas Company,* 298 U. S. 393, decided at the 1935 term in accordance with the views then earnestly pressed upon us by the Solicitor General.

It is not clear to what extent the court's opinion adopts the doctrine advocated by the government. It is said merely that the appellee is an independent contractor, that the tax is non-discriminatory and is not laid upon the contract of the government; and it is suggested that if in the view of Congress the burden of such a tax becomes too heavy, Congress has the means of redress. Whether one or all of these factors is requisite to justify the exaction we are not told.

The cases on which the opinion especially relies do not justify sustaining this tax. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, throws no light upon the problem presented. A contractor employed to advise a state and its municipal subdivisions sought exemption from a federal tax upon net income. The law imposing the tax did not discriminate against the receipts from the contract but treated them as part of the gross income upon which

the taxable net income was to be calculated. In accordance with all of this court's applicable decisions the tax was held not to be upon the state or its contract with the taxpayer, not upon an instrumentality or means chosen by the state for executing its powers, not directly upon the amount of the taxpayer's compensation received from the state. The exaction was not, as here, of a proportion of each dollar paid by the government. It was upon net income remaining after allowable deductions from gross.

The decision in *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, relied on as sustaining the instant exaction, neither rules nor aids in the decision of the present cause. There a foreign surety company was required by law to pay an annual fee equal to two per cent. of its gross premiums, in order to be admitted to do business in Pennsylvania. Under a federal statute surety companies desiring to execute bonds running to the United States were required to obtain written authority from the Attorney General so to do. The Fidelity Company obtained such authority and became surety in Pennsylvania on a number of bonds insuring the faithful performance of official duties by federal employes. It challenged so much of the state tax as was laid upon the premiums received for writing these bonds. The challenge was not sustained. The claim that the company, by obtaining leave to execute bonds running to the United States, had become a federal instrumentality, was properly overruled.[34] But it is said that, in sustaining the tax, the court held that an exaction on the gross receipts of government contracts is valid. A moment's reflection will show that this is incorrect. The premiums received by the surety company were received from its clients—those for whom it wrote the bonds. It received no compensation from the United States and its transactions in essence were with

[34] See the cases cited in note 10, *supra*.

citizens of the State of Pennsylvania as such. They did not differ from transactions with federal officers and employes whereby the latter procured any other sort of goods or service.[35] Of course, the mere fact that a contractual relation—that of suretyship—was created between the Fidelity Company and the United States, was not in and of itself sufficient to relieve the company of the burden of paying a local tax for the privilege of doing business with its customers.

Alward v. *Johnson,* 282 U. S. 509, is cited as an instance where a gross receipts tax incident upon the consideration paid the contractor by the United States was sustained. Examination of the case demonstrates that the contrary is true. Alward was engaged in operating an automotive stage line between points in California. In his business he employed automotive property and used the state highways. In classifying property for taxation the state separately classified property of persons carrying on such a business as his and laid a tax on this class of property, in lieu of all other taxes, at the rate of four and one-half per cent. of gross receipts. Other classes of property were taxed at a percentage of value. As the major portion of Alward's gross receipts arose from a contract for carrying United States mails he insisted that the tax was invalid because, by virtue of his contract with the Government, he became a federal agency immune from taxation upon his gross receipts.

This court found that the Supreme Court of California had declared the tax one upon property in cases having no relation to its incidence upon federal instrumentalities or means. It further found that the challenged classification for taxation of automotive property used in a business transacted on the public roads was not arbitrary or unreasonable. The case was likened to those arising

[35] See note 5, *supra.*

under the commerce clause in which the intrastate property of an interstate carrier was either directly taxed or was taxed by use of a percentage of gross receipts in lieu of all other taxes, including property taxes, in order to reach a fair measure of the taxable value of the carrier's intrastate property. *Pullman Co.* v. *Richardson,* 261 U. S. 330; *Hopkins* v. *Southern California Tel. Co.,* 275 U. S. 393. It was pointed out that the tax was not on gross receipts as such and did not bear upon the contract between the taxpayer and the government. In the instant case the tax is admittedly an excise for revenue imposed in addition to property taxes and foreign corporation fees paid by the appellee.

It may be considered,—though I do not think with reason,—that the conclusion of the court that the tax was a property tax and not a tax upon gross receipts as such was erroneous but, even if this be conceded, it cannot be contended that the case stands as authority for the proposition that a gross receipts tax as such upon the earnings of a government contractor, from his government contract, is not a burden or impediment upon the operations of the United States within the rule of federal immunity.

Much stress is laid by the Solicitor General upon the decision in *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, and he suggests that the views therein stated be adopted in the present case in preference to those embodied in the *Panhandle Oil* case, *supra.* The suggestion implies, contrary to the fact, that the two decisions are contradictory. The Liggett & Myers Company, a manufacturer of tobacco, sold a portion of its product to a state. The company resisted the collection of a federal internal revenue tax laid "upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale" at a flat rate in cents

per pound "to be paid by the manufacturer or importer thereof." Upon analysis of the statute it was concluded that the tax was upon the manufacture and that payment was merely postponed until removal or sale. The tax did not vary in amount with the price received for the tobacco and was not in terms upon its sale. Upon this ground the *Indian Motocycle Co.* case and the *Panhandle* case were distinguished.

It may be conceded that often it is difficult to determine whether a tax is laid upon the local operations of a manufacturer or contractor or upon the actual sale of his product. But such distinctions must be made. Indeed the court itself is required to make such an one in the instant case in determining that payment for what the appellee manufactured for the government in Pittsburgh, Pennsylvania, did not constitute a gross receipt in West Virginia under the contract. The court has repeatedly been confronted with the problem whether a tax was in fact on the sale of a commodity or upon some prior dealing with it by the producer or supplier. While the distinctions drawn may seem somewhat nice, examination of the facts carries conviction that the distinctions are substantial.[36]

It is suggested that the appellee's status as an independent contractor lifts the ban from the tax. This is to ignore the direct bearing of the exaction on the transaction between the contractor and the government. The fact that the tax is laid upon him who contracts with the government rather than upon the contract as such, or the government itself, is immaterial. Every purchaser of government obligations is an independent con-

[36] *Cornell* v. *Coyne*, 192 U. S. 418; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572. The same problem arises in connection with taxation alleged to burden interstate commerce. See *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459.

tractor with the government. If the fact that the taxpayer is an independent contractor were significant, it would have validated every tax laid upon the ownership of government obligations or upon the interest received therefrom.[37] It has been held that ores produced by an independent contractor for the government, though still in his possession, cannot be taxed by a state; [38] and that a license tax upon an independent contractor cannot be measured by the gross receipts from his transactions with the government.[39]

What was said by Mr. Justice Bradley, dissenting in *Railroad Company* v. *Peniston,* 18 Wall. 5, 38, when read in the light of its context, has no bearing upon the issue here presented. In *M'Culloch* v. *Maryland,* in holding that a tax upon the operations of the United States Bank invaded the federal immunity, Chief Justice Marshall said:

"It [the immunity] does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, . . ."

In the *Peniston* case the question was whether a uniform *ad valorem* state tax could lawfully be assessed upon the intrastate property of the railroad, a federal corporation. The court held that it could. The correctness of the decision has never been doubted. Justices Bradley and Field, however, thought that the scope of the immunity was so broad as to exempt even the local property of a federal instrumentality from such a uniform local tax. It is to be observed that no other kind of exaction was involved. Mr. Justice Bradley insisted that while

---

[37] See the cases cited in notes 17, 18 and 19.

[38] *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.

[39] *Western Union Tel. Co.* v. *Texas,* 105 U. S. 460; *Williams* v. *Talladega,* 226 U. S. 404; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218; *Graves* v. *Texas Company,* 298 U. S. 393.

such a tax might lawfully be laid upon the *property* of one who was a mere contractor with the United States it could not be laid upon the local assets of a federal corporate instrumentality. The challenged tax was not upon the franchise of the corporation granted by the government, not on its right to exist within the state, nor upon the gross receipts from its operations. Confessedly the property of a contractor with the government is more remote from the government's operations than is the property of a government instrumentality. If the latter may be locally taxed *a fortiori* the former may, and the language of Mr. Justice Bradley applied only to that situation, and not to a gross receipts tax such as we have here.

Does the fact that the tax is non-discriminatory save it? The Solicitor General, as we have seen, so argues. He says that both the appellee and the United States derive substantial benefits in connection with the federal projects located in the State and adds that it seems these benefits should not be free. Though he does not overlook the fact that when the work is completed the United States will continue to receive benefits from the State, he contends that a non-discriminatory tax upon the gross receipts of the contractor is but a method of reimbursing the State for benefits conferred. The argument proves too much. It requires that equal and uniform state taxation upon federal property on which stand customs houses, post offices, forts, arsenals, *et id omne genus,* be upheld. In every instance of the ownership and use of property within a state, according to the argument, the federal government receives substantial benefits for which it should pay. The Solicitor General balks at the result of his position. He says: "We recognize that the logic of our analysis of benefits received would lead to taxation of the sovereign itself. But the attributes of sovereignty may be such as to prevent a tax from being

imposed upon the government itself. Certainly, the principle of the tax immunity of the sovereign itself is too firmly established now to be reexamined."

The short answer is that the immunity from state taxation upon the means, the operations, and the instruments of the government is just as firmly established as is the immunity from taxation of the government's property or offices or posts created by it, and that neither class of taxation can be justified by the fact that the burden on the government is uniform with that laid on others.

Taxes condemned by the court's decisions which were imposed upon the principal and interest of federal securities, upon the product of mining lessees, in which the government had an interest, upon storage and sale of property sold to the government, upon the operation and franchises of federal instrumentalities, such as national banks, were non-discriminatory. They bore equally and alike upon property and operations in which the government was interested and those which were alien to it, but they were voided as illegally burdening the operations of the United States. The fact that taxes upon government property and upon property of wholly owned government corporations were non-discriminatory did not suffice to save them. Taxes on franchises granted by the federal government, taxes upon the office or salary of a federal official, though non-discriminatory, nevertheless fell under the ban. It was said in *Johnson* v. *Maryland,* 254 U. S. 51, 55:

"Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch *v.* Maryland, 4 Wheat. 316."

The element of discrimination becomes important only in a case where a tax which would otherwise be per-

missible is aimed at the taxpayer because of his relation to the government. Of course a state cannot lay a heavier burden upon those contracting with the government simply because they are such contractors. A discrimination of that nature on its face spells a hostile purpose, an intent to hinder and burden the government, to impede its operations, and to discourage dealing with it. But the question of discrimination has no place in the consideration of the legality of an exaction laid directly upon the government, upon its operations, or upon the means or instrumentalities it has chosen for executing its powers.

As we have seen, the Solicitor General suggests that the tax should be sustained, although it lays a burden on the United States, because the burden is a "normal tax burden" and the United States can bear it. The opinion of the court suggests the same thought and adds that if West Virginia ever imposes a gross receipts tax uniform in its incidence, but inordinately heavy, Congress has power to relieve the government from such interference. Both suggestions are in the teeth of all that has been said by the court on the subject of federal immunity. The necessity for enforcement of the doctrine was embodied in the phrase of Chief Justice Marshall in *M'Culloch* v. *Maryland, supra,* that "the power to tax involves the power to destroy." As was said in *Knowlton* v. *Moore,* 178 U. S. 41, 60:

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

Chief Justice Marshall denied the existence of the power. From that day to this the court has consistently held that the question is not one of quantum, not one of the weight of the burden, but one of power. The court has said that the attempt to tax the means employed by the Government is "the usurpation of a power which the people of a single State cannot give." Referring to the decision in *M'Culloch* v. *Maryland,* it was said:

"The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today." [40]

Again the court has said:

"It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State." [41]

Again it was recently said:

"Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. *McCulloch* v. *Maryland,* 4 Wheat. 316, 430; *United States* v. *Baltimore & Ohio R. Co.,* 17 Wall. 322, 327; *Johnson* v. *Maryland,* 254 U. S. 51, 55–56; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505; *Crandall* v. *Nevada,* 6 Wall. 35, 44–46." [42]

No one denies the competence of the Congress to waive the immunity in whole or in part.[43] But this is the

[40] *Johnson* v. *Maryland,* 254 U. S. 51, 55.

[41] *Brown* v. *Maryland,* 12 Wheat. 419, 439.

[42] *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575.

[43] *Van Allen* v. *Assessors,* 3 Wall. 573.

reverse of saying the power to tax federal means and operations exists in the states subject to veto by Congress of any exorbitant exercise of the power. And it may be pertinent to suggest that, if, as the court has always held, the immunity is reciprocal, the state legislatures, by a parity of reasoning, ought to have the power to prohibit federal taxes upon state operations, if they be deemed immoderate.

It must be evident that if the principle of federal immunity is to be preserved, if all that the court has said respecting it is not to be set aside, the gross receipts tax under review cannot be rescued from condemnation by the circumstances that it bears upon an independent contractor, does not discriminate, and is not so burdensome as seriously to interfere with governmental functions.

Such a tax upon gross receipts has been contrasted in all the decisions, including those dealing with burdens upon commerce, with a tax upon net income; the one being held a forbidden burden and the other a permissible exaction. Despite the fact that the court has repeatedly applied the same tests of validity to taxes alleged to burden interstate commerce as it has to exactions said to burden the operations of the federal government,[44] it is said in the opinion:

"Respondent invokes our decisions in the field of interstate commerce, where a tax upon the gross income of the

[44] *Telegraph Co.* v. *Texas*, 105 U. S. 460, 465; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 14; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 32; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 344; *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 299; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin*, 240 U. S. 227, 232; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504–5; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 275 U. S. 136, 140; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575; *Eastern Air Transport* v. *South Carolina Tax Comm'n*, 285 U. S. 147, 152; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 126; *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383, 387.

taxpayer derived from interstate commerce has long been held to be an unconstitutional burden. . . .

"But the difference is plain. Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce or the privilege of engaging in it or the receipts as such derived from it."

As has been pointed out, the doctrine of federal immunity from state taxation is based upon the right of the federal government to carry on its lawful operations free from burden or impediment imposed by a state upon the business which constitute such operations or the privilege of engaging in them. The Constitution contains no clause forbidding the states to burden, impede, or interfere with the operations of the federal government. In express terms it confers upon that government power to conduct those operations. Nor does the Constitution contain any clause prohibiting the states from burdening or interfering with the conduct of interstate commerce. In express terms it confers upon Congress the power to regulate that commerce. In each case there is implied from the federal power delegated by the people an immunity from interference or burden by the states. The cases are entirely analogous. Comparing the immunity of interstate commerce from state taxation with the like immunity of the federal government, the court has said:

"The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance." [45]

The cases in our reports respecting the immunity of interstate commerce from burden by state taxation are the complete analogue of those dealing with the federal immunity from the like burden. As in the case of a private corporation employed as an agency of the United

[45] *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505.

States, so in the case of a private corporation engaged in interstate commerce, the states are free to lay a uniform and nondiscriminatory tax upon the property employed in the business within their jurisdiction.[46]

A tax upon the gross receipts of corporations derived both from intrastate and interstate commerce is bad because it burdens the latter.[47] A franchise tax upon a corporation transacting an interstate business, measured by its interstate business or its property without the state, is void, on the same principle that a tax laid upon the franchise of a corporation which is a federal agency or instrumentality is void.[48]

A sales tax on gasoline sold within a state is invalid as it affects gasoline purchased outside the state for use therein, for the same reason a sales tax upon sales to the United States is invalid.[49] A tax upon the gross receipts of one engaged in interstate commerce is bad be-

---

[46] *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Western Union Tel. Co.* v. *Taggart,* 163 U. S. 1; *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299; *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Pullman Co.* v. *Richardson,* 261 U. S. 330. And as in the case of agents of the federal government or contractors with it, a state may measure the value of the property within its borders by a receipts tax in lieu of all property taxes. Compare *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Pullman Co.* v. *Richardson,* 261 U. S. 330, with *Alward* v. *Johnson,* 282 U. S. 509.

[47] *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298.

[48] Compare *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, and *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, with *California* v. *Central Pacific R. Co.,* 127 U. S. 1; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664; *Third National Bank* v. *Stone,* 174 U. S. 432; and *Louisville* v. *Third National Bank,* 174 U. S. 435.

[49] Compare *Cook* v. *Pennsylvania,* 97 U. S. 566, and *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, with *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218.

cause a direct burden on that commerce in the same sense that a tax on the gross receipts of business done with the United States is a direct burden on the transaction with the federal government.[50] In contrast, a tax on the net income of one engaged in interstate commerce is not upon his transactions in that commerce, but so remote therefrom as not to burden it, just as a net income tax upon one who contracts with the federal government is inoffensive to the rule of federal immunity.[51]

A state may not lay an occupation tax upon the act of engaging in interstate commerce, for the same reason that it may not lay a similar tax upon the employment of an officer of the United States.[52] The same considerations of remoteness sustain taxes upon the mere purchase of articles intended for use in interstate commerce or for the fulfilment of government contracts.[53]

I conclude, then, that the tax in question is plainly imposed upon the operations of the federal government; that it falls squarely within the definition of such a burden and is prohibited upon the principle announced

---

[50] Compare *Cook* v. *Pennsylvania*, 97 U. S. 566, *Fargo* v. *Michigan*, 121 U. S. 230, *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338, *Fisher's Blend Station* v. *State Tax Comm'n*, 297 U. S. 650, *Puget Sound Co.* v. *Tax Comm'n, ante*, p. 90, with *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460.

[51] Compare *Shaffer* v. *Carter*, 252 U. S. 37, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, and *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, with *General Construction Co.* v. *Fisher*, 295 U. S. 715 (149 Ore. 84; 39 P. (2d) 358), and *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508. But see *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

[52] Compare *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, with *Dobbins* v. *Commissioners*, 16 Pet. 435, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401.

[53] Compare *Eastern Air Transport* v. *South Carolina Tax Comm'n*, 285 U. S. 147, with *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466, and *Tirrell* v. *Johnston*, 293 U. S. 533.

in *M'Culloch* v. *Maryland* and ever since consistently applied in the decisions of the court. I think that the judgment should be affirmed.

These views with respect to the nature of the tax render it unnecessary to express any opinion as to the asserted exclusive federal jurisdiction over the area within which the appellee pursued the activities which are the subject of the exaction.

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

SILAS MASON CO. ET AL. *v.* TAX COMMISSION OF WASHINGTON ET AL.*

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 7. Argued April 27, 1937. Reargued October 12, 13, 1937.—Decided December 6, 1937.

1. A state occupation tax on gross receipts may constitutionally include the receipts from construction work done under a contract with the United States. *James* v. *Dravo Contracting Co., ante* p. 134. P. 190.
2. Acquisition by the United States of exclusive territorial jurisdiction over land to which it has acquired title within a State, is dependent upon consent of or cession from the State. P. 197.
3. Whether a State has yielded to the United States exclusive legislative authority over land within the State is a federal question. P. 197.
4. The provisions of the federal Reclamation Act relative to the acquisition of land, and the provisions of Remington's Rev. Stats. of Washington §§ 7410–7412 granting land to the United States for irrigation projects, do not intend that, with the title, the United States shall acquire exclusive jurisdiction over the land conveyed. Pp. 197 *et seq.*

---

* Together with No. 8, *Ryan* v. *Washington et al.*, also on appeal from the Supreme Court of Washington.

This applies to land in the bed of a navigable river, shore lands and uplands, including school lands.

5. The term "other needful buildings" in Const. Art. I, § 8, Cl. 17, embraces whatever structures are found to be necessary in the performance of the functions of the Federal Government. *James* v. *Dravo Contracting Co., ante* p. 134. P. 203.

6. This clause of the Constitution does not imply that the consent of the State to purchases must be without any reservation of jurisdiction. *James* v. *Dravo Contracting Co., ante* p. 134. *Id.*

Such an implication would not be consistent with the freedom of the State and with its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.

7. Sec. 8108 of Remington's Rev. Stats. of Washington, giving the State's consent to acquisition of lands by the United States for purposes named, applies to acquisition from individuals and corporations, but *semble* not to acquisitions from the State itself. P. 205.

8. Sec. 8108 of Remington's Rev. Stats. of Washington, which consents, in accordance with Const. Art. I, § 9, Cl. 17, to acquisition of lands by the United States for locks, dams, piers, etc., and other necessary structures and purposes required in improvement of rivers and harbors of the State, or for sites of forts and magazines, arsenals, docks etc., "or other needful buildings" and cedes jurisdiction is construed by the State Supreme Court as inapplicable, and as not yielding all legislative authority of the State, where the land is acquired for a project such as the Columbia Basin Project, which looks not only to the improvement of navigation but also to the development of irrigation and of power for industrial purposes. *Held:*

(1) That in view of the scope of the project mentioned, this construction can not be deemed inadmissible, and even if not binding it should be accorded much weight. P. 206.

(2) Assuming that the power development contemplated is incidental to improvement of navigation, reclamation of arid and semi-arid land, one of the main objectives of the project, is an activity always regarded as carrying with it an appropriate recognition of continued state jurisdiction. *Id.*

(3) Therefore this statute (enacted in 1891) can not be taken as conclusively showing an intent to yield exclusive jurisdiction in such a case; and in as much as it appears that the Federal Government did not intend to acquire exclusive jurisdiction but con-

templated the continued existence of state jurisdiction consistent with federal functions and invited the coöperation of the State in providing an appropriate exercise of local authority over the territory embraced in the project, the State court's construction is accepted. *Id.*

9. In acquiring land for federal purposes the Government is not compelled to accept a transfer of exclusive jurisdiction from the State. P. 207.
10. Unauthorized administrative action becomes legal when ratified by Congress. P. 208.
11. Ratification of "all contracts" executed in connection with the Grand Coulee Dam project, permits reference to the contracts as proving the intention, not only of the federal officials who executed them but of Congress, that, consistently with the execution of the plan, the jurisdiction of the State, over the large area acquired, including jurisdiction over contractors engaged on the project, should be retained. P. 209.
12. To invest the United States with exclusive jurisdiction over tribal Indian lands in a State a cession from the State is essential. P. —.
13. The State of Washington had territorial jurisdiction to tax the receipts of federal contractors on the land acquired by the United States for the Grand Coulee Dam project and the tax does not lay an unconstitutional burden on the Federal Government. P. 210.

188 Wash. 98, 115; 61 P. (2d) 1269, 1276, affirmed.

APPEALS from decrees affirming decrees of a Superior Court which sustained occupation taxes laid on the gross receipts enuring to the appellants under contracts with the United States for construction work in the State of Washington. In the first case injunctive relief was denied by the Superior Court. The second case included an action or appeal to recover a tax payment, and a suit for an injunction, both of which were dismissed by the Superior Court.

Mr. B. H. Kizer for appellants in No. 7, on the original argument and the reargument. *Messrs. John W. Davis, J. Arthur Leve,* and *E. D. Weller* were with him on the brief.

Messrs. E. D. Weller and *B. H. Kizer* for appellant in No. 8, on the original argument.

Mr. John W. Davis for appellant in No. 8, on the reargument. *Messrs. B. H. Kizer, J. Arthur Leve,* and *E. D. Weller* were with him on the brief.

Messrs. E. W. Schwellenbach and *E. P. Donnelly* for appellees in No. 8, on the original argument and the reargument.

Solicitor General Reed, with whom *Attorney General Cummings, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch, Arnold Raum,* and *Francis A. LeSourd* were on the brief, for the United States as *amicus curiae* in Nos. 7 and 8, by special leave of Court, on the reargument.

By leave of Court, briefs of *amici curiae* were filed by *Mr. W. G. Graves,* on behalf of Mason-Walsh-Atkinson-Kier Co., in support of appellant in No. 8; and by *Messrs. E. P. Donnelly* and *E. W. Schwellenbach,* on behalf of Grant County, Oreg., in support of appellees in No. 8.

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

These suits were brought to restrain the enforcement of the Occupation Tax Act of the State of Washington (Laws of 1933, c. 191, p. 869; Spec. Sess., 1933, c. 57, p. 157 [1]) as applied to the gross income received by appellants under contracts with the United States for work performed in connection with the building of the Grand Coulee Dam

[1] The Act describes the tax as laid "upon the privilege of engaging in business activities." Section 2-a (1) provides: " . . . there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services . . . an annual tax or excise for the privilege of engaging in such business . . . equal to the gross income of the business multiplied by five-tenths of one per cent; . . . ."

on the Columbia River.[2] The Supreme Court of the State sustained the tax and affirmed judgments dismissing the suits. *Silas Mason Co.* v. *State Tax Comm'n,* 188 Wash. 98; 61 P. (2d) 1269; *Ryan* v. *State,* 188 Wash. 115; 61 P. (2d) 1276. The cases come here on appeal.

The questions are (1) whether the tax imposes an unconstitutional burden upon the Federal Government, and (2) whether the areas in which appellants' work is performed are within the exclusive jurisdiction of the United States. On reargument, and at the request of the Court, the views of the Government upon these questions were presented. With respect to the first question, our ruling upholding the validity of a similar tax of West Virginia as laid upon the gross receipts of a contractor engaged in building locks and dams for the United States is controlling. *James* v. *Dravo Contracting Co., ante,* p. 134. We pass to the question of territorial jurisdiction.

1. The following facts as to the nature and history of the enterprise, as set forth in appellants' complaints and shown by evidence and stipulations, are uncontroverted: The Columbia River, above its lower reaches, partakes of the character of a mountain stream, its fall being great, its current swift and its course marked at intervals of a few miles by rapids flowing over and through rocky masses of such magnitude as to render navigation difficult and in many instances impossible save by the construction of canals and locks. There are great alternations in its flow, its period of high water depending upon the melting of snow in the mountains where its sources are found. Its principal tributary is the Snake River which has the same characteristics. Through improvements that have been made and are contemplated,

[2] Appellant David H. Ryan, in No. 8, also brought an action to obtain a refund of occupation taxes which he had paid. That action was consolidated for hearing in the state courts with the suit for injunction to restrain further collection.

the Columbia River is commercially navigable from its mouth to the mouth of the Snake, and above that point the Columbia is navigable locally, from pool to pool, to the mouth of the Okanogan River, but all such navigation is difficult and not commercially feasible because of the physical conditions above described. These characteristics, however, "render it an ideal stream for the development of hydroelectric power." For the most part the Columbia River within the United States flows through an arid country, "the land being immensely productive and rich when placed under irrigation, but of no value without irrigation." The course of the river for the greater part of its length in the United States lies wholly within the State of Washington. From a short distance below the mouth of the Snake, the Columbia is the boundary between the States of Washington and Oregon.

Following sporadic improvements extending over a number of years, the Corps of Engineers of the War Department finally made an exhaustive survey, and in 1932 the Chief of Engineers of the United States Army recommended a comprehensive plan for the development of the Columbia River, which took into consideration the use of its waters for the purposes of navigation, flood control, power development, and irrigation. The plan contemplated the construction of ten dams across the river at various points in Washington and where the river is the boundary between Washington and Oregon. The uppermost of these dams is at the head of Grand Coulee in Washington about 150 miles below the international boundary and 274 miles above the mouth of the Snake River. The plan was commonly described as the Columbia Basin Project.

In June, 1933, Harold L. Ickes was appointed Administrator of Public Works, and later the President, under authority of the National Industrial Recovery Act (§§

201–203, 48 Stat. 200–205) directed the Administrator to include in the Public Works program the Grand Coulee Dam and Power Plant. Appellants state that the project as finally recommended by the War Department and the Department of the Interior contemplated, among other features, a dam at the Grand Coulee to be 370 feet high above low water (550 feet high, as actually constructed) and 4290 feet long on the crest, and a power plant to develop 2,100,000 horse power, at a total cost of $392,000,000. Appellants add that this is the key dam on the river and will create a lake 150 miles long, reaching the Canadian boundary; that over five million acre feet of storage will become available, the release of which when the flow of the river is at its lowest will double the prime power of the river downstream to the Snake River and add more than 50 per cent. to the power of the Columbia below the Snake; that the storage will have an appreciable effect in reducing floods on the whole river and that "there will be 905,500 acres of first class land available for irrigation."

In 1933, the legislature of the State of Washington created the Columbia Basin Commission to promote the Columbia Basin Project. Laws of 1933, c. 81, p. 376; *Ryan* v. *State, supra,* p. 1277. For that purpose the Commission obtained an allocation of $377,000 of the emergency relief funds of the State. On June 30, 1933, the United States, represented by the Commissioner of the Bureau of Reclamation, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388) and amendatory and supplementary Acts, made a contract with the Columbia Basin Commission by which the United States agreed to undertake topographic surveys and exploratory work and prepare certain designs and estimates for which the Columbia Basin Commission undertook to pay within the limits of its appropriation. *Ryan* v. *State, supra,* p. 1278.

On November 1, 1933, the Secretary of the Interior signed a memorandum, addressed to himself as Administrator of Public Works, in which the Secretary recommended that the project "be considered a federal project to be constructed, operated and maintained by the Bureau of Reclamation and to be paid for from net revenues derived from the sale of its electric power." Under the same date, the United States, represented by the Secretary of the Interior, in pursuance of the Reclamation Act of 1902 and the National Industrial Recovery Act, made a further agreement with the State of Washington providing for the expenditure by the United States, through the Bureau of Reclamation, of the sum of $63,000,000 for the construction of a dam and power plant at the Grand Coulee site, together with necessary transmission lines. There was further provision that the United States should retain title to the dam and power plant until the cost of the project, including the cost of the first unit dam and power plant, had been fully repaid into the United States Treasury; that the State Commission should act as an advisory board in conference with officers of the United States concerning the various important questions which might arise in connection with the construction and use of the dam, power plant and transmission lines; and that the State should have an option to purchase the perpetual right to the entire power output of the first unit dam and power plant upon prescribed conditions. *Ryan* v. *State, supra,* p. 1278.

On December 12, 1933, the Secretary of the Interior and Administrator of Public Works signed an amended Declaration of Taking in the case of *United States* v. *Continental Land Co. et al.,* in the United States District Court for the Eastern District of Washington, in which it was stated that certain lands at the Grand Coulee Dam site to the extent of 840.28 acres "are hereby taken for the use of the United States" in the construction of a

dam "for the regulation and control of the flow of the Columbia River, for a storage reservoir from the damsite to the Canadian boundary, for the improvement of navigation, for flood control, for hydro-electric power development at the Grand Coulee damsite, for the increase of power development down-stream, for the reclamation of arid and semi-arid lands, for the domestic use of water, and for the relief of unemployment." Thereupon the United States immediately acquired title and possession of the lands involved. 40 U. S. C. 258a. Shortly after, on January 4, 1934, the First Assistant Secretary of the Interior gave formal notice to the Commissioner of Public Lands of Washington of the intention of the United States to make examinations and surveys and attached to the notice a list of lands owned by the State "over and upon which the United States requires rights of way for canals, ditches, laterals and sites for reservoirs and structures appurtenant thereto; and such additional rights of way and quantities of land as may be required for the operation and maintenance of the completed works for the said proposed Columbia Basin Project." The notice was given pursuant to the state statutes to which we shall presently refer. The lands in this list are described as "Bed and Shore Lands of Washington State" and "Uplands of Washington State," affected by Columbia Basin Project.

In December 1933, the Department of the Interior entered into a contract with David H. Ryan (No. 8) for the excavation of the "over-burden" at the damsite. That work was upon land, above high water mark, already or about to be acquired by the United States. The contractor completed it in the summer of 1934, maintaining his office and living quarters within the territory of the Grand Coulee Project. The contract provided that the appellant should "obtain all required licenses and permits," should furnish "compensation insurance"

in compliance with the laws of the State, and should "comply with all applicable provisions of federal, state and municipal safety laws and building and construction codes." *Ryan* v. *State, supra,* p. 1279.

In July, 1934, a contract was made between the United States and Silas Mason Company and others, appellants in No. 7, for the construction of part of the Grand Coulee Dam and Power Plant covered by described items in the schedule of specifications, for the sum of $29,339,301.50.[3] This contract, like that of Ryan, required the contractor to obtain licenses and permits and to furnish compensation insurance in compliance with the workmen's compensation law of the State.

Such a vast undertaking necessarily had in view a large number of employees who with their families would require the appropriate facilities of community life. Accordingly, the specifications provided for the erection on the tract acquired by the Government of a "contractor's camp," embracing the various buildings incident to the work and homes for the contractor's employees. The contractor was required, regardless of the approval of the contracting officer, to "comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof, which affect the building, maintenance or operation" of the camp. The discharge of sewage into the Columbia River was to conform to the laws and regulations of the Department of Health of the State. The contractor was to make all necessary arrangements with the proper state and county authorities

[3] For administrative purposes and to avoid confusion with business operations of the contractors elsewhere, the contractors organized the appellant Mason-Walsh-Atkinson-Kier Company, and to avoid objections to an assignment of the contract they entered into an agreement with the United States in September, 1934, by which the new company was constituted the agent of the contractors for the prosecution of the work without relinquishment of their obligations.

for school facilities and for police protection, which within "the area involved in and surrounding the construction work" was to be furnished by the Washington State Patrol in coöperation with the Government. The contractor was also to provide and maintain jail facilities satisfactory to the Washington State Patrol and to cooperate with it and the Government in the maintenance of law and order.

The contractor's camp has developed into a community called "Mason City." On the opposite side of the river lies another camp maintained by the United States for the offices and residences of its engineers. It appears that there are "two regularly formed school districts" in the area in question, one in the "engineers' town" and one in "Mason City," under the laws of the State of Washington; that in "Mason City" the policemen employed by the contractor have been made deputy sheriffs of Okanogan County; that the attorney for the contractor has been appointed a justice of the peace, and one of the doctors in the hospital at the camp has been made a deputy coroner, in that county; that, in the fall of 1933, one who was operating a beer parlor within the part of the area which lies in Grant County, without a permit from the county commissioners, was fined in a justice's court as provided in the local ordinance; that the sheriff of Grant County has been called to the damsite to investigate infractions of local law.

In September 1934, the Department of the Interior made a further contract with appellant Ryan for the construction of a railroad connecting with the tracks of the Northern Pacific Railway Company at Odair, Washington, and running to the site of the Grand Coulee Dam. The sole purpose of this railroad was to assist in the construction of the dam and the appurtenant works.

By the Act of August 30, 1935, 49 Stat. 1028, 1039, 1040, the Congress "validated and ratified" all the "con-

tracts and agreements" which had been executed in connection with the Grand Coulee Dam.

2. No question is presented as to the constitutional authority of Congress to provide for this enterprise or to acquire the lands necessary or appropriate for that purpose. There is no contention that the State may interfere with the conduct of the enterprise. The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise. *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 650–652; *James* v. *Dravo Contracting Co., supra.* See, also, *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 527, 539; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, 451; *United States* v. *Unzeuta,* 281 U. S. 138, 142.

In this instance, the Supreme Court of Washington has held that the State has not yielded exclusive legislative authority to the Federal Government. *Ryan* v. *State, supra.* That question, however, involving the extent of the jurisdiction of the United States, is necessarily a federal question. *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Utah,* 283 U. S. 64, 75; *Borax Consolidated* v. *Los Angeles,* 296 U. S. 10, 22.

3. The question arises with respect (a) to lands acquired by the United States from the State itself, (b) to lands acquired by the United States from individual owners by purchase or condemnation, (c) to Indian tribal lands.

Lands acquired from the State. These consist of the river bed and shore lands and of certain uplands including "school lands."

While the United States has paramount authority over the river for the purpose of the control and improvement of navigation, the title to the river bed, as well as to the shore lands and school lands, was in the State (*Port of Seattle* v. *Oregon-Washington R. Co.,* 255 U. S. 56, 63) and the State had legislative authority over all this area consistent with federal functions. *United States* v. *Bevans,* 3 Wheat. 336, 386, 387; *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9, 18; *Hamburg American S. S. Co.* v. *Grube,* 196 U. S. 407, 415; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371, 372. The notice to the state authorities by the Department of the Interior with respect to the river bed, shore lands and uplands owned by the State was said to be given "pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto." 43 U. S. C. 371 *et seq.* The notice is set forth in the margin.[4] The reference is to the United States Recla-

[4] "United States Department of the Interior
Office of the Secretary, Washington

Jan – 4 1934

Bureau of Reclamation
Mails and Files, Jan 5 1934
Washington, D. C.

State Commissioner of Public Lands,
Olympia, Washington.

Dear Sir:

Please take notice that pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, the United States intends to make examinations and surveys for the utilization of the waters of Columbia River and its tributaries in the development of the proposed Columbia Basin Project.

The foregoing notice is given pursuant to Section 3378 of Pierce's Code (1929).

Please take further notice that attached hereto, identified as "Exhibit A" and made a part hereof is a list of lands owned by the

mation Act. That Act was not intended to provide for the acquisition of exclusive federal jurisdiction. The Act itself stated the contrary (§ 8, 43 U. S. C. 383). It directed the Secretary of the Interior to proceed in conformity with the state laws in carrying out the provisions of the Act and provided that nothing therein contained should be construed as interfering with the laws of the State relating to the control, appropriation, use or distribution of water used in irrigation. The Act has been administered in harmony with this controlling principle that the State should not be ousted of jurisdiction. See *Kansas* v. *Colorado,* 206 U. S. 46, 92, 93; *Nebraska* v. *Wyoming,* 295 U. S. 40, 42; *California Oregon Power Co.* v. *Beaver Cement Co.,* 295 U. S. 142, 164.

The Department of the Interior expressly stated that the notice was given "pursuant to § 3378 of Pierce's Code (1929)" with respect to examinations and surveys, and the list of state lands "in pursuance of § 3380 of Pierce's Code (1929)." These are §§ 7410 and 7412 of Remington's Revised Statutes, which with related provisions were enacted in 1905. Laws of Washington, 1905, p. 180. These provisions are set forth in the margin.[5] They

---

State of Washington, over and upon which the United States requires rights of way for canals, ditches, laterals and sites for reservoirs and structures appurtenant thereto; and such additional rights of way and quantities of land as may be required for the operation and maintenance of the completed works for the said proposed Columbia Basin Project. Please file this notice, together with the attached list, in your office, as a reservation from sale or other disposition of such lands, so described, by the State of Washington.

The notice last herein given is in pursuance of Section 3380 of Pierce's Code (1929).

Very truly yours,

(Sgd.) T. A. WALTERS,
First Assistant Secretary."

[5] "§ 7410. *Exemptions pending federal investigation.* Whenever the secretary of the interior of the United States, or any officer of the United States duly authorized, shall notify the commissioner of

were manifestly enacted to give authority to the United States to acquire property for the purposes of irrigation under the United States Reclamation Act and with the corresponding limitations. Thus § 7410 (§ 3378 of Pierce's Code) provides for notice by the Secretary of the Interior to the Commissioner of Public Lands of the State that the United States pursuant to the Reclamation Act intends to make examinations or surveys for the utilization of specified waters. And § 7412 (§ 3380 of Pierce's Code) contemplates the proceeding under the Reclamation Act as described in § 7410.

---

public lands of this state that pursuant to the provisions of the act of congress approved June 17, 1902, entitled, 'An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands,' or any amendment of said act or substitute therefor, the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not thereafter be subject to appropriation under any law of this state for a period of one year from and after the date of the receipt of such notice by such commissioner of public lands; but such notice shall not in any wise affect the appropriation of any water theretofore in good faith initiated under any law of this state, but such appropriation may be completed in accordance with the law in the same manner and to the same extent as though such notice had not been given. No adverse claim to any such waters initiated subsequent to the receipt by the commissioner of public lands of such notice shall be recognized, under the laws of this state, except as to such amount of the waters described in such notice or certificate hereinafter provided as may be formally released in writing by a duly authorized officer of the United States. If the said secretary of the interior or other duly authorized officer of the United States shall, before the expiration of said period of one year, certify in writing to the said commissioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be subject to appropriation under any law of this state for the further period of three years following the date or receipt of such certificate, and such further time as the commissioner of public lands

Section 7411 (§ 3379 of Pierce's Code) refers to the same sort of proceeding. As to appropriation of water, it provides that appropriation "by or on behalf of the

---

may grant, upon application of the United States or some one of its authorized officers and notice thereof first published once in each week for four consecutive weeks in a newspaper published in the county where the works for the utilization of such waters are to be constructed, and if such works are to be in or extend into two or more counties, then for the same period in a newspaper in each of such counties: Provided, that in case such certificate shall not be filed with said commissioner of public lands within the period of one year herein limited therefor the waters specified in such notice shall, after the expiration of said period of one year, become unaffected by such notice and subject to appropriation as they would have been had such notice never been given: And provided further, that in case such certificate be filed within said one year and the United States does not authorize the construction of works for the utilization of such waters within said three years after the filing of said certificate, then the waters specified in such notice and certificate shall, after the expiration of said last named period of three years, become unaffected by such notice or certificate and subject to appropriation as they would have been had such notice never been given and such certificate never filed."

"§ 7411. *Appropriation—Title to beds and shores.* Whenever said secretary of the interior or other duly authorized officer of the United States shall cause to be let a contract for the construction of any irrigation works or any works for the storage of water for use in irrigation, or any portion or section thereof, for which the withdrawal has been effected as provided in section 7410, any authorized officer of the United States, either in the name of the United States or in such name as may be determined by the secretary of the interior, may appropriate, in behalf of the United States, so much of the unappropriated waters of the state as may be required for the project, or projects, for which water has been withdrawn or reserved under the preceding section of this act, including any and all divisions thereof, theretofore constructed, in whole or in part, by the United States or proposed to be thereafter constructed by the United States, such appropriation to be made, maintained and perfected in the same manner and to the same extent as though such appropriation had been made by a private person, corporation or association, except that

United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made

---

the date of priority as to all rights under such appropriation in behalf of the United States shall relate back to the date of the first withdrawal or reservation of the waters so appropriated, and in case of filings on water previously withdrawn under said section 7410, no payment of fees will be required. Such appropriation by or on behalf of the United States shall inure to the United States, and its successors in interest, in the same manner and to the same extent as though said appropriation had been made by a private person, corporation or association. The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works."

"§ 7412. *Reservation of necessary lands by United States—Procedure.* When the notice provided for in section 7410 shall be given to the commissioner of public lands the proper officers of the United States may file with the said commissioner a list of lands (including in the term 'lands' as here used, the beds and shores of any lake, river, stream, or other waters) owned by the state, over or upon which the United States may require rights of way for canals, ditches, or laterals or sites for reservoirs and structures therefor or appurtenant thereto, or such additional rights of way and quantity of land as may be required for the operation and maintenance of the completed works for the irrigation project contemplated in such notice, and the filing of such list shall constitute a reservation from the sale or other disposal by the state of such lands so described, which reservation shall, upon the completion of such works and upon the United States by its proper officers filing with the commissioner of public lands of the state a description of such lands by metes and bounds or other definite description, ripen into a grant from the state to the United States. The state, in the disposal of lands granted from the United States to the state, shall reserve for the United States rights of way for ditches, canals, laterals, telephone and transmission lines which may be required by the United States for the construction, operation and maintenance of irrigation works."

by a private person, corporation or association." As to acquisition of title by the United States, it provides:

"The title to the beds and shores of any navigable lake or stream utilized by the construction of any reservoir or other irrigation works created or constructed as a part of such appropriation hereinbefore in this section provided for, shall vest in the United States to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works."

Neither in the statutes governing the proceeding initiated by the Secretary of the Interior nor in the state statute was there provision for acquisition by the United States of exclusive legislative authority over the lands of the State to which title was thus obtained. This is true with respect to all the lands mentioned in the Secretary's notice embracing the bed of the river, the shore lands and the designated uplands including school lands.

Lands acquired by purchase or condemnation. Appellants contend that exclusive jurisdiction as to these lands vested *ipso facto* in the Federal Government by the operation of Clause 17, § 8, Article I, of the Federal Constitution, which provides that the Congress shall have power "to exercise exclusive legislation" over "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Considering this provision in *James* v. *Dravo Contracting Co., supra,* we construed the phrase "other needful buildings" to embrace locks and dams and whatever structures are found to be necessary in the performance of the functions of the Federal Government. We also concluded that Clause 17 should not be construed as implying a stipulation that the consent of the State to purchases must be without reservations. We were unable to reconcile such an implication with the freedom of the State and its

admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.

The Statute of Washington which is relied upon as granting consent and ceding exclusive jurisdiction to the Federal Government is § 8108 of Remington's Revised Statutes, the full text of which is quoted in the margin.[6] This statute gives consent to the acquisition of lands by the United States "for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress." The consent is said to be given in accordance with the constitutional provision found in Clause 17 of § 8 of Article I and with the Acts of Congress in such cases made and provided.

---

[6] "§ 8108. *Consent to acquisition of certain rights by United States, etc.* The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States, which may be set apart by the general government for any or either of the purposes before mentioned by an order,

The statute in terms refers to such acquisition "from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state." This language is not apt to describe acquisitions from the State itself. And many years ago (1903) the Supreme Court of the State so held with respect to the corresponding provisions of the Acts of 1890, p. 459, and 1891, p. 31, embodied in § 8108. *State ex rel. Bussell* v. *Callvert,* 33 Wash. 380, 388–390; 74 Pac. 573. Under that construction, the above quoted provisions of § 8108 would be inapplicable to the acquisition of title to the river bed, shore lands and uplands owned by the State, apart from our conclusions in the light of the proceedings taken under the United States Reclamation Act and the pertinent state statute.

With respect to lands acquired from private owners, the Supreme Court of the State has held in the instant case that the enterprise of the Federal Government has a reach which takes it outside the purview of § 8108. The pith of the decision is that while the statute contemplated the building of locks and dams and other struc-

---

patent, or other official document or papers describing such lands; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

tures required in the improvement of the rivers and harbors of the State, it did not contemplate the yielding by the State of all legislative authority in connection with such a project as the Columbia Basin Project embracing "the development of irrigation and of power for industrial purposes." The state court concluded "that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above [in the statute], so as to give the United States exclusive jurisdiction over the lands, but rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require." *Ryan* v. *State, supra,* p. 1284.

Considering the scope of the federal undertaking, we cannot say that this construction of § 8108 is inadmissible. Thus irrigation—"the reclamation of arid and semi-arid lands"—is an integral part of the federal plan and the reservoirs for the storage of water were to be provided with that end in view. That was set forth as one of the main objectives, as well as the development of power, in the Declaration of Taking filed in the federal court in the condemnation proceedings, and whatever may be said of power development so far as it is incidental to the improvement of navigation, the reclamation of arid or semi-arid lands has always been regarded as a project which carried with it an appropriate recognition of a continued state jurisdiction. *Kansas* v. *Colorado, supra; Nebraska* v. *Wyoming, supra.* We cannot say that the state statute, enacted in 1891, must be taken as conclusively showing an intent to yield exclusive jurisdiction in such a case. Assuming that because of the presence of the federal question we are at liberty to construe the statute for ourselves, we should, in harmony with our principles of decision in such cases, give great weight to the views of

the state court as to the intent and limitations of the state statute in granting consent and cession. See *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595, 596; *Milwaukee Electric Ry. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 184; *Phelps* v. *Board of Education,* 300 U. S. 319, 322; *Dodge* v. *Board of Education, ante,* p. 74. We should accept that construction unless we are satisfied that it does violence to federal right based upon the statute, defeating the reasonable anticipation and purpose of securing through the operation of the statute an essential and exclusive legislative authority for the Federal Government.

Not only do we find no violence done to federal right or frustration of federal intent by the State's construction of its statute, but the evidence is clear that the Federal Government contemplated the continued existence of state jurisdiction consistent with federal functions and invited the coöperation of the State in providing an appropriate exercise of local authority over the territory.

Even if it were assumed that the state statute should be construed to apply to the federal acquisitions here involved, we should still be met by the contention of the Government that it was not compelled to accept, and has not accepted, a transfer of exclusive jurisdiction. As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. The mere fact that the Government needs title to property within the boundaries of a State, which may be acquired irrespective of the consent of the State (*Kohl* v. *United States,* 91 U. S. 367, 371, 372), does not necessitate the assumption by the

Government of the burdens incident to an exclusive jurisdiction. We have frequently said that our system of government is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. In acquiring property, the federal function in view may be performed without disturbing the local administration in matters which may still appropriately pertain to state authority. In our opinion in *James* v. *Dravo Contracting Co., supra,* we observed that the possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. And we added that there appeared to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.

The federal intent in this instance is clearly shown. It is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress, which gives the force of law to the prior official action even if unauthorized when taken. *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 301, 302. As Congress validated and ratified "all contracts" which have been executed in connection with the Grand Coulee Dam project, we are at liberty to refer to the terms of these contracts as manifesting the intention of Congress no less than that of the officers who executed them. These contracts with appellants were made in full appreciation of the inevitable creation, through the carrying out of this project, of a large local community within the area acquired by the United States, with residents whose needs could be suitably served by the administration of the laws of the State without interfering in any way with the execution of the

federal plan. School facilities were to be, and have been, provided by arrangements with the local authorities. Police protection was to be, and has been, assured by cooperation with the State Patrol. Cognizance of crimes committed within the area has been taken by local prosecutors and judicial officers. It is futile to say that these local authorities became federal authorities *pro hac vice,* for the contracts which have been ratified by Congress manifestly contemplated action by the local officers as representatives of the State and as acting in the exercise of state jurisdiction.

In particular, appellants' contracts assumed that state jurisdiction would extend to activities of the contractors. They were to obtain all required licenses and permits. Compensation insurance under the laws of the State was to be provided for their employees. State building regulations were to be obeyed. The rules of the local Department of Health were to be observed in the discharge of sewage into the river. We are at a loss to understand how the continued jurisdiction of the State without conflicting with federal operations could have been more fully recognized, or the assumption of exclusive legislative authority by the United States more effectively disclaimed, than by the action of Congress in ratifying the provisions of these contracts.

Appellants' argument comes to this—that we must not only override the construction of the state statute by the state court but that we must construe the statute as compelling the Federal Government to assume an exclusive legislative authority which it did not need, which it has not accepted or exercised, and against the burden of which it has sought to protect itself by securing state coöperation in accordance with the express authorization of Congress. We find no warrant for such action.

Indian tribal lands. What has been said also disposes of the contention in relation to this part of the area.

Appellants say that title was originally in the United States for the benefit of Indians on the Colville Reservation. Executive Order of July 2, 1872. While at a later date the lands were opened for entry (Act of March 22, 1906, 34 Stat. 80; Proclamation of the President, May 3, 1916, 39 Stat. 1778) it appears that they were withdrawn before any entry was made. Appellants concede that title to these lands has always been in the United States and hence could not have been acquired by purchase or condemnation. But with respect to such lands exclusive legislative authority would be obtained by the United States only through cession by the State. *Surplus Trading Co.* v. *Cook, supra,* p. 651. If they may be deemed to be within the reference in § 8108 to "public land" which "may be set apart by the general government" for the purposes "before mentioned," we are brought back to the questions already discussed and we need not consider the question whether these lands had in fact been set apart in the prescribed manner.

Our conclusion is that the State had territorial jurisdiction to impose the tax upon appellants' receipts and that the tax does not lay an unconstitutional burden upon the Federal Government.

The respective judgments are

Affirmed.

Mr. Justice McReynolds, Mr. Justice Sutherland, Mr. Justice Butler and Mr. Justice Roberts dissent for the reasons stated in the dissenting opinion in *James* v. *Dravo Contracting Co., ante,* p. 161.

BERMAN *v.* UNITED STATES.

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

No. 26. Argued November 9, 1937.—Decided December 6, 1937.

1. The sentence in a criminal case is the final judgment. P. 212.
2. A sentence remains the final judgment, and is appealable, notwithstanding a suspension of execution. P. 212.

   In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.
3. The finality of a sentence and the right to appeal from it are not affected by placing the convict on probation. P. 213.
4. During the pendency of an appeal from a sentence, the District Court is without jurisdiction to modify its judgment by resentencing the prisoner. P. 214.

88 F. (2d) 645, reversed.

CERTIORARI, 301 U. S. 675, to review a judgment dismissing an appeal from a criminal sentence and affirming a later one imposed after the appeal was taken.

Mr. Samuel H. Kaufman, with whom *Messrs. Emil Weitzner* and *Isadore Polier* were on the brief, for petitioner.

Mr. William W. Barron, with whom *Solicitor General Reed, Assistant Attorney General McMahon* and *Mr. W. Marvin Smith* were on the brief, for the United States.

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

On conviction upon an indictment containing several counts for using the mails to defraud (18 U. S. C. 338) and for conspiracy to that end (18 U. S. C. 88), petitioner was sentenced on each count to serve a year and a day,

the terms of imprisonment to run concurrently. Execution of the sentence was suspended and petitioner was placed on probation for two years. Petitioner appealed from the sentence.

While the appeal was pending and without its withdrawal, petitioner fearing its dismissal applied to the District Court for resentence. That court reimposed the prior sentence of imprisonment, again suspending its execution, and added a fine of one dollar upon each count. The court did not vacate the prior sentence. Petitioner then appealed from the second sentence.

The Circuit Court of Appeals held that, by reason of suspension of its execution, the first sentence was interlocutory and dismissed the first appeal. Assuming that appeal to be a nullity, the Court of Appeals thought that the District Court had power to resentence; that petitioner could not complain of the fine as it was imposed at his request; and that the second sentence of imprisonment, if taken alone, was interlocutory. The judgment imposing the fine was affirmed and the appeal from the second sentence of imprisonment was dismissed. 88 F. (2d) 645.

We are of the opinion that the Court of Appeals erred in dismissing the first appeal as interlocutory. Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464. Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler, supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal

"when it terminates the litigation . . . on the merits" and "leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28; *United States* v. *Pile,* 130 U. S. 280, 283; *Heike* v. *United States,* 217 U. S. 423, 429.

Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence. *Matter of Ackerson,* 218 App. Div. (N. Y.) 388, 392; 218 N. Y. S. 654. His civil rights may be determined solely by reference to the judgment.

Placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime." *Escoe* v. *Zerbst,* 295 U. S. 490, 492, 493. The considerations it involves are entirely apart from any reëxamination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain." *Burns* v. *United States,* 287 U. S. 216, 220. But if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication.

As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner. *Draper* v. *Davis,* 102 U. S. 370, 371; *Keyser* v. *Farr,* 105 U. S. 265, 266; *Spirou* v. *United States,* 24 F. (2d) 796, 797; *United States* v. *Radice,* 40 F. (2d) 445, 446; *United States* v. *Habib,* 72 F. (2d) 271.

The judgment of the Circuit Court of Appeals is reversed so far as it dismissed the first appeal and affirmed the later judgment imposing the fine, and the cause is remanded to that court for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* KAPP ET AL.

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

No. 97. Argued November 12, 1937.—Decided December 6, 1937.

1. Within the meaning of the Criminal Appeals Act, an indictment for conspiracy (Criminal Code, § 37) to commit a substantive offense may be treated as founded on the statute defining the substantive offense. P. 216.
2. The District Court sustained a demurrer to an indictment for conspiracy to violate the False Claims Act (§ 35 Criminal Code), upon the ground that that Act does not apply to an attempt to defraud the United States by obtaining approval of claims to payments of money through false representations, if the statute authorizing such payments is invalid. *Held:*

   (1) A construction not of the indictment but of the False Claims Act. P. 217.

   (2) An inadmissible construction. *Id.*
3. Those who attempt to obtain payments from the Government by false representations are estopped to defend upon the ground that the statute providing for such payments has been declared unconstitutional. P. 218.

Reversed.

APPEAL from a judgment sustaining a demurrer to an indictment and dismissing the cause.

Assistant Attorney General McMahon, with whom *Solicitor General Reed* and *Messrs. W. W. Barron* and *William C. Lewis* were on the brief, for the United States.

Mr. William J. Hughes, Jr., with whom *Mr. William E. Leahy* was on the brief, for appellees.

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

This case comes here under the Criminal Appeals Act. 18 U. S. C. 682.

The second count of an indictment charged appellees with conspiracy to defraud the United States by furnishing false information and making false statements to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31; Criminal Code, §§ 35, 37; 18 U. S. C., §§ 80, 88. The District Court sustained a demurrer to this count and the Government appeals.

The contention of the Government is that the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold and the continued ownership by such producers. Appellees' demurrer went upon the ground, among others, that the provisions of the statute and the regulations of the Secretary of Agriculture to which the count referred are void (*United States* v. *Butler,* 297 U. S. 1) and that the acts set forth in the indictment do not constitute an offense against the laws of the United States.

The false claims statute under which the prosecution was brought penalizes one who "for the purpose and with the intent of cheating and swindling or defrauding

the Government of the United States . . . shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations" (Criminal Code, § 35; 35 Stat. 1095, as amended, 40 Stat. 1015). After referring to the statute, the District Judge said in his opinion:

"The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

"There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

"This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls."

1. Appellees contend that if any statute was construed, it was not the statute on which the indictment is founded and hence that this Court has no jurisdiction. The point is that the indictment charged a conspiracy under Criminal Code, § 37. But the conspiracy charged is one to violate the false claims statute, Criminal Code, § 35. In similar cases the jurisdiction of this Court has been sustained. The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States* v. *Bowman,* 260 U. S. 94, 95; *United States* v. *Walter,* 263 U. S. 15, 16, 17. See, also, *United States* v. *Keitel,* 211 U. S. 370, 387.

2. Appellees contend that the court below construed the indictment and not the statute. *United States* v. *Colgate & Co.,* 250 U. S. 300, 306; *United States* v. *Hastings,* 296 U. S. 188, 192. The argument is that a conspiracy to violate § 35 must involve a pecuniary fraud. *United States* v. *Cohn,* 270 U. S. 339, 345, 346. In that view appellees urge that the court below has simply ruled that there was no pecuniary loss under the facts alleged. But the District Court found no flaw in the indictment as a pleading. Nor does the court appear to have considered the question of pecuniary loss. The court rested its decision upon the point that the facts alleged in the indictment with respect to the identity of the producers of the hogs, or the sources from which the hogs originated, had ceased to be material because of the unconstitutionality of the provisions of the Agricultural Adjustment Act. This did not purport to be a construction of the indictment but a ruling that the indictment in view of the invalidity of that Act failed to state an offense. The substance of the decision thus appears to be that the false claims statute does not apply to an attempt to defraud the United States by obtaining the approval of claims and benefit payments through false representations, if the statute providing for such claims and payments is found to be invalid. That is clearly a construction of the statute. *United States* v. *Patten,* 226 U. S. 525, 535; *United States* v. *Birdsall,* 233 U. S. 223, 230.

3. Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. See *Madden* v. *United States,* 80 F. (2d) 672, 674. Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against

frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. See *Langer* v. *United States,* 76 F. (2d) 817, 824, 825; *Madden* v. *United States, supra; United States* v. *Harding,* 65 App. D. C. 161; 81 F. (2d) 563, 568; *United States* v. *MacDonald,* 10 F. Supp. 948.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

HARRY FLEISHER ET AL. *v.* UNITED STATES.*

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

No. 202. Argued November 15, 1937.—Decided December 6, 1937.

1. Registration of stills for the production of distilled spirits should be with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. P. 219.

   A count charging conspiracy to commit the offense of possessing such stills "without having the same registered with the Collector of Internal Revenue, as required by law," is therefore bad. (Cf. Rev. Stats. § 3258; 26 U. S. C. § 1162.)

2. When the first of several counts upon which consecutive sentences are based is defective the sentences should be corrected so as to fix a definite date for their commencement. P. 220.

91 F. (2d) 404, reversed.

CERTIORARI, *post,* p. 673, to review judgments affirming judgments sentencing petitioners after conviction upon four counts of a joint indictment for conspiracy.

---

* Together with No. 203, *Sam Fleisher* v. *United States;* and No. 204, *Stein* v. *United States,* also on writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Messrs. Isadore G. Stone, Alfred A. May, and *Arthur H. Ratner* were on the brief and submitted the case for the petitioners.

Mr. Bates Booth, with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* were on the brief, for the United States.

PER CURIAM.

Judgments of conviction on four counts of an indictment charging conspiracies to violate provisions of the internal revenue laws were affirmed by the Circuit Court of Appeals. 91 F. (2d) 404. Certiorari was granted, limited to the question whether the first count of the indictment states an offense under federal law.

The first count alleged that defendants from October 1, 1934, to the date of the indictment, October 30, 1935, unlawfully conspired to possess, and cause to be possessed, stills and apparatus for the production of distilled spirits without having the same registered with the Collector of Internal Revenue as required by law. The Government concedes that under the applicable law the charge should have been that there was failure to register the stills with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. The first count failed to state an offense. Act of March 3, 1927, c. 348, 44 Stat. 1381; 5 U. S. C. 281 c; Prohibition Reorganization Act of May 27, 1930, c. 342, 46 Stat. 427; Regulations No. 3, Bureau of Industrial Alcohol, Treasury Department (March 24, 1931), Article 14; Act of March 3, 1933, c. 212, § 16, 47 Stat. 1518; Executive Order No. 6639, March 10, 1934, 5 U. S. C. 132 note; Treasury Decision No. 4432, May 10, 1934. *Scott* v. *United States,* 78 F. (2d) 791; *Benton* v. *United States,* 80 F. (2d) 162.

The sentence upon count two provides that it shall run "from and after expiration of term of imprisonment im-

posed on count one." Each of the sentences on the remaining counts runs from the expiration of the term of imprisonment imposed on the preceding count. In view of the invalidity of the sentence on count one, the sentences on the remaining counts should be amended so as to fix a definite date for their commencement.

The judgments on count one are severally reversed and the causes are remanded for further proceedings in conformity with this opinion.

Reversed.

FORTE *v.* UNITED STATES.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 459. Argued November 15, 1937.—Decided December 6, 1937.

1. A bill of exceptions agreed to by counsel and filed with the clerk of the District Court within the time allowed for settlement by No. IX of the Criminal Appeals Rules, but not settled and signed by the judge until afterwards, is not settled in time. P. 223.

   If the trial judge is absent from the district, the rule permits settlement by any other judge assigned to hold, or holding, the court in which the case was tried.

2. Where the Court of Appeals decides a criminal appeal for the appellant upon the assumption that the bill of exceptions is properly before it, and the objection that the bill was not settled in time is first made by the Government's petition for rehearing, that court, exercising its broad authority under Rule No. IV, may, in the interest of justice, refuse to strike the bill of exceptions and may approve the settlement and filing theretofore had. P. 223.

Mr. Henry A. Schweinhaut, with whom *Solicitor General Reed, Assistant Attorney General McMahon* and *Messrs. William W. Barron* and *W. Marvin Smith* were on the brief, for the United States.

No brief filed on behalf of Forte.

PER CURIAM.

The case comes here on certified questions. 28 U. S. C. 346.

Appellant was indicted for violation of the National Motor Vehicle Theft Act, 41 Stat. 324, 18 U. S. C. 408. He was convicted, sentenced, and on July 1, 1936, in due time, took an appeal. On July 20, 1936, he filed an assignment of errors and a designation of record. On that date, he also submitted a bill of exceptions by filing it, not signed by the trial judge, with the clerk of the court. At the same time, he gave notice of that filing to the United States Attorney stating that he would submit the bill of exceptions for settlement. Prior to July 31, 1936, the bill of exceptions was "agreed upon" by the United States Attorney and appellant's counsel. On July 31, 1936, the trial judge was on vacation outside the District and was not to return until September. He signed the bill of exceptions on September 2, 1936. Below his signature appeared the statement "The foregoing bill of exceptions is satisfactory to the Government and the defendant," signed by the attorneys for both parties. There was no extension of time for the settlement of the bill of exceptions, which, together with the assignment of errors, was transmitted to the clerk of the Court of Appeals on September 9, 1936. Argument was had in due course and on April 5, 1937, the Court of Appeals decided that the judgment of the District Court should be reversed. The errors assigned and argued on the appeal involved solely the sufficiency of the evidence as shown by the bill of exceptions.

The Court of Appeals granted a motion by the Government to stay the mandate and also a motion for rehearing "limited to the legal effect of the settlement of the bill of exceptions on September 2, 1936, the appeal having been perfected on July 1, 1936." The Government moved that the bill of exceptions be stricken and

the judgment of the District Court be affirmed. The Court of Appeals has certified the following questions:

"1. When, in a criminal case, a bill of exceptions has, within thirty days after the taking of an appeal, been prepared, agreed to by counsel for the United States and the appellant, and 'submitted' by filing the same with the clerk of the District Court, but when the trial judge does not settle and sign the bill within said thirty days, but does settle and sign the same thereafter, is the bill of exceptions properly settled and signed?

"If question No. 1 is answered in the negative, then:

"2. When, in a criminal case, a bill of exceptions not settled and signed by the trial judge within proper time, but nevertheless actually settled and signed by said judge, is transmitted by the clerk of the District Court to the clerk of the Court of Appeals, together with the assignment of errors and other pertinent papers, and when the Court of Appeals hears the appeal upon errors assigned and argued involving solely the sufficiency of the evidence to sustain a verdict of guilty, and adjudges that the judgment of the District Court be reversed, and when throughout the appeal the United States raises no question as to the validity of the bill of exceptions, and when question as to the validity of the bill of exceptions is for the first time raised upon petition for rehearing by the United States, and when on rehearing granted motion is made by the United States to strike the bill of exceptions, must the bill of exceptions be stricken?

"If question No. 2 is answered in the affirmative, then

"3. When, in a criminal case, the validity of the bill of exceptions is for the first time raised on petition for rehearing by the United States after the case has been heard and reversed on appeal upon errors involving solely the sufficiency of the evidence to sustain a verdict of guilty, and when the Court of Appeals on rehearing granted and motion to strike has stricken the bill of exceptions as not

settled and signed within proper time, is it within the power of the Court of Appeals then to make an order extending the time for settlement and signing of the bill of exceptions by the trial judge in order that the case may be heard anew upon the merits?"

The bill of exceptions was not settled and filed in time. Rule IX, Criminal Appeals Rules. The fact that the trial judge was absent from the District was not an excuse. The Criminal Appeals Rules provide in that case for settlement by any other judge assigned to hold, or holding, the court in which the case was tried. Rule XIII. But although the bill of exceptions was not settled and filed in time, the Court of Appeals, from the time of the filing of the duplicate notice of appeal, had complete supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal. Rule IV.

Under the comprehensive provisions of Rule IV, the Court of Appeals may vacate or modify any order made by the trial judge in relation to the prosecution of the appeal and this authority extends to any order fixing the time for the settlement and filing of a bill of exceptions. *Ray* v. *United States,* 301 U. S. 158, 163, 164. The Court of Appeals may extend the time or shorten the time. Through its supervision and control it may correct any miscarriage of justice in respect to the settlement of the bill of exceptions. Neither party is remediless when such corrective action is required. To that end, and in order to give a desirable flexibility, the rules do not attempt to lay down specific requirements to meet various situations but place upon the Court of Appeals full responsibility for the exercise of a reasonable control over all the proceedings relating to the appeal. *Ray* v. *United States, supra.*

In this instance, had the question been raised *in limine,* the Court of Appeals would have had power to deter-

mine what the interests of justice required and it lost none of that power by reason of the fact that the question was not brought to its attention until the court had heard argument and reached a decision upon the assumption that the bill of exceptions was properly before it. As no question appears to have been raised as to the propriety or sufficiency of the bill of exceptions, apart from the time of settlement and filing, it would be a mere idle form to extend the time and return the bill of exceptions for resettlement accordingly, which the Court of Appeals has power to do, and thus to have the same bill of exceptions again presented and the case heard anew upon the merits, and the court may, in its sound discretion refuse to strike the bill of exceptions and approve the settlement and filing heretofore had.

Question No. 1 is answered "No". Question No. 2 is answered "No". Question No. 3 is not answered.

It is so ordered.

FIDELITY & DEPOSIT CO. *v.* PINK, SUPERINTENDENT OF INSURANCE OF NEW YORK.

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

No. 38. Argued November 17, 18, 1937.—Decided December 6, 1937.

1. Standard form of reinsurance contract, providing for insurance "against loss," and requiring reinsurer to pay its share of any loss under the original insurance, and of costs &c. "upon proof of the payment of such items by the reinsured, and upon delivery to the reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof,"—*held* to make payment of loss by reinsured a condition precedent to reinsurer's liability. *Allemannia Insurance Co.* v. *Fireman's Insurance Co.*, 209 U. S. 326, distinguished. P. 227.
2. Liability under a contract of reinsurance must be determined upon consideration of the words employed, read in the light of attending circumstances. P. 229.

3. Assumption that change of language in a form of reinsurance contract was intended to impose different liability from that imposed by an earlier form as construed by a decision of this Court. P. 230.

88 F. (2d) 630, reversed.

CERTIORARI, 301 U. S. 678, to review the affirmance of a judgment of the District Court, 15 F. Supp. 715, in favor of the present respondent in an action against the petitioner upon a contract of reinsurance.

Mr. Harold L. Smith, with whom *Messrs. Ralph S. Harris* and *E. Myron Bull* were on the brief, for petitioner.

Mr. Irvin Waldman, with whom *Mr. Alfred C. Bennett* was on the brief, for respondent.

By leave of Court, *Messrs. Ernest L. Wilkinson* and *Allen C. Rowe* filed a brief on behalf of the Surety Association of America, as *amicus curiae,* urging issuance of the writ of certiorari.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In 1930 Southern Surety Company, a New York corporation, issued to John DeMartini Co., Inc., a fidelity insurance bond and on the same day reinsured half of the risk with petitioner, Fidelity & Deposit Company of Maryland. The DeMartini Co. claimed a loss. While this was in course of adjustment (March, 1932), a New York court adjudged the Southern Company insolvent and dissolved it. Respondent Pink, Superintendent of Insurance for New York, took possession of its property and entered upon liquidation of the business.

He allowed but did not discharge the DeMartini Company's claim. Thereupon he demanded that petitioner pay half of it. This having been refused he instituted

these proceedings in the United States District Court to recover upon the reinsurance contract. Judgment went in his favor; the Circuit Court of Appeals affirmed; the matter is here upon certiorari. The facts are not in dispute.

The contract between the two insurance companies incorporated the "standard form of reinsurance agreement" adopted by the Surety Association of America in 1930. This form provides—

"In consideration of the premium payable under section 1 hereof ..... hereinafter called the Reinsurer, does hereby reinsure Fidelity & Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered ....., together with all riders attached thereto, hereinafter called the Bond, issued by the Reinsured in the penalty of ..... Dollars, in favor of ..... (obligee), and in behalf of ..... hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement.

"The foregoing agreement is subject to the following conditions and provisions: . . ." (These appear in fifteen succeeding sections.)

Section 4, copied in the margin,[1] contains the following, among other things—

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have

its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond."

Petitioner's counsel maintain that the standard form provides for insurance only "against loss"; that the reinsurer thereunder becomes liable only upon "proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof"; that payment by the reinsured is a condition precedent to the reinsurer's liability. Sundry provisions in the form, indicated below, they say lend support to this view.[1]

---

[1] Introduction—"Does hereby reinsure . . . against loss."

Section 3—

"3. Unless otherwise expressly agreed, the amount of liability retained by the Reinsured at its own risk both when this agreement is made and at the time of any breach of the bond resulting in a claim thereunder shall be:

"(a) If the bond be other than a depository bond or blanket bond, in no event less than the amount ceded hereunder, such retention to be carried under the bond; or

"(b) If the bond be a depository bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other depository bond or bonds issued by the Reinsurer in behalf of the Principal and effective at the time of any breach of the bond resulting in a claim thereunder, such retention to be carried under any depository bond or bonds issued and/or any depository reinsurance or reinsurances carried by the Reinsured in behalf of the Principal; or

"(c) If the bond be a blanket bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other blanket bond or bonds issued by the Reinsured in favor of the same insured and ef-

Respondent maintains that proof of payment is not a prerequisite to recovery.

Both courts below thought that *Allemannia Insurance Co.* v. *Fireman's Insurance Co.*, 209 U. S. 326 (1908),

---

fective at the time of any breach of the bond resulting in a claim thereunder; such retention to be carried under any blanket bond or bonds issued and/or any blanket bond reinsurance or reinsurances carried by the Reinsured in favor of the same insured. The actual retained liability of the Reinsured as aforesaid shall not be more remote than that ceded to the Reinsurer, whether it be primary or excess or partly primary and partly excess. . . ."

Section 4—

. . . . . .

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond.

"The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

"The term costs and expenses shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; and all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond."

Section 10—

"The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured . . ."

required approval of respondent's contention. This was error. The defense was well taken and should have been sustained.

We do not question the general rules concerning liability of reinsurers announced in the *Allemannia* case; but the liability under any written contract must be determined upon consideration of the words employed, read in the light of attending circumstances.

Here the two insurance companies stood upon an equal footing; both were experts in the field. The language used differs materially from that found in the policy of the Allemannia Company. There is no ambiguity and no circumstance requires disregard of the ordinary meaning of the language.

The 1930 form provides, "The Reinsurer does hereby reinsure against loss." The Allemannia policy declared the company "hereby agrees to reinsure."

Petitioner's policy says—"The reinsurer's proportionate share of the loss . . . shall be paid to the reinsured upon proof of the payment of such items by the reinsured and upon the delivery to the reinsurer of copies of all essential documents concerned with such loss and the payment thereof." The Allemannia policy contained no equivalent terms. It provided—"Upon receiving notice of any loss or claim under any contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or damage, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract re-

insured, and a copy of the original receipt taken upon the payment of such loss; . . ."

As the standard form of 1930 was adopted twenty years after the *Allemannia* case it fairly may be assumed that the dissimilar language employed was intended to impose liability different from the one there found to exist.

The judgment below must be reversed. The cause will be remanded for further proceedings.

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this cause.

ALUMINUM COMPANY OF AMERICA *v.* UNITED STATES.

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

No. 281. Argued November 8, 9, 1937.—Decided December 6, 1937.

An earlier consent decree against a corporation in a suit by the Government under the antitrust laws *held* not inconsistent with prosecution of a later suit under those laws in another district differing substantially in subject matter, parties, issues and relief sought. P. 232.

Affirmed.

APPEAL from a decree of a District Court of three judges, 20 F. Supp. 608, denying a petition for an injunction.

Mr. William Watson Smith, with whom *Messrs. Frank B. Ingersoll* and *Leon E. Hickman* were on the brief, for appellant.

Assistant Attorney General Jackson, with whom *Solicitor General Reed,* and *Messrs. Walter L. Rice, John W. Aiken, Hugh B. Cox, John C. Herberg,* and *Edward Dumbauld* were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This appeal brings up a final decree of the District Court, Western District of Pennsylvania, three judges sitting, which vacated a preliminary injunction and refused to restrain law officers of the United States from conducting a proceeding against appellant in another district.

June 9, 1912, in the present cause—"Pennsylvania Suit"—when appellant was the only defendant, a consent decree cancelled certain restrictive provisions of designated contracts and forbade future violations of the antitrust laws by it, its officers, agents and representatives. With certain modifications (1922) presently unimportant this decree remains in force.

April 23, 1937, the United States through their law officers, defendants here, instituted a proceeding in the Southern District of New York—"New York Suit"—wherein the appellant, its officers, agents, stockholders and others (sixty-three in all), were named as defendants. All of these were charged with violating the antitrust laws and appropriate relief through injunctions, dissolution of appellant, rearrangement of its properties, etc., was asked.

April 29, 1937, in the "Pennsylvania Suit" appellant asked and the District Court entered an ex parte order directing the law officers concerned with the New York suit to appear as defendants. It then filed the petition now before us wherein it prayed for an injunction restraining these officers from proceeding further in New York against it, its wholly owned subsidiaries, officers and directors.

The petition charged that prosecution of the later suit would subject appellant to the peril of concurrent decrees on the same subject matter by two courts; also that there

was the possibility of conflicting decrees and unseemly conflict. The prayer for relief rested essentially upon the assertion that the suit embraced subject matters and issues substantially identical with those previously presented and adjudicated by the consent decree of 1912.

The law officers appeared specially and answered; the Attorney General filed an expediting certificate under the Act of February 11, 1903, as amended, 15 U. S. C. 28, 29; a court of three judges assembled, heard evidence, made findings of fact and denied relief. Errors were assigned; this appeal followed.

Plainly, and there is no suggestion to the contrary, appellant cannot succeed unless the Pennsylvania and New York suits are substantially identical in subject matter and issues. It says that comparison of the petitions in the two causes reveals this fact. Also that comparison of the petition in the later suit with the prohibitions of the 1912 consent decree shows the alleged identity, since each charging paragraph of the petition sets up violations of the antitrust laws inhibited by the decree.

On the other hand, counsel for the United States submit that the two suits differ in substantial respects—defendants, charges and relief prayed.

The court below found: "The subject matter, parties, issues and relief sought in the New York suit differ substantially from those in the 1912 suit. The New York suit does not attack the affirmative provisions of the 1912 decree or seek to reverse any action taken by the District Court for the Western District of Pennsylvania in the suit in 1912. The New York suit does not subject Aluminum Company to the peril of two conflicting decrees. Aluminum Company will not suffer irreparable injury by being compelled to defend the suit in the Southern District of New York. . . ." It concluded that the two suits were dissimilar in respect of parties defendant, subject matter, issues and relief sought, and that no basis for an injunction had been shown.

We have heard counsel, examined the record and briefs, and are unable to say that the court below erred either in respect of its findings or conclusion. The findings are adequately supported and the conclusion reached, we think, is proper. For us again to analyze the pleadings, evidence and decrees and point out the differences and necessary inferences would serve no useful purpose. This was adequately done below.

The challenged decree must be

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this cause.

PHILLIPS-JONES CORPORATION ET AL. *v.* PARMLEY, EXECUTRIX, ET AL.

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

No. 45. Argued November 19, 1937.—Decided December 6, 1937.

1. A stockholder who has received his *pro rata* share of the corporate assets upon dissolution of the corporation and has been compelled by assessment under § 280 (a) (1) of the Revenue Act of 1926 to pay the whole of income and profits taxes owed by the corporation, is entitled to contribution from his co-stockholders who have not been assessed for the taxes, and may maintain a bill therefor. P. 235.
2. The liability of the co-stockholders to contribute arises under the general law; it is not dependent upon the making of an assessment against them under § 280. P. 236.

88 F. (2d) 958, reversed.

CERTIORARI, 301 U. S. 680, to review a judgment affirming a decree dismissing a bill for contribution.

Mr. Robert T. McCracken, with whom *Mr. Milton J. Levitt* was on the brief, for petitioners.

Case submitted on brief for Margaret Wilkinson, respondent, by *Margaret Wilkinson, pro se.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The sole question for decision is the stockholder's right to contribution.

In 1919, the Coombs Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its eleven stockholders. In 1924 and 1925, the Commissioner of Internal Revenue assessed against the company additional income and profits taxes for the years 1918 and 1919. To the extent of $9,306.36 these taxes remained unpaid. I. L. Phillips, a stockholder resident in New York City, had received in 1919 liquidating dividends in excess of that amount. In 1926, the Commissioner notified Phillips that it was proposed to assess against him as transferee of the corporation's assets this sum of $9,306.36, pursuant to § 280 (a) (1) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 61). No notice of the deficiency was sent by the Commissioner to any of the other stockholders; no assessment was made against any of them; and no proceeding was instituted by him against any of them.

Phillips having died, his executors contested the deficiency assessed against the company and both the validity and the amount of the assessment made against him, insisting, among other things, that in no event could Phillips' estate be held liable for more than his pro rata portion of the unpaid tax of the company. The Commissioner adhering to his determination, the executors sought a review by the Board of Tax Appeals. It held Phillips' estate liable for the full amount. 15 B. T. A. 1218. The United States Circuit Court of Appeals for the Second Circuit affirmed that judgment, 42 F. (2d)

177. And, in *Phillips* v. *Commissioner*, 283 U. S. 589, we affirmed the judgment of that court.

The Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the judgment and the expenses of the litigation. Then it and Phillips' executors brought, in the federal court for eastern Pennsylvania, this suit in equity for contribution against the eight stockholders or their representatives, resident in that State. The District Court dismissed the bill for want of equity, on the ground that liability for the taxes arose solely from assessment under § 280; and that since the defendant stockholders had never been assessed they were not liable for contribution. In affirming that judgment the Circuit Court of Appeals said, 88 F. (2d) 958, 959:

"Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress for imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

We granted certiorari. The injustice of allowing the other stockholders to escape contribution is obvious. And there is nothing in the applicable statutes, or the unwritten law, which compels our doing so.

First. The liability of the stockholders for the taxes was not created by § 280. It does not originate in an assessment made thereunder. Long before the enactment it had been settled under the trust fund doctrine

(see *Pierce* v. *United States,* 255 U. S. 398, 402–403) that if the assets of a corporation are distributed among the stockholders before all its debts are paid, each stockholder is liable severally to creditors, to the extent of the amount received by him; and that as between all stockholders similarly situated the burden of paying the debts shall be borne ratably. But because the Commissioner was free to pursue Phillips alone for the entire amount of the unpaid taxes, Phillips could not compel him to join other stockholders in the proceeding, as was said in *Phillips* v. *Commissioner, supra,* p. 604:

"Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders."

Second. The right of a stockholder transferee to contribution arises under the general law and does not differ from that of any other person who has paid more than his fair share of a common burden. The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover, a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations.[1] Every defendant may, of course, set up any defense personal to him.

---

[1] Compare *Lidderdale* v. *Robinson,* 12 Wheat. 594; *Wright* v. *Rumph,* 238 Fed. 138 (C. C. A. 5); *U. S. Fidelity & Guaranty Co.* v. *Naylor,* 237 Fed. 314 (C. C. A. 8); *Carter* v. *Lechty,* 72 F. (2d) 320 (C. C. A. 8); *Allen* v. *Fairbanks,* 45 Fed. 445 (C. C. D. Vt.); see *M'Donald* v. *Magruder,* 3 Pet. 470, 477; *Southern Surety Co.* v. *Commercial Casualty Ins. Co.,* 31 F. (2d) 817, 819 (C. C. A. 3).

Since the enactment of § 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. *Leighton* v. *United States,* 289 U. S. 506; *Hulburd* v. *Commissioner,* 296 U. S. 300, 303. If he had resorted to that remedy he could have sued Phillips alone (see *Phillips* v. *Commissioner, supra,* pp. 603–604); and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution.[2] The right is no less where the Commissioner proceeds under § 280. This statute does not affect the duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. *Phillips* v. *Commissioner, supra,* pp. 592, 594. As an incident of this summary remedy, the Commissioner must make an assessment against the stockholder or stockholders whom he elects to pursue. But, as each stockholder transferee is severally liable to the extent of the assets received by him, the Commissioner may pursue only one and need not make an assessment against other transferees. He elected to proceed only against Phillips; and as he succeeded in obtaining payment of the whole tax from Phillips' estate, he had no occasion to make an assessment against other stockholders. Indeed, after the corporation's tax had been paid he had no power to do so.

Reversed.

---

[2] Compare *Richter* v. *Henningsan,* 110 Cal. 530; 42 Pac. 1077.

Syllabus.

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

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

No. 27. Argued October 22, 1937.—Decided December 6, 1937.

1. Dividends of preferred stock to common stockholders whereby they acquire an interest in the corporation essentially different from that represented by their common stock are income within the meaning of the Sixteenth Amendment. P. 241.
2. Although Congress has power to tax such dividends, they are exempted by § 115 (f) of the Revenue Act of 1928, which declares that "A stock dividend shall not be subject to tax." P. 241.
3. A common stockholder received a dividend of preferred stock worth $100 per share and several months later disposed of it to the corporation for cash at that valuation. *Held:*

   (1) That the whole of the proceeds of the sale were taxable as income. P. 243.

   The computation is under §§ 111 and 113, Revenue Act of 1928, which provide that the gain from conversion of property into money shall be computed at the excess of the amount realized over the "cost" of the property, which in this case was zero.

   (2) The stock dividend was not to be likened to gifts and legacies, as to which there are special provisions of the Act excluding them from gross income and prescribing the basis for computing gain from later disposition of the property—§§ 113 (a) (2); 22 (b) (3). P. 243.

   (3) Section 115 (f) cannot, in view of its history, be taken as a declaration of Congressional intent that the value of all stock dividends shall be immune from tax not only when received but also when converted into money or other property. P. 244.

   (4) The rates applicable were those prescribed for ordinary income, not the rate for "capital gains" from "property held by the taxpayer for more than two years." § 101 (c) (8). *Id.*

   If it be assumed that the common stock was held by the taxpayer for more than two years, the fact is immaterial, since the dividend stock had been held for only three months, and was income substantially equivalent for income tax purposes to cash or property, and under § 115 (b) was presumed to have been

made "out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits."

4. The Circuit Court of Appeals may affirm a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board; but acceptance of the new theory may involve granting the taxpayer an opportunity to establish additional facts. P. 245.

87 F. (2d) 125, reversed.

CERTIORARI, 301 U. S. 676, to review a judgment which reversed a decision of the Board of Tax Appeals, 32 B. T. A. 820, sustaining an income tax assessment.

Assistant Attorney General Jackson argued the cause, and *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for petitioner.

Messrs. John C. Altman and *A. L. Nash* for respondent.

By leave of Court, *Mr. Roger S. Baldwin* filed a brief as *amicus curiae,* in opposition to the petition for a writ of certiorari.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The questions for decision concern the taxation as income of a dividend in preferred stock and the proceeds received on its sale.

On June 29, 1929, the Hamilton Manufacturing Company, a Wisconsin corporation, had outstanding preferred stock of the par value of $100 a share and common stock without par value. On that day the directors declared from the surplus earnings a dividend of $14 a share on the common stock, payable on July 1, 1929, in preferred stock at its par value. Gowran, as owner of common stock, received as his dividend 533 and a fraction shares of the preferred. On or about October 1, 1929, the company acquired his preferred stock and paid him therefor,

at $100 a share, $53,371.50. In his income tax return for the year Gowran did not treat this sum as taxable income, but included $27,262.72 as capital net gain on the shares received and sold, computing the gain under Articles 58 and 600 of Regulations 74, then in force. The Commissioner rejected that treatment of the matter; determined that the $53,371.50 received was income taxable under the Revenue Act of 1928, § 115 (g), 45 Stat. 791, 822, as a stock dividend redeemed; and assessed a deficiency of $5,831.67.

The taxpayer sought a redetermination by the Board of Tax Appeals. A division of the Board concluded, upon testimony and stipulated facts, that there had been no cancellation or redemption of the preferred stock so as to make it a taxable dividend under § 115 (g); that the transaction by which the company acquired it constituted a sale. The Commissioner secured a reconsideration of the case. He then contended that, under the rule declared in *Commissioner of Internal Revenue* v. *Tillotson Mfg. Co.*, 76 F. (2d) 189, the stock dividend was taxable, because it had resulted in a change of Gowran's proportionate interest in the company. That contention was sustained by the Board; and, on that ground, it affirmed the Commissioner's determination of a deficiency. 32 B. T. A. 820.

The taxpayer sought a review by the Circuit Court of Appeals. The Commissioner again urged that the stock dividend was taxable; and then, for the first time, contended that, even if it was not taxable, the determination of the deficiency should be affirmed, because within the tax year the stock had been sold at its par value and, as its cost had been zero, the entire proceeds constituted income. The Court of Appeals recognized that, since the dividends in preferred stock gave to Gowran an interest different in character from that which his common stock represented, it was constitutionally taxable under *Kosh-*

land v. *Helvering*, 298 U. S. 441; but it held that the dividend could not be taxed as income, since by § 115 (f) Congress had provided: "A stock dividend shall not be subject to tax." And it held further that no part of the proceeds could be taxed as income, since there was no profit on the sale, it being agreed that the fair market value of the stock, both at the date of receipt and at the date of the sale, was $100 a share. 87 F. (2d) 125.

Because of the importance of the questions presented in the administration of the revenue laws, certiorari was granted.

First. The Government contends that § 115 (f) should be read as prohibiting taxation only of those stock dividends which the Constitution does not permit to be taxed; and that, since by the dividend Gowran acquired an interest in the corporation essentially different from that theretofore represented by his common stock, the dividend was taxable. In support of that construction of § 115 (f), it is urged that Congress has in income tax legislation manifested generally its intention to use, to the full extent, its constitutional power, *Helvering* v. *Stockholms Bank,* 293 U. S. 84, 89; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; that this Court holds grants of immunity from taxation should always be strictly construed, *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; and that the only reason for exempting stock dividends was to comply with the Constitution.

This preferred stock had substantially the same attributes as that involved in the *Koshland* case. There the dividend was of common stock to a preferred stockholder, it is true; but we are of opinion that under the rule there declared Congress could have taxed this stock dividend. Nevertheless, by § 115 (f) it enacted in 1928, as it did in earlier and later Revenue Acts, that "a stock dividend shall not be subject to tax." The prohibition is comprehensive. It is so clearly expressed as to leave no room

for construction. It extends to all stock dividends. Such was the construction consistently given to it by the Treasury Department.[1] The purpose of Congress when enacting § 115 (f) may have been merely to comply with the requirement of the Constitution as interpreted in *Eisner* v. *Macomber,* 252 U. S. 189; and the comprehensive language in § 115 (f) may have been adopted in the erroneous belief that under the rule declared in that case no stock dividend could be taxed. But such facts would not justify the Court in departing from the unmistakable com-

[1] *Eisner* v. *Macomber* was decided March 8, 1920. Soon thereafter, the Treasury Department declared, in a series of Decisions and Regulations, that no stock dividend was taxable. Treas. Dec. 3052, 3 C. B. 38 (August 4, 1920); Treas. Dec. 3059, 3 C. B. 38 (August 16, 1920); Office Dec. 732, 3 C. B. 39 (October 28, 1920). Office Dec. 801, 4 C. B. 24 (January 5, 1921) provided: "A stock dividend paid in true preferred stock is exempt from tax the same as though the dividend were paid in common stock." Then followed legislation in the precise form embodied in § 115 (f) of the Revenue Act of 1928. See § 201 (d) of the Revenue Act of 1921, 42 Stat. 227, 228; § 201 (f) of the Revenue Act of 1924, 43 Stat. 253, 255; § 201 (f) of the Revenue Act of 1926, 44 Stat. 9, 11; § 115 (f) of the Revenue Act of 1932, 47 Stat. 169, 204; § 115 (f) of the Revenue Act of 1934, 48 Stat. 680, 712. Article 628 of the Regulations in force in 1928 provided: "Stock dividends.—The issuance of its own stock by a corporation as a dividend to its shareholders does not result in taxable income to such shareholders, but gain may be derived or loss sustained by the shareholders from the sale of such stock. The amount of gain derived or loss sustained from the sale of such stock, or from the sale of the stock in respect of which it is issued, shall be determined as provided in Articles 561 and 600."

Koshland v. *Helvering,* 298 U. S. 441, was decided May 18, 1936. On June 22, 1936, Congress, in enacting the Revenue Act of 1936, provided in § 115 (f): "1. General Rule—A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution." 49 Stat. 1648, 1688. See also § 115 (h).

mand embodied in the statute. Congress declared that the preferred stock should not be taxed as a dividend.

Second. The Government contends that, even if § 115 (f) be construed as prohibiting taxation of the preferred stock dividend, the decision of the Board of Tax Appeals affirming the Commissioner's determination of a deficiency should be sustained, because the gain from sale of the stock within the year was taxable income and the entire proceeds must be deemed income, since the stock had cost Gowran nothing. The Circuit Court of Appeals rejected that contention. It held that there was no income, because, as stipulated, there was no difference between the value of the stock when received and its value when sold. The court likened a non-taxable stock dividend to a tax-free gift or legacy and said: "One who receives a tax-free gift and later sells it, in the absence of statute providing otherwise, is taxed upon the profit arising from the difference in its value at the time he receives it and the sale price. Similarly one who receives a tax-free bequest, when selling it, is taxed upon the profit arising from any excess of the sale price over its fair market value at the time of receipt." [p. 128] Compare *Taft* v. *Bowers,* 278 U. S. 470.

The cases are not analogous. Unlike earlier legislation, § 113 (a) (2) of the Revenue Act of 1928 prescribes specifically the basis for determining the gain on tax-free gifts and legacies. It provides that: "If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift." And the basis for the computation on property transmitted at death is provided for in paragraph (5). But the method of computing the income from the sale of stock dividends constitutionally taxable is not specifically provided for. Furthermore, unlike § 22 (b) (3), excluding from gross income the value of gifts and lega-

cies, § 115 (f) cannot, in view of its history, be taken as a declaration of Congressional intent that the value of all stock dividends shall be immune from tax not only when received but also when converted into money or other property. Gain on them is, therefore, to be computed as provided in §§ 111 and 113, by the "excess of the amount realized" over "the cost of such property" to the taxpayer. As the cost of the preferred stock to Gowran was zero, the whole of the proceeds is taxable.

Gowran asserts that if this "basis of zero" theory is accepted, the proceeds are taxable not as determined by the Commissioner but as a capital gain at a different rate and under different regulations. This depends upon whether the preferred stock received as a dividend was a "capital asset," defined by § 101 (c) (8) as "property held by the taxpayer for more than two years." The record is silent as to when Gowran acquired the common stock upon which the preferred was issued as a dividend, but it may be assumed that he had held it for more than two years. For that fact is immaterial since the dividend stock had been held for only three months. Whether taxed by Congress or not, it was income, substantially equivalent for income tax purposes to cash or property, and under § 115 (b) was presumed to have been made "out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits." In no sense, therefore, can it be said to have been "held" by Gowran prior to its declaration.[2] Since the proceeds

[2] Article 501 of Regulations 74 states that "if the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets." But this was based upon the erroneous premise that stock dividends could not be income, and was part of an administrative scheme to apportion some of the cost of the original shares to the stock received by way of dividend. This arrangement we declared in *Koshland* v. *Helvering*, 298 U. S. 441, to be without statutory authority, and the same must be said of the Regulation involved here.

were therefore not "capital gains," they were taxable at the normal and surtax rates applicable to ordinary income.[3]

Third. Gowran contends here that the Government should not have been permitted by the Court of Appeals to argue its "basis of zero" theory, because that theory raised an issue not pleaded, tried, argued or otherwise referred to in the proceedings before the Board. It is true that the theory was first presented by the Commissioner in the Court of Appeals. But it does not appear by the record that objection to the consideration of this theory was made below. The only objection made there, as disclosed by the opinion, was "that the Board was without jurisdiction to decide the case upon a point not urged by the Commissioner." As to that objection, the court, after stating that the only questions submitted are those of law, said: "The Board approved the Commissioner's assessment, but did so upon a legal theory different from his. We are of opinion that the Board acted within its powers. . . . It is immaterial whether the Commissioner proceeded upon the wrong theory. The burden is upon the petitioner to show that the assessment is wrong, upon any proper theory; otherwise he must fail." [p. 127].

In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son* v. *Cudahy Packing Co.,* 256 U. S. 208; *United States* v. *American Ry. Express Co.,* 265 U. S. 425; *United States* v. *Holt State Bank,* 270 U. S. 49, 56; *Langnes* v. *Green,* 282 U. S. 531; *Stelos Co.* v. *Hosiery Motor-Mend Corp.,* 295 U. S. 237, 239; cf. *United States* v. *Williams,* 278 U. S. 255. This

[3] See *Burnet* v. *Harmel,* 287 U. S. 103, 105–106; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 463; *McFeely* v. *Commissioner,* 296 U. S. 102, 106–107.

applies also to the review of decisions of the Board of Tax Appeals. *Helvering* v. *Rankin*, 295 U. S. 123, 132–133; cf. *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206.[4] The taxpayer sought review of the Board's decision by the Court of Appeals. The ultimate question before that court was whether, upon the facts stipulated, the Board had erred in affirming the Commissioner's determination that the additional taxes were due. If the Commissioner was right in his determination, the Board properly affirmed it, even if the reasons which he had assigned were wrong.[5] And, likewise, if the Commissioner's determination was right, the Board's affirmance of it should have been sustained by the Court of Appeals, even if the Board gave a wrong reason for its action. By this rule the Government was entitled to urge in the Court of Appeals that on the undisputed facts the Board's decision was correct because of the "basis of zero" theory. And since that court rejected the theory, the Government was entitled to assert its contention here. Nothing in *General Utilities & Operating Co.* v. *Helver-*

[4] See also *Hurwitz* v. *Commissioner*, 45 F. (2d) 780 (C. C. A. 2); *Superheater Co.* v. *Commissioner*, 38 F. (2d) 69 (C. C. A. 2); *Commissioner* v. *Linderman*, 84 F. (2d) 727 (C. C. A. 3); *Dickey* v. *Burnet*, 56 F. (2d) 917 (C. C. A. 8); *Lewis-Hall Iron Works* v. *Blair*, 57 App. D. C. 364; 23 F. (2d) 972; cf. *Dobbins* v. *Commissioner*, 31 F. (2d) 935 (C. C. A. 3); *Seufert Bros. Co.* v. *Lucas*, 44 F. (2d) 528 (C. C. A. 9); *Hughes* v. *Commissioner*, 38 F. (2d) 755 (C. C. A. 10).

[5] Compare *Darcy* v. *Commissioner*, 66 F. (2d) 581 (C. C. A. 2); *Helvering* v. *Gregory*, 69 F. (2d) 809 (C. C. A. 2), aff'd, 293 U. S. 465; *Alexander Sprunt & Son* v. *Commissioner*, 64 F. (2d) 424 (C. C. A. 4); *Helvering* v. *Bowen*, 85 F. (2d) 926 (C. C. A. 4); *Atlanta Casket Co.* v. *Rose*, 22 F. (2d) 800 (C. C. A. 5); *J. & O. Altschul Tobacco Co.* v. *Commissioner*, 42 F. (2d) 609 (C. C. A. 5); *Crowell* v. *Commissioner*, 62 F. (2d) 51 (C. C. A. 6); *Schweitzer* v. *Commissioner* 75 F. (2d) 702 (C. C. A. 7), rev'd on other grounds, 296 U. S. 551; *Christopher* v. *Burnet*, 55 F. (2d) 527 (App. D. C.); *Beaumont* v. *Helvering*, 63 App. D. C. 387; 73 F. (2d) 110.

ing, supra, or in *Helvering* v. *Salvage,* 297 U. S. 106, is opposed to such procedure.

If the Court of Appeals had accepted the theory, it would have been open to the taxpayer to urge, in view of the new issue presented, that he should have the opportunity to establish before the Board additional facts which would affect the result.[6] As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose.

Reversed.

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

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

No. 29. Argued October 22, 1937.—Decided December 6, 1937.

1. Section 115 (f) of the Revenue Act 1928 exempted dividends of preferred stock from taxation. *Helvering* v. *Gowran, ante,* p. 238. P. 250.
2. An appellee can not, without a cross appeal, attack the judgment appealed from. This rule applies to a decision of the Board of Tax Appeals. P. 250.

88 F. (2d) 3, affirmed.

CERTIORARI, 301 U. S. 677, to review a judgment affirming in part and reversing in part a decision of the Board of Tax Appeals.

Assistant Attorney General Jackson argued the cause, and *Solicitor General Reed, Assistant Attorney General Morris, Messrs. Sewall Key* and *Morton K. Rothschild* were on the brief, for petitioner.

---

[6] Compare *Woodward* v. *Boston Lasting Machine Co.,* 60 Fed. 283, 63 Fed. 609 (C. C. A. 1).

Messrs. John C. Altman and *A. L. Nash* argued the cause for respondent. With *Mr. Altman* on the brief was *Mr. Roger S. Baldwin.*

By leave of Court, *Messrs. J. Harry Covington, John Thomas Smith* and *Paul E. Shorb* filed a brief as *amici curiae,* in support of the respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

This case presents questions of income taxation applicable to stock dividends.

In 1931, Annie M. Pfeiffer, a holder of common stock in William R. Warner Corporation, received as a dividend thereon 6,291¼ shares of its preferred stock. She also received from the corporation in that year $200,000 cash in exchange for 2,000 shares of its preferred stock which she had received as a dividend in 1928. In her income tax return for 1931, she did not include as taxable income either the preferred stock or the $200,000 cash. She did not include the preferred stock received in that year, because she deemed it exempt from taxation under § 115 (f) of the Revenue Act of 1928, 45 Stat. 791, 822. She did not include the $200,000 cash as taxable income, because she considered it the proceeds from the sale of a capital asset. But she did include $180,100 thereof as taxable capital gain on the sale, computing the gain in accordance with the then effective Treasury Regulations. And she paid a tax of $22,512.50 on such capital gain.

The Commissioner assessed a deficiency on each item. He determined that the 6,291¼ shares of preferred stock valued at $629,125, were taxable income of 1931, because not exempt under § 115 (f); and that the $200,000 cash were the proceeds of a redemption under § 115 (g), and hence taxable income. He eliminated the taxable capi-

tal gain reported and assessed a deficiency on each of the items.

The taxpayer sought a review by the Board of Tax Appeals. It affirmed the Commissioner's determination that the preferred stock received in 1931 was taxable income; but reversed his determination as to the proceeds of the 2,000 shares, and said:

"The Commissioner held that the redemption of the 2,000 shares in 1931 was at such time and in such manner as to be substantially equivalent to a taxable dividend in 1931, within the meaning of section 115 (g) of the Revenue Act of 1928. He erred in this since the distribution was subject to tax as a dividend in 1928 (see cases above cited). Thereafter the shares had a basis for gain or loss to the petitioner of $100 each, and they were redeemed without gain or loss to the petitioner at $100 each in 1931."

The Commissioner acquiesced in the Board's decision. The taxpayer sought a review by the Circuit Court of Appeals. It reversed the Board's decision as to the 1931 stock dividend, on the ground that § 115 (f) exempted that dividend from taxation; and it affirmed the Board's decision that the $200,000 cash was not taxable income of 1931, saying, 88 F. (2d) 3, 5:

"The appellee argues that the proceeds from the redemption in 1931 of 2,000 shares of preferred stock distributed as a stock dividend in 1928 should be considered either (a) subject to a tax as a capital gain or (b) subject to taxation as the equivalent of the distribution of a taxable dividend pursuant to section 115 (g) of the Revenue Act. The question of taxability as capital gain of the $200,000 or any part thereof was not in issue before or decided by the Board of Tax Appeals. The contention that we have authority to sustain the deficiency pro tanto even though the issue was not raised before the Board nor decided by it nor assigned as error in the

petition to this court for a review of the Board's decision is untenable. General Utilities & Operating Co. *v.* Helvering, 296 U. S. 200, . . .; Helvering *v.* Salvage, 297 U. S. 106, ... The Board held that this stock dividend redeemed in 1931 at $100 per share was taxable in the year 1928 when received and was therefore not taxable under section 115 (g); that it had a basis for gain or loss of $100 per share; and that therefore there was no taxable income from the redemption. The Commissioner did not file a cross-appeal. By the provisions of section 115 (g) the proceeds of the redemption of the stock can be taxed only if it occurs at such time and in such manner as to make the redemption essentially equivalent to the distribution of a taxable dividend. Since the Board did not so find, we cannot support this contention."

The Commissioner's petition for certiorari was granted in connection with that in *Helvering* v. *Gowran, ante,* p. 238, decided this day.

First. As to the 1931 dividend in preferred stock, the Commissioner contends that the immunity from taxation conferred by § 115 (f) did not extend to it. We hold, for the reasons stated in Paragraph First of *Helvering* v. *Gowran, supra,* that it was exempt from taxation.

Second. As to the $200,000 received in 1931, the Commissioner contends that the Circuit Court of Appeals erred in failing to hold it taxable income, since under the rule declared in *Helvering* v. *Gowran, supra,* the cost was zero.

We are not at liberty to entertain that contention. The Board of Tax Appeals decided that the $200,000 was not taxable income of 1931. As the Commissioner did not seek a review of that decision, which was adverse to him, the Circuit Court of Appeals properly refused to consider the contention. *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206. While a decision

below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, see *Helvering* v. *Gowran, supra,* an appellee cannot without a cross-appeal attack a judgment entered below. Compare *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435; *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185.[1] The same rule applies to a decision of the Board of Tax Appeals.

Third. The Commissioner requests that, if we hold that the Board erred in declaring that the 2,000 shares received in 1928 were then taxable and refuse to review its decision that the proceeds received in 1931 were not taxable, we should remand the case to the Board to determine whether redemption of the 2,000 shares was made at such time and in such manner as to be essentially equivalent to the distribution of a taxable dividend under § 115 (g). The Commissioner acquiesced in the decision of the Board. No good reason is shown for disturbing it.

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO think the judgment should be reversed.

The issue before the Board of Tax Appeals was the existence of a deficiency in respondent's income tax for a single year, 1931. The deficiency fixed by the commissioner represented her net tax liability for that year and drew in question every item which entered into computation of the tax. *Lewis* v. *Reynolds,* 284 U. S. 281, 283. Her appeal to the board drew in question her net tax liability on a reëxamination of every item of income in that year which she had challenged in her peti-

[1] See also *The Stephan Morgan,* 94 U. S. 599; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 527; *United States* v. *Blackfeather,* 155 U. S. 180; *Landram* v. *Jordan,* 203 U. S. 56; *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 137; *Fitchie* v. *Brown,* 211 U. S. 321, 329; *Bothwell* v. *United States,* 254 U. S. 231.

tion. The commissioner had treated as taxable income of respondent two items, both received in that year, and assessed a deficiency accordingly. They were a dividend paid to the taxpayer in preferred stock, and cash received by her in that year upon the redemption of preferred stock received as a dividend in an earlier year. The Board of Tax Appeals thought respondent was taxable in 1931 on the first but not on the second item, and reduced the deficiency accordingly. It "Ordered and decided, that there is a deficiency for the year 1931 in the amount of $89,841.75."

This Court, upon consideration of the facts stipulated by the parties and found by the board, holds that respondent was taxable upon the full amount of the item of cash received but not upon the stock dividend. But, because the commissioner took no appeal from the order of the board, the Court declines to give any effect to its ruling that the cash is taxable income in 1931. If the commissioner had sought only to increase the deficiency found by the board, it may be conceded that the point would be well taken, but such is not his purpose. On the contrary, he accepts the order and relies upon it as establishing a deficiency of which he asks the benefit only so far as it is sustained by the application, to the facts found, of the rule of law announced by this Court.

The circumstance that the board, by the erroneous application of a rule of law to the facts before it arrived at a deficiency which is sustained by a correct application of a different rule, is not ground for setting aside its order. *Langnes* v. *Green,* 282 U. S. 531, 538–539; *Anderson* v. *Atherton, post, p.* 643; compare *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185. In denying to the commissioner any benefit of the order because he did not appeal, the opinion of the Court gives no hint of any ground upon which the commissioner should or could have appealed so far as the order fixes a deficiency which the record shows is lawfully due or

why the respondent is not free to maintain that the board reached the right result even though the reason it gave was wrong.

The cause should be remanded to the Board of Tax Appeals to recompute the deficiency in conformity with the rule of tax liability laid down in the opinion of this Court, but in an amount not exceeding that which the board has found.

General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200, does not require any different result. There it was held that it was error for the circuit court of appeals, on an appeal by the commissioner, to reverse an order of the board and remand the cause for new findings to support a theory of tax liability which first emerged from the case on appeal. Here there is no new issue to be tried by the board. The only issue is one of law which this Court has resolved and which has been implicit in the case from the beginning.

PUERTO RICO *v.* THE SHELL CO. (P. R.), LIMITED, ET AL.

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

No. 18. Argued November 9, 1937.—Decided December 6, 1937.

1. The meaning of a particular word as used in a particular instance in a statute is to be arrived at by consideration not only of the word itself, but also of the context, the purposes of the law, and the circumstances under which the word was used. P. 258.
2. The word "territory" in § 3 of the Sherman Antitrust Act—forbidding contracts, combinations, or conspiracies "in restraint of trade or commerce in any territory of the United States" etc.—was used in its most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, and includes Puerto Rico. P. 259.
3. The existence of § 3 of the Sherman Antitrust Act did not preclude adoption by the legislature of Puerto Rico of a local antitrust Act. P. 259.

4. The insular legislature of Puerto Rico had authority, under the grant of legislative power contained in § 32 of the Foraker Act and continued in force by § 37 of the Organic Act of 1917, to enact a local antitrust Act. The subject-matter is "of a legislative character not locally inapplicable." P. 260.
5. Puerto Rico's power of local legislation is not limited by any express provision of the Foraker Act or of the Organic Act, to subjects in respect of which there is an absence of explicit legislation by Congress; and there is nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires that such a limitation be implied. P. 263.
6. The federal appellate courts have power to resolve a conflict of decisions between the insular courts of Puerto Rico and the federal district court. P. 263.
7. A prosecution under either the Sherman Act or the antitrust Act of Puerto Rico is a bar to a prosecution under the other for the same offense; wherefore there is no risk of double jeopardy. *Grafton* v. *United States*, 206 U. S. 333. P. 264.
8. In determining questions relating to the history, purpose and application of territorial powers, pertinent decisions of state supreme courts, rendered when the States were newly created from former territories, are entitled to great weight. P. 266.
9. *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87; *Davis* v. *Beason*, 133 U. S. 333; and *Domenech* v. *National City Bank*, 294 U. S. 199, distinguished. Pp. 268, 270.
10. The contention that the Sherman Act and the local antitrust Act of Puerto Rico can not both stand, because a conflict of jurisdiction between the federal courts and the insular courts may result, can not be sustained. P. 271.

86 F. (2d) 577, reversed.

CERTIORARI, 301 U. S. 675, to review a judgment affirming a judgment of the Supreme Court of Puerto Rico, which dismissed an appeal from an order of the insular district court sustaining demurrers to an information charging violation of the local antitrust Act.

Mr. William Cattron Rigby, with whom *Mr. Nathan R. Margold* was on the brief, for petitioner.

Messrs. William D. Whitney and *James R. Beverley* for respondents.

Messrs. Oscar B. Frazer and *Gabriel I. Lewis* were on the brief for Pyramid Products, Inc., et al., respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a criminal proceeding brought by petitioner against the respondents in the insular district court of San Juan, Puerto Rico. An information filed by the district attorney charged respondents with entering into a conspiracy in restraint of trade in violation of the local anti-trust act, passed by the Legislature of Puerto Rico March 14, 1907. Demurrers to the information were sustained by the district court on the ground that the Sherman Anti-trust Act of 1890, supplemented by the Clayton Act of 1914, covered the entire field embraced by the local anti-trust act, and the latter, therefore, was void. The Supreme Court of Puerto Rico accepted that view and dismissed the appeal; and its judgment was affirmed on appeal by the court below. 86 F. (2d) 577. The single question which we have to decide is whether the existence of § 3 of the Sherman Act precluded the adoption of the local act by the insular legislature.

The pertinent provisions of the Sherman Act and the local act are set forth in the margin.[1] Section 3 of the

[1] Sherman Act (July 2, 1890, c. 647, 26 Stat. 209):

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce

The Puerto Rico Act of March 14, 1907 (Laws 1907, p. 328):

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of

Sherman Act and § 1 of the local act, so far as the question here involved is concerned, are substantially identical. Section 4 of the Sherman Act confers jurisdiction

---

between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ."

By § 24 (2) of the Judicial Code, 28 U. S. C. § 41 (2), the district courts of the United States are given jurisdiction—"Of all crimes and offenses cognizable under the authority of the United States."

Puerto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

. . .

"Section 3. The district courts of the island are hereby vested with jurisdiction to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. . . ."

in respect of violations of the act upon the several district courts of the United States. Section 3 of the local act confers jurisdiction upon the district courts of Puerto Rico in respect of violations of that act.

First. Section 3 of the Sherman Act extends to "any territory of the United States." But it is urged that Puerto Rico cannot be brought within the intent of this phrase, and, therefore, the section does not apply to that dependency. The point is not well made. When the Sherman Act was passed (1890), we had no insular dependencies; and, necessarily, the application of § 3 did not extend beyond our continental domain; and, undoubtedly, it was this domain which was in the immediate contemplation of Congress. Certainly, Congress at that time did not have Puerto Rico in mind. But that is not enough. It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act. *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 644; *Takao Ozawa* v. *United States,* 260 U. S. 178, 195–196; *United States* v. *Thind,* 261 U. S. 204, 207–208. The only question, therefore, is whether the word "territory," as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States which is borne by Puerto Rico.

In *Balzac* v. *Porto Rico,* 258 U. S. 298, 304–305, it was held that, although the Sixth Amendment of the Constitution with respect to the right of trial by jury applied to the territories of the United States, it did not apply to territory belonging to the United States which had not been incorporated into the Union; and that neither the Philippines nor Porto Rico was territory which had been so incorporated or had become a part of the United States, as distinguished from merely belonging to it. But it is evident, from a consideration of the pertinent acts

of Congress and the decisions of this court with respect to these acts, that whether Puerto Rico comes within a given congressional act applicable in terms to a "territory," depends upon the character and aim of the act. Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 86, 87–88. Thus, although Puerto Rico is not a territory within the reach of the Sixth and Seventh Amendments and may not be a "territory" within the meaning of the word as used in some statutes, we held in *Kopel* v. *Bingham,* 211 U. S. 468, 474, 475, 476, that Puerto Rico was a "territory" within the meaning of § 5278 of the Revised Statutes, which provides for the demand and surrender of fugitive criminals by governors of territories as well as of states. The court said that it was impossible to hold that Puerto Rico was not intended to have power to reclaim fugitives from its justice, or that it was intended that it should be an asylum for fugitives from the United States. The word "territory" as used in that statute was defined as meaning "a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States." And the court concluded, "It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory

as is comprised in § 5278." See *Porto Rico* v. *Rosaly y Castillo,* 227 U. S. 270, 274. Compare *Talbott* v. *Silver Bow County,* 139 U. S. 438, 444–445.

With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a "territory" within the meaning of § 3 of the Sherman Act. We pointed out in the *Atlantic Cleaners & Dyers* case, *supra,* p. 435, that in the light of the applicable history and circumstances, it was apparent that Congress meant to deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, "and to that end to exercise all the power it possessed"; that while Congress in passing § 1 exercised only the power conferred by the commerce clause, in passing § 3 it exercised a general power, unlimited by that clause. We therefore concluded that the word "trade" as used in § 3 should be given a more extended meaning than the same word as used in § 1.

If, as we there determined, Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter—trade and commerce—, it is equally reasonable to conclude that Congress intended to include all territories to which its powers might extend. The same reason which requires the utmost liberality of construction in respect of the word "trade," also requires the same degree of liberality of construction in respect of the word "territory"; and we hold, accordingly, that the word "territory" was used in its most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, including Puerto Rico.

Second. The court below held that although § 1 of the local act contained some words not to be found in § 3 of the Sherman Act, the pertinent provisions were in substance the same; that the act charged in the information as a crime under the local statute was the

same as that denounced as a crime in the Sherman Act; and that in each instance the offense was a crime against the sovereignty of the United States. With that view we agree. But that court concluded that the act of Congress preëmpted the ground occupied by the local act and superseded it; and consequently the local district court was without jurisdiction of the offense. With that conclusion we are unable to agree.

1. Section 14 of The Foraker Act, passed April 12, 1900, c. 191, 31 Stat. 77, 80, provided that the statutory laws of the United States, not locally inapplicable, should have the same force and effect in Puerto Rico as in the United States, with certain exceptions not material here. Section 27 (p. 82) provided "That all local legislative powers hereby granted shall be vested in a legislative assembly . . ." And by § 32 (p. 83–84), it was provided that the legislative authority "shall extend to all matters of a legislative character not locally inapplicable . . ." These various provisions are continued in force by §§ 9, 25 and 37 of the Organic Act of March 2, 1917, c. 145, 39 Stat. 951. These provisions do not differ in substance from the various provisions relating to the powers of the organized and incorporated continental territories of the United States, in respect of which this court said in *Clinton* v. *Englebrecht,* 13 Wall. 434, 441, that the theory upon which these territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress"; and in *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655–656, we said: "The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature." See also *Cope* v. *Cope,* 137 U. S. 682, 684, where this court, speaking of this typical general provi-

sion contained in the Utah Organic Act, said that, with the exceptions noted in the provision itself, "the power of the Territorial legislature was apparently as plenary as that of the legislature of a State." In *Maynard* v. *Hill*, 125 U. S. 190, 204, the essential similarity of the various provisions in respect of the powers of territorial legislatures was pointed out, and it was said that what were "rightful subjects of legislation" was to be determined "by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented."

The grant of legislative power in respect of local matters, contained in § 32 of the Foraker Act and continued in force by § 37 of the Organic Act of 1917, is as broad and comprehensive as language could make it. The primary question posed by the challenge to the validity of the act under consideration is whether the matter covered by the act is one "of a legislative character not locally inapplicable." It requires no argument to demonstrate that a conspiracy in restraint of trade within the borders of Puerto Rico is clearly a local matter, and that it falls within the precise terms of the power granted by §§ 32 and 37 of the respective acts in which the grant is found. The power being given without express limitation, a conclusion that the present exercise of the power is precluded by the existence of § 3 of the Sherman Act must rest upon the assumption that a congressional statute penalizing specific local behavior and a statute of Puerto Rico to the same effect cannot coexist. With due regard to the status of the territory, the character of its established government, the positive terms of the congressional grant of power, and the lack of conflict between the two acts, that assumption must be rejected.

2. The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination,

with an autonomy similar to that of the states and incorporated territories. *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 370; *Porto Rico* v. *Rosaly y Castillo, supra,* p. 274. The effect was to confer upon the territory many of the attributes of *quasi*-sovereignty possessed by the states—as, for example, immunity from suit without their consent. *Porto Rico* v. *Rosaly y Castillo, supra.* By those acts, the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial—was erected. "A body politic"—a commonwealth—was created. 31 Stat. 79, § 7, c. 191. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures.

This comprehensive grant of legislative power made by Congress plainly recognizes the great desirability of devolving upon the local government the responsibility of searching out local offenses and prosecuting them in the local tribunals. The insular Supreme Court in this case declared in emphatic terms the wisdom of such local control in respect of the matter dealt with by the act in question. Although striking down, with evident reluctance, the act as invalid, that court said: "The right of the Insular Legislature and officers to prosecute and punish such monopolies as may be set up within our jurisdiction is really inestimable. It was so understood by our Legislature when it took upon itself to legislate on the subject. This is a wholesome and necessary legislation that should be enforced through the insular courts. It must be admitted that The People of Puerto Rico has a special interest in prosecuting before the courts those citizens who violate its own laws. No matter how inter-

ested the National Government may be in prosecuting such offenses, instances might occur where the latter would pass unnoticed by the federal officers, or where, for some reason or other, such officers might not display the same activity and interest that is to be expected from the local officials."

3. In the light of the foregoing considerations, including the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917, the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest. In this connection it is significant that the only express limitation upon the power is that, in certain of its aspects, it shall be exercised consistently with the provisions of the respective acts. See §§ 37, 57 of the Organic Act, and § 32 of the Foraker Act. Nothing is expressed in these acts or, so far as we are advised, in any other federal act, which suggests a congressional intent to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress; and we find nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires an implication to that effect.

Our attention is called to certain differences of language in the two acts; and it is urged that these differences create a "risk" of conflict of interpretation between the local courts and the federal district courts. The fear of conflicting decisions is more fanciful than real, since we agree with the court below that there is in fact no substantial conflict between the pertinent provisions of the two statutes. But in the unlikely event that, in spite of this conclusion, a conflict of decisions shall arise, the power of the federal appellate courts to resolve that conflict is clear. Secs. 128 (a) and 240, Judicial Code, as

amended by the Act of February 13, 1925, c. 229, 43 Stat. 936; 28 U. S. C. §§ 225, 347.

It likewise is clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or of double punishment for the same offense. The risk of double jeopardy[2] does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. See *Balzac* v. *Porto Rico, supra,* p. 312. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court. *Grafton* v. *United States,* 206 U. S. 333. In that case, Grafton, a soldier in the army, had been acquitted by a general court martial convened in the Philippine Islands of a crime not capital, alleged to have been committed in violation of the 62d Article of War. Subsequently, a criminal information in the name of the United States was filed in a Philippine court of first instance, charging him with the same offense committed in violation of a local law. This court held that the acquittal of the accused by the court martial precluded his being again tried for the same offense in the civil courts, for the reason that he would thus be put twice in jeopardy of punishment. The 62d Article of War[3] was a federal statute. Revised Statutes, § 1342. The general court martial was a federal tribunal. The Philippine act was a local law; and the court of first instance was a local court. But both of the laws and both

---

[2] The Fifth Amendment to the Constitution provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Section 2 (the Bill of Rights) of the Puerto Rico Organic Act of 1917, 39 Stat. 951, provides that "no person for the same offense shall be twice put in jeopardy of punishment."

[3] "All crimes not capital . . . which officers and soldiers may be guilty of . . . are to be taken cognizance of by a general . . . court-[martial], . . . and punished at the discretion of such court."

of the courts owed their existence to the same supreme authority. The situation presented there was, in all essentials, the same as that presented here. The decision of the court in that case rested upon the ground that the accused, having been acquitted by the federal tribunal, could not be subjected to prosecution in another court, civil or military, of the same sovereignty. We held that although the same act might constitute distinct offenses against a state and against the United States, for both of which the accused might be prosecuted, that rule had no application to acts committed in the Philippine Islands. We said (pp. 354–355), "The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States."

An attempt is made to distinguish the *Grafton* case on the ground that but one statute was there involved—namely, the statute of the Philippine Islands—and that both the general court martial and the Philippine court undertook to enforce that statute. Obviously, that view is incorrect. The court-martial proceeding was not to enforce the Philippine legislation, but to enforce the 62d Article of War; and that article was none the less a federal law, distinct from the local law, because it might be necessary to refer to the local law to determine whether

the act charged against the soldier was embraced by the term "crimes" in the 62d Article. This is well illustrated by § 289 of the Criminal Code (18 U. S. C. § 468), which, in respect of offenses committed upon places subject to the exclusive jurisdiction of the United States within the limits of a state or organized territory or district, makes applicable the laws of such state, territory or district in respect of such offenses. Prosecutions under that section, however, are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference. See *United States* v. *Press Publishing Co.*, 219 U. S. 1.

4. The decisions of the supreme courts of four states, rendered when the states were newly-created from former territories, are, except in one particular, of which we shall speak later, in harmony with the views we have expressed. Those decisions, though not conclusive, are entitled to great weight, because they dealt with territorial powers in operation at a time so shortly before the rendition of the decisions that the judges who rendered them well may be credited with such knowledge of the purpose of these powers and their history and application, as to make these judges peculiarly competent to decide questions relating thereto.

The Supreme Court of Wyoming, in a very full and carefully drawn opinion, reached the conclusion that a statute of that territory defining and punishing the crime of bigamy was valid and enforceable, notwithstanding the fact that an act of Congress defined and prescribed punishment for the same crime when committed in any of the territories. *In re Murphy*, 5 Wyo. 297; 40 Pac. 398. Following its discussion in respect of the relations between the national and territorial governments, and the extensive powers which had been conferred upon the latter, that court (5 Wyo. 315; 40 Pac. 404) con-

cluded: " . . . the crime of bigamy as defined and punishable by act of congress, is a crime against the sovereignty of the United States. The act of congress embraces no express limitation upon the right of the territory to also punish the same act as an offense against it and its local laws, nor upon the local legislature to enact a law defining and providing a punishment therefor as an offense against the territorial sovereignty. As there are in practical and legal effect two governments, although the one emanates from the other, we are unable to perceive why the legislature of the territory under the general grant of power with which it was invested, may not have enacted a valid law assuming to punish as a territorial offense the crime of bigamy. It does not conflict with the United States statute. It could not and did not assume to destroy the force or effect of the congressional provision. It could not have assumed to offer immunity to those desiring to contract polygamous marriages. By silence, it could only have refused to punish it as a territorial crime. To avoid this possibility congress undertook to punish it as a crime against the Federal government." That decision was followed by the Supreme Court of Utah in *State* v. *Norman,* 16 Utah 457; 52 Pac. 986.

The Wyoming and the Utah courts thought that prosecution and punishment could be had under both statutes, and attempted to justify that view by invoking the rule applicable to state and federal statutes denouncing the same criminal acts. This, of course, in the light of our later decision in the *Grafton* case, is now seen to be erroneous; but the error does not affect the accuracy of the reasoning and conclusion of these courts upon the main point—that the local statute was a valid exercise of territorial power, notwithstanding the identical legislation by Congress.

In *Territory* v. *Guyott,* 9 Mont. 46; 22 Pac. 134, a territorial statute making it a felony to sell, barter or give

intoxicating liquor to an Indian, was sustained against the contention that the authority of the territory to pass the statute had been foreclosed by § 2139 U. S. Rev. Stats., which defines and punishes the same offense.

Territory v. *Long Bell Lumber Co.,* 22 Okla. 890; 99 Pac. 911, involved the validity of the anti-trust act passed by the former territorial legislature. Suits were brought against the defendants, charging violations of the territorial act, which were also violations of the Sherman Act. The court sustained the validity of the territorial act, holding that it was not repugnant to or in conflict with the federal act. In doing so, it followed the reasoning of, and relied upon, the Wyoming, Montana and Utah decisions, above cited.

The Supreme Court of the Territory of Arizona, in *Territory* v. *Alexander,* 11 Ariz. 172; 89 Pac. 514, had before it for consideration a bigamy statute like that involved in the Wyoming case, and erroneously held it to be invalid. In reaching that conclusion, it expressly rejected the Wyoming, Utah and Montana decisions upon the authority of *Davis* v. *Beason,* 133 U. S. 333, a case which we shall presently consider.

5. There is some general language in *El Paso & N. E. Ry. Co.* v. *Gutierrez,* 215 U. S. 87, and *Davis* v. *Beason, supra,* which, considered apart from the question which was involved and apart from the opinions in their entirety, seems to support the decision of the court below in the present case. The opinion of the court below and the argument of respondents here rest in the main upon these cases. An examination of them, however, will show that they have been misunderstood. The *Gutierrez* case involved the validity of a statute of the Territory of New Mexico, which provided that no action for injuries inflicting death caused by any person or corporation in the territory should be maintained unless the person claiming damages should, within 90 days after the infliction

of the injuries complained of and 30 days before commencing suit, serve upon the defendant an affidavit covering certain specified particulars. The statute also required that suit must be brought within a year and in a specified district court of the territory. The statute is set forth in full in the margin of the opinion of this court in *Atchison, T. & S. F. Ry. Co.* v. *Sowers,* 213 U. S. 55, 59–63. An action was brought in Texas by Enedina Gutierrez against the railway company to recover damages for the death of her intestate. The accident causing the death happened in New Mexico, and the railway company set up the New Mexico statute by way of special plea and answer. A writ of error brought here for review the judgment of the Supreme Court of Texas holding that the case was controlled by the Federal Employers' Liability Act, 34 Stat. 232, and refusing to give effect to the New Mexico statute—a statute which was plainly an attempted restriction upon the right of action conferred in unlimited terms by the Federal Employers' Liability Act, and, therefore, in direct conflict with that act. In deciding the question, this court said that there could be no doubt that the act of Congress "would necessarily supersede the territorial law regulating the same subject." This is broad language; but it must be construed in the light of the question presented, which was whether a territorial act, *in plain conflict with* the federal act, was valid. In that situation, the applicable rule is that formulated by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, where, speaking for this court, he said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." See, also, *Humphrey's Executor* v. *United States,* 295 U. S. 602, 627, and cases cited.

In the course of the opinion rendered by this court in *Davis* v. *Beason, supra* (p. 348), it was said: "The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground." This generalization was not necessary to the decision of the case, and, taken literally, cannot stand, because, as in the *Gutierrez* case, it omits the element of actual conflict between the two acts of legislation. The decision itself sustained the validity of a statute penalizing any person who teaches, advises, counsels or encourages the practice of bigamy or polygamy, notwithstanding there was a general act of Congress which had for its object the suppression of bigamy and polygamy in the territories. And the court said in its opinion (page 341), that bigamy and polygamy are "crimes by the laws of the United States, and they are crimes by the laws of Idaho"; and further (page 348), that the act of Congress was a general law applicable to all territories and "does not purport to restrict the legislation of the Territories over kindred offenses or over the means for their ascertainment and prevention." Each of the two observations which we have last quoted, may have gone beyond the necessities of the case and may fall within the rule announced by Chief Justice Marshall in the *Cohens* case. In any event, however, they indicate that the general statement first quoted is not to be given the sweeping effect which a categorical reading of the words might at first suggest.

Only a word need be said about *Domenech* v. *National City Bank,* 294 U. S. 199, which the court below thought lent support to its judgment. That case involved the validity of a tax sought to be imposed by Puerto Rico upon a branch of a national bank organized under the

laws of the United States. We held that § 5219 of the Revised Statutes was in force in Puerto Rico and that that section forbade the tax. The grant to the territory of the general power to tax did not constitute consent on the part of Congress that a tax not authorized by § 5219 could be laid; and it is upon that ground that our decision rests. The conflict between the tax and the federal law we regarded as plain.

6. Finally, it is contended that, if the local anti-trust act and the Sherman Act both stand, a conflict of jurisdiction between the federal courts and the local courts may result. But clearly there is slight, if any, ground for the apprehension. The local act simply confers jurisdiction upon the local courts to enforce that act. No attempt, of course, is made to confer jurisdiction upon those courts to enforce the Sherman Act, or upon the federal courts to enforce the local act. It is hard to see why a conflict as to which law shall be enforced and which jurisdiction shall be invoked should ever arise, since the officers charged with the administration and enforcement of both acts are, in the last analysis, under the control of the same sovereignty and, it well may be assumed, will work in harmony.

We conclude that the anti-trust act of Puerto Rico is valid and enforceable; and, accordingly the judgment below is

Reversed.

WILLING, RECEIVER, *v.* BINENSTOCK ET AL.

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

No. 36. Argued November 17, 1937.—Decided December 6, 1937.

1. In Pennsylvania, deposits to the credit of individual members of a partnership in an insolvent bank may be set off against an obligation of the partnership to the bank. P. 274.
2. Nothing in the National Banking Act or in any other federal statute conflicts with the application of this rule in the liquidation of an insolvent national bank in Pennsylvania. P. 276.
3. A federal court will lean towards agreement with the courts of the State when the question seems balanced with doubt. P. 275.
4. A depositor in an insolvent national bank is not entitled to set off his deposit against a secondary liability as indorser of a note the maker of which is solvent. P. 276.
5. Where the facts disclosed by the record are insufficient to enable this Court to dispose of a substantial question, the case may be remanded to the district court for further consideration of the question, with authority, in its discretion, to take further evidence to that end. P. 277.

88 F. (2d) 474, affirmed in part; reversed in part.

CERTIORARI, 301 U. S. 678, to review a decree affirming a decree, 18 F. Supp. 262, in favor of the claimants in a suit against the receiver of a national bank.

Messrs. James M. Kane and *George P. Barse,* with whom *Mr. Thomas J. Minnick, Jr.* was on the brief, for petitioner.

Mr. Robert T. McCracken, with whom *Mr. C. Russell Phillips* was on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought by respondents in a federal district court in Pennsylvania seeking to have allowed as a set-off against the indebtedness of the partnership firm

of Swinger and Binenstock to the Commercial National Bank the amount of a deposit in the bank by Swinger, now deceased, and so much of a deposit by Binenstock as might be necessary to cancel the indebtedness. The bank was organized under the National Banking Act of the United States, and as such was engaged in business in Pennsylvania. On January 9, 1933, the partnership executed and delivered its promissory note to the bank in the sum of $10,000; and on February 28, 1933, executed and delivered to the bank its further promissory note in the same amount. Under date of January 25, 1933, one Luciano Cammarota executed and delivered to the partnership his promissory note for $300, which note was endorsed and discounted at the bank.

At the close of business on February 28, Swinger had on deposit in the bank the sum of $1,546.58, and Binenstock the sum of $32,323.76. At the same time, the partnership had on deposit the sum of $5,822.52. On that date the bank became insolvent and was taken over by the Comptroller of Currency, who appointed petitioner, Willing, receiver. Petitioner, when the suit was brought, had reduced the indebtedness of the partnership by allowing a set-off of the amount of the partnership deposit, but had failed and refused to allow as a set-off the amounts here in controversy.

Upon these facts the district court sustained the claim of respondents, 18 F. Supp. 262, and entered a decree allowing the set-off of the individual deposits against the joint indebtedness of the partnership, ordering a cancellation and return of the partnership promissory notes, and allowing a claim of Binenstock against the assets of the bank for the amount of his deposit, after making provision for the set-off. The decree also directed petitioner to endorse, without recourse, and deliver to Binenstock, the note of Cammarota for $300. Upon appeal, the court below affirmed. 88 F. (2d) 474. The decrees in both

courts were based upon what was understood and declared by them to be the Pennsylvania rule upon the subject.

The case has been elaborately argued upon both sides; but, in respect of the partnership notes, we find it unnecessary to do more than consider and determine the question whether the courts below correctly stated the Pennsylvania law on the subject and were right in following it as the controlling rule of decision.

First. In *Miller* v. *Reed,* 27 Pa. 244, the Supreme Court of Pennsylvania held that, whatever distinctions otherwise would exist between joint contracts and contracts joint and several, these distinctions, under the statutes of the state, had been obliterated. These statutes, it was said (p. 249), "have taken away distinctions that were always embarrassing, and sometimes insuperable obstacles to the course of justice. There was no difference in the duty before, and none in the remedy now. The moral obligation is not affected by the words joint and several, and in Pennsylvania at least, the legal liability is not." It, therefore, makes no difference here whether the Swinger and Binenstock notes were joint, or joint and several.

In the opinion of the federal district court in this case, Judge Kirkpatrick said: "The law of the state of Pennsylvania, if applicable, would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. Stewart v. Coulter, 12 Serg. & R. (Pa.) 252; Cochran v. Cutter, 18 Pa. Super. 282. See also Mintz v. Tri-County Natural Gas Company, 259 Pa. 477." He held the law applicable and entered the decree accordingly. The court below affirmed on the authority of the opinion of the district judge.

Petitioner challenges this view of the district judge, albeit faintly. The judges of both courts below have had

wide experience in the field of Pennsylvania law; and, even if the question were doubtful, as we think it is not, we should have little hesitation in accepting their determination as to the state law on the point here under consideration. We have, however, examined the decisions of the Pennsylvania courts, and fully agree with the courts below as to their interpretation.

Second. We have no occasion to consider whether § 721 of the Revised Statutes (28 U. S. C. § 725) is applicable.* Under *Swift* v. *Tyson,* 16 Pet. 1, it would not be. That case has been much criticized, and the tendency of our decisions which have followed has been to limit it somewhat strictly. And one of the practical restrictions upon the principle of that case, which we have many times announced, is that, even where it applies, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess* v. *Seligman,* 107 U. S. 20, 33–34; *Sim* v. *Edenborn,* 242 U. S. 131, 135, and authorities cited; *Trainor Co.* v. *Aetna Casualty & Surety Co.,* 290 U. S. 47, 54–55; *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335, 340; *Community Bldg. Co.* v. *Maryland Casualty Co.,* 8 F. (2d) 678, 680. Even if there were a conflict between the decisions of the state and those of the lower federal courts, we should be free to apply the "harmony" rule and follow the state decisions. We are, however, unable to find any such conflict.

The case which seems most nearly in point is *Roelker* v. *Bromley-Shepard Co.,* 73 F. (2d) 618; and that case, so far as it goes, is in harmony with the Pennsylvania rule. There, the company was indebted to the Middle-

* Sec. 721. "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

sex National Bank in the sum of $5,000 on a joint note signed by the company and Sarah Bromley Shepard. On the day the bank closed, the company had on deposit in the bank $5,611.10 and Sarah Bromley Shepard had on deposit the sum of $6,275.13. The court ordered that $5,000 of the $5,611.10 due from the bank to the company be set off against the $5,000 due from the company to the bank on the joint note, holding that where justice requires and there is no adequate remedy at law, as was the case there, a court of equity will order a set-off.

There is nothing in the National Banking Act or in any other federal statute which conflicts with the Pennsylvania rule. In the case of an insolvent bank, the National Banking Act, 12 U. S. C. § 194, simply provides for a "ratable dividend" on all proved or adjudicated claims. This court held in *Scott* v. *Armstrong,* 146 U. S. 499, 510, that the allowance of a valid set-off cannot be considered a preference, and that only the balance, after deduction of the set-off, constitutes part of the assets of the insolvent. "The requirement," the court said, "as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

Third. The reason for the order of the district court requiring the surrender of the Cammarota note for $300 is not clear, but the requirement seems to be erroneous. It does not appear from the record whether Cammarota was solvent or insolvent. If he was solvent, the partnership was not entitled to set off its deposits against its secondary liability as endorser of the Cammarota note. See *Williams* v. *Rose,* 218 Fed. 898, 900; *Bank of United States* v. *Braverman,* 259 N. Y. 65, 68, *et seq.;* 181 N. E. 50, and authorities cited. "To allow an indorser," the

New York court said, 259 N. Y., pp. 70–71, "to set off his deposit when the maker is solvent and able to indemnify the indorser as in this case would enable the indorser to collect the full amount unpaid on the note from the maker and at the same time receive a larger amount of his deposit than other depositors. Such a result would be inequitable." An excellent statement in support of the foregoing view, and the reasons for it, will be found in the opinion delivered by Judge Parker in *Shannon* v. *Sutherland,* 74 F. (2d) 530, 531–532.

The facts are not sufficiently disclosed by the record to enable us to dispose of this item. The opinion of neither court deals with the subject, and respondents, neither in their brief nor oral argument, have had anything to say about it. In these circumstances, the case must be remanded to the district court for further consideration of the question, with authority, in its discretion, to take further evidence to that end. With that exception, the decree below is approved.

Reversed and remanded for further proceedings in conformity with this opinion.

Reversed.

BREEDLOVE *v.* SUTTLES, TAX COLLECTOR.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 9. Argued November 16, 17, 1937.—Decided December 6, 1937.

1. A Georgia statute exempts all persons under 21 or over 60 years of age, and all females who do not register for voting, from a poll tax of $1.00 per year, which is levied generally upon all inhabitants, and which, under the state constitution, must be paid by the person liable, together with arrears, before he can be registered for voting. *Held* that males who are not within the exemption are not denied the equal protection of the laws guaranteed by the Fourteenth Amendment. Pp. 281–282.

2. On the basis of special consideration to which they are naturally entitled, women as a class may be exempted from poll taxes without exempting men. P. 282.
3. Since this discrimination is permissible in favor of all women, a man subject to the tax has no status to complain that, among women, the tax is levied only on those who register to vote, or that registration is allowed to them without paying taxes for previous years. P. 282.
4. Payment of the Georgia poll tax as a prerequisite to voting is not required for the purpose of denying or abridging the privilege of voting. P. 282.
5. Exaction of payment of poll taxes before registration as an aid to collection is a use of the State's power consistent with the Federal Constitution. P. 283.
6. Voting is a privilege derived not from the United States but from the State, which may impose such conditions as it deems appropriate, subject only to the limitations of the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution. P. 283.
7. A state law requiring payment of poll taxes as a condition to voting does not abridge any privilege or immunity protected by the Fourteenth Amendment. P. 283.
8. The Nineteenth Amendment, forbidding denial or abridgement of the right to vote, on account of sex, applies equally in favor of men and women, and by its own force supersedes inconsistent measures, whether federal or state. P. 283.
9. It was not the purpose of the Nineteenth Amendment to limit the taxing power of the State. P. 283.
10. The Georgia statute levying on inhabitants of the State a poll tax, payment whereof is made a prerequisite to voting, but exempting females who do not register for voting, does not abridge the right of male citizens to vote, on account of their sex, and is not repugnant to the Nineteenth Amendment. P. 284.

183 Ga. 189; 188 S. E. 140, affirmed.

APPEAL from a judgment which affirmed the dismissal of appellant's petition for a writ of mandamus requiring the appellee to allow the appellant to register for voting for federal and state officers at primary and general elections, without payment of poll taxes.

Messrs. J. Ira Harrelson and *Henry G. Van Veen,* with whom *Mr. Arthur Garfield Hays* was on the brief, for appellant.

The appellant contends that the privilege of voting for federal officials is one to which he is entitled, unrestricted by a tax unreasonably imposed through state invasion of his rights as a citizen of the United States. As such citizen he is entitled to participate in the choice of electors of the President and the Vice President of the United States and of Senators and Representatives in Congress and no State may exercise its taxing power so as to destroy this privilege. If the tax imposed by Georgia were increased to a high degree, as it can be if valid, it could be used to reduce the percentage of voters in the population to even less than eight per cent. as at present, or to destroy the elective franchise altogether. Whatever property and other economic restrictions on the franchise may have been upheld in earlier periods of our history, the admission today that a State has the power to prevent its poorer inhabitants from participating in the choice of federal officials would be totally contrary to the contemporary spirit of American institutions, and inconsistent with the purposes announced in the Preamble to the United States Constitution.

Messrs. W. S. Northcutt and *E. Harold Sheats,* with whom *Mr. Chas. B. Shelton* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

A Georgia statute provides that there shall be levied and collected each year from every inhabitant of the State between the ages of 21 and 60 a poll tax of one dollar, but that the tax shall not be demanded from the

blind or from females who do not register for voting. Georgia Code, 1933, § 92–108. The state constitution declares that to entitle a person to register and vote at any election he shall have paid all poll taxes that he may have had opportunity to pay agreeably to law. Art. II, § I, par. III; Code, § 2–603. The form of oath prescribed to qualify an elector contains a clause declaring compliance with that requirement. § 34–103. Tax collectors may not allow any person to register for voting unless satisfied that his poll taxes have been paid. § 34–114. Appellant brought this suit in the superior court of Fulton county to have the clause of the constitution and the statutory provisions above mentioned declared repugnant to various provisions of the Federal Constitution and to compel appellee to allow him to register for voting without payment of poll taxes. The court dismissed his petition. The state supreme court affirmed. 183 Ga. 189; 188 S. E. 140.

The pertinent facts alleged in the petition are these. March 16, 1936, appellant, a white male citizen 28 years old, applied to appellee to register him for voting for federal and state officers at primary and general elections. He informed appellee he had neither made poll tax returns nor paid any poll taxes and had not registered to vote because a receipt for poll taxes and an oath that he had paid them are prerequisites to registration. He demanded that appellee administer the oath, omitting the part declaring payment of poll taxes, and allow him to register. Appellee refused.

Appellant maintains that the provisions in question are repugnant to the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment and to the Nineteenth Amendment.

1. He asserts that the law offends the rule of equality in that it extends only to persons between the ages of 21 and 60 and to women only if they register for voting

and in that it makes payment a prerequisite to registration. He does not suggest that exemption of the blind is unreasonable.

Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States. To prevent burdens deemed grievous and oppressive, the constitutions of some States prohibit or limit poll taxes. That of Georgia prevents more than a dollar a year. Art VII, § II, par. III; Code § 2–5004. Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end.[1] The equal protection clause does not require absolute equality. While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay. Attempt equally to enforce such a measure would justify condemnation of the tax as harsh and unjust. See *Faribault* v. *Misener,* 20 Minn. 396, 398; *Thurston County* v. *Tenino Stone Quarries,* 44 Wash. 351, 355; 87 Pac. 634; *Salt Lake City* v. *Wilson,* 46 Utah 60, 66, *et seq.;* 148 Pac. 1104. Collection from minors would be to put the burden upon their fathers or others upon whom they depend for support.[2] It is not unreasonable to exclude them from the class taxed.

Men who have attained the age of 60 are often, if not always, excused from road work, jury duty and service

---

[1] Dowell, History of Taxation and Taxes in England, Vol. III, c. 1. Bryce, the American Commonwealth, c. XLIII. Cooley, The Law of Taxation (4th ed.) §§ 40, 1773. *Hylton* v. *United States,* 3 Dall. 171, 175, 182. *Short* v. *Maryland,* 80 Md. 392, 397, *et seq.;* 31 Atl. 322. *Faribault* v. *Misener,* 20 Minn. 396.

[2] Section 74–105, Georgia Code, declares: "Until majority, [21 years] it is the duty of the father to provide for the maintenance, protection, and education of his child."

in the militia.[3] They have served or have been liable to be called on to serve the public to the extent that the State chooses to require. So far as concerns equality under the equal protection clause, there is no substantial difference between these exemptions and exemption from poll taxes. The burden laid upon appellant is precisely that put upon other men. The rate is a dollar a year, commencing at 21 and ending at 60 years of age.

The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes. Cf. *Muller* v. *Oregon,* 208 U. S. 412, 421, *et seq. Quong Wing* v. *Kirkendall,* 223 U. S. 59, 63. *Riley* v. *Massachusetts,* 232 U. S. 671. *Miller* v. *Wilson,* 236 U. S. 373, *Bosley* v. *McLaughlin,* 236 U. S. 385. The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. § 53–501. To subject her to the levy would be to add to his burden. Moreover, Georgia poll taxes are laid to raise money for educational purposes, and it is the father's duty to provide for education of the children. § 74–105. Discrimination in favor of all women being permissible, appellant may not complain because the tax is laid only upon some or object to registration of women without payment of taxes for previous years. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447. *Rosenthal* v. *New York,* 226 U. S. 260, 270.

Payment as a prerequisite is not required for the purpose of denying or abridging the privilege of voting. It does not limit the tax to electors; aliens are not there permitted to vote, but the tax is laid upon them, if within

---

[3] In Georgia, men are excused from road work at 50 (§ 95–401) from jury duty at 60 (§ 59–112) and from liability for service in the militia at 45 (§ 86–201; see also § 86–209).

the defined class. It is not laid upon persons 60 or more years old, whether electors or not. Exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the State's power is not prevented by the Federal Constitution. Cf. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44.

2. To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. *Minor* v. *Happersett,* 21 Wall. 162, 170 *et seq. Ex parte Yarbrough,* 110 U. S. 651, 664–665. *McPherson* v. *Blacker,* 146 U. S. 1, 37–38. *Guinn* v. *United States,* 238 U. S. 347, 362. The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources. *Hamilton* v. *Regents,* 293 U. S. 245, 261.

3. The Nineteenth Amendment, adopted in 1920, declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state. *Leser* v. *Garnett,* 258 U. S. 130, 135. Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a limitation upon the power to tax. Cf. *Minor* v. *Happersett, supra,* 173; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 173–174. The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in

Georgia.[4] That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment.

Affirmed.

TEXAS ET AL. *v.* DONOGHUE, TRUSTEE.

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

No. 28. Argued November 10, 1937.—Decided December 6, 1937.

Held, that the bankruptcy court, in a proceeding under § 77B of the Bankruptcy Act, abused its discretion in denying a State permission to institute proceedings in a state court to have adjudged confiscate a quantity of oil, then in the possession of the trustee of the debtor, but claimed by the State to have become its property through statutory forfeiture when, prior to the approval of the debtor's petition, it was produced or transported in alleged violation of the conservation laws of the State. P. 289.

Possession had been voluntarily surrendered to the bankruptcy court by receivers appointed by a state court in other proceedings brought by the State.

88 F. (2d) 48, reversed.

CERTIORARI, 301 U. S. 674, to review a judgment affirming orders of the District Court in a proceeding under § 77B of the Bankruptcy Act.

Messrs. William C. Davis and *W. J. Holt,* Assistant Attorneys General of Texas, with whom *Messrs. William McCraw,* Attorney General of Texas, *Charles M.*

[4] Constitution of 1798, Art. IV, § 1 (2 Thorpe, Federal and State Constitutions, p. 800). Act of Dec. 12, 1804 (Cobb, New Digest Laws of Georgia, p. 1044).

Kennedy, Earl Street, and *Wm. Madden Hill,* Assistant Attorneys General of Texas, were on the brief, for petitioners.

Messrs. William B. Harrell and *Robert W. Kellough* for respondent.

Mr. Justice Butler delivered the opinion of the Court.

This writ is limited to the questions raised on the application of Texas to the United States court for the northern district of that State in a proceeding under § 77B of the Bankruptcy Act [1] for permission to institute proceedings in a state court for the confiscation of oil held by the trustee but claimed by the State as "unlawful oil" because produced or transported in violation of state conservation measures.

Texas statutes [2] and orders of its Railroad Commission purport to prorate production of crude oil, to prohibit purchase, transportation or handling of that produced in whole or in part in excess of the amount allowed,[3] to impose fines and penalties for violations,[4] and to make oil produced or transported in violation of statute or order subject to confiscation in an action brought by the State for that purpose.[5] The statute declares that if at the

[1] 11 U. S. C., § 207.

[2] Texas Revised Civil Statutes, 1925, Title 102.

[3] Art. 6049e, § 10.

[4] Art. 6036.

[5] Art. 6066 (a), § 10:

(a) "All unlawful oil . . . [is] hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. . . .

(b) "When the Attorney General is advised from any source of the presence and existence of unlawful oil . . . it shall be his duty to institute a suit in rem against such unlawful oil . . . and against all persons owning, claiming or in possession thereof, such suit to be brought in the name of the State . . . in any court of competent jurisdiction in Travis County or in the county in which such oil . . .

trial it shall be found that the oil is unlawful, the court shall render judgment forfeiting the same to the State and authorizing an order directed to sheriff or constable commanding him "to seize and sell" the condemned oil. Costs of suit and expenses of the sale are to be paid out of money received from the oil, and the balance becomes part of the general revenue fund of the State.

There is before us no question as to validity of the State's measures to regulate production, or as to when, if ever, the oil in controversy became forfeit.[6] The sole issue is whether the bankruptcy court should have permitted the State to bring suit in a state court to have the oil adjudged confiscate.

These are the facts.

Texas sued the Trinity Refining Company in the district court, 126th judicial district, Travis county, to recover fines and penalties for violation of the conservation

---

is located. If it shall appear to the court . . . that unlawful oil . . . mentioned in the petition . . . [is] in danger of being removed, wasted, lost or destroyed, the court is authorized and required . . . to issue restraining orders or injunctive relief . . . or to appoint a receiver to take charge of the oil . . . in question, or to direct the sheriff of the county . . . to seize and impound the same until further orders of the court."

(c) " . . . If, upon the trial of such suit the oil . . . in controversy is found to be unlawful . . . then the court . . . shall render judgment forfeiting the same to the State . . . and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution . . . The money realized from the sale . . . shall be applied, first, to the payment of the costs of suit and expenses incident to the sale . . . and all funds then remaining, shall be . . . placed to the credit of the General Revenue Fund of the State. . . ."

[6] *United States* v. *1960 Bags of Coffee*, 8 Cranch 398. See also *Clark* v. *Protection Insurance Co.*, 1 Story (C. C.) 109, 134; Fed. Cas. No. 2832.

laws. The court appointed Clopton and Hyder receivers of defendant's property pending the trial of the case. They took possession of property claimed by the defendant, including a large quantity of oil which the State insists had already become its property because unlawfully produced or transported. Later, the State sued the company in the district court, 98th judicial district of the same county, to recover delinquent taxes. That suit having been transferred to the district in which the first was pending, the court there appointed as receivers in the second case the same persons it had appointed in the first one.

Within four months after commencement of the first suit, the company filed its petition in the United States district court, submitting a plan of reorganization. The court found the petition to have been presented in good faith, approved it as properly filed, appointed Donoghue trustee of the debtor, directed him to take possession of its property, ordered that all persons having property of the debtor deliver it to him and issued in usual form a restraining order preventing interference with his possession or control. The trustee took from the receivers property claimed by the debtor including the oil in question, approximately 77,000 barrels. Texas applied to the bankruptcy court for permission to bring suit in a state court to obtain judgment of confiscation against that oil. The court withheld consent and directed the trustee to retain the oil. The Circuit Court of Appeals sustained that ruling, 88 F. (2d) 48, 51, and to review its judgment upon that issue, we brought the case here. 301 U. S. 674.[7]

[7] Later, no plan of reorganization having been adopted, the bankruptcy court ordered liquidation of the debtor's property under subds. (c) (8) and (k) of § 77 B. Donoghue was appointed trustee in bankruptcy. § 44; 11 U. S. C., § 72. This Court substituted him in that capacity as respondent in place of himself as trustee of the debtor.

The State's right to bring the suit in the state court is the same as if on its voluntary petition the company had been adjudged bankrupt on the day its petition for reorganization was approved. § 77B (o). Forfeiture of unlawful oil under Texas law is a penalty imposed to vindicate the State's policy of conservation. *Champlin Rfg. Co.* v. *Corporation Commission,* 286 U. S. 210, 240–241. The bankruptcy court exercises jurisdiction under sovereignty that is independent of and foreign to that of Texas. *Moore* v. *Mitchell,* 281 U. S. 18, 23. It is without power to enforce penalties imposed by the State for violation of its laws. *The Antelope,* 10 Wheat. 66, 123. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 289, *et seq.* Cf. § 57 (j), Bankruptcy Act;[8] *New York* v. *Jersawit,* 263 U. S. 493, 496; *United States* v. *Childs,* 266 U. S. 304, 309–310. The State's insistence is not that it is presently entitled to establish a right to forfeit the oil, but that the oil became its property when produced or transported contrary to law. It seeks not to forfeit but to enforce the forfeiture that resulted, as it maintains, immediately from unlawful production or transportation.

Possession or control of the oil by the state court is not essential to its jurisdiction to entertain the suit proposed to be brought.[9] Texas does not claim to be entitled to possession of the oil until final adjudication in the state court. Retention by the trustee is not inconsistent with the maintenance of that suit. He is entitled there to be heard in support of his claim to the oil. If when the debtor's petition was approved the oil did not belong to Texas, the State was not entitled to have it withheld from the trustee. But, if by reason of unlawful production or transportation, the oil had already by forfeiture become

[8] 11 U. S. C., § 93 (j).

[9] Art. 6066a, §§ 10 (b) and (c).

the property of the State, the trustee was not entitled to take or retain it. If in a suit brought by Texas in a state court it should be determined that title to the oil had vested in the State before approval of the debtor's petition, the bankruptcy court doubtlessly will recognize that title and direct the trustee to hand over the oil or account for it to the State. *Rose* v. *Himely,* 4 Cranch 241, 268. *Hudson* v. *Guestier,* 4 Cranch 293, 297. See *Wisconsin* v. *Pelican Ins. Co., supra,* 291.

The filing of the petition for reorganization in the bankruptcy court may not be held to deprive the State of opportunity in its own court to establish its claim that through forfeiture it had already become the owner of the oil for that would be to take the State's property for the benefit of the offending company or its creditors. Nor may the receivers' voluntary surrender of possession to the debtor's trustee prevent adjudication of the State's claim. The bankruptcy court abused its discretion in denying the State's application for permission to institute proceedings in the state court and, to the extent that the Circuit Court of Appeals sustained that ruling, its judgment must be

Reversed.

MR. JUSTICE CARDOZO, dissenting.

I think the judgment should be affirmed.

Texas was not the owner of the oil in controversy when it came into the possession of the court of bankruptcy. If she had been such an owner, she could be heard in that court *pro interesse suo,* vindicating her title in reclamation proceedings like any other adverse claimant. By common consent ownership sufficient for such relief was not hers when the court of bankruptcy took the oil into its custody, and is not hers today. "It is not correct to say, that property forfeited is vested in the government

at the very moment of forfeiture, and the title of the owner immediately devested. On the contrary, the established doctrine is, that, notwithstanding the forfeiture, the property remains in the owner, until it is actually seized by the government, and then by the seizure the title of the government relates back to the time of the forfeiture." *Clark* v. *Protection Insurance Co.,* 1 Story 109, 134; cf. *United States* v. *Stowell,* 133 U. S. 1. So far as I am aware there is no contention to the contrary. The oil "shall be forfeited to the State as hereinafter provided" (Texas Revised Civil Statutes, Art. 6066a, § 10), and not otherwise. The statute does not mean that without the aid of any judgment title is transferred at once on the commission of the offense. The judgment is to be *in rem* and imports control over the *res. Pennoyer* v. *Neff,* 95 U. S. 714, 734; *Isaacs* v. *Hobbs Tie & T. Co.,* 282 U. S. 734.

With the oil in the possession of the federal court of bankruptcy—a possession lawfully acquired—leave to sue in the state court for a decree of forfeiture and sale will be an idle and empty form, productive of nothing except delay and vain expense, unless upon the pronouncement of the decree it will be the duty of the court of bankruptcy to surrender the oil to the court of another jurisdiction, and this for the sole purpose of making a forfeiture effective. I deny that any such duty will exist. Cf. *Isaacs* v. *Hobbs Tie & T. Co., supra.* I find no intimation of its existence in any case till this one. Certainly there is none in the cases now cited in the opinion of the court. True indeed it is that if possession of the *res* were to be acquired by the Texas court at the time of the decree of forfeiture or even at the time of a sale pursuant thereto, a title obtained thereunder would be recognized as valid everywhere. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 291; *Rose* v. *Himely,* 4 Cranch 241; *Hudson* v. *Guestier,* 4 Cranch 293; Dicey, Conflict of

Laws, 5th ed., pp. 484, 485. This is far from saying that a court of another jurisdiction which already holds the *res* upon a trust for general creditors will give its possession up in aid of a forfeiture otherwise impossible. "The courts of no country execute the penal laws of another." *The Antelope,* 10 Wheat. 66, 123; *Gwin* v. *Breedlove,* 2 How. 29, 37; *Wisconsin* v. *Pelican Ins. Co., supra; Huntington* v. *Attrill,* 146 U. S. 657, 666; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 102; Dicey, *supra,* p. 212. Cf. Bankruptcy Act, § 57 (j). Within the purview of that doctrine, the state and the federal courts are ranked as courts of separate sovereignties, quite as much as the courts of different states. *Gwin* v. *Breedlove, supra; Moore* v. *Mitchell,* 281 U. S. 18, 23. If the oil in controversy had been removed to California and were in possession of the receivers of a California corporation after a decree of dissolution, would any one contend that the California court would order its receivers to return the property to Texas for the purpose by such return of making a forfeiture effective? A federal court of bankruptcy is subject to no greater duty. The prevailing opinion commits us to a holding that property in one jurisdiction may be diverted from the use of creditors and made to feed a forfeiture in another jurisdiction, a forfeiture *brutum fulmen* unless thus aided from afar. If that is done, the efficacy of penal laws will have taken on a new extension. Without a transfer of possession the forfeiture is dead at birth. A court of bankruptcy will not stir a hand to make it viable.

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

WORCESTER COUNTY TRUST CO. *v.* RILEY, CONTROLLER OF CALIFORNIA, ET AL.

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

No. 34. Argued November 15, 16, 1937.—Decided December 6, 1937.

1. State taxing officials seeking through judicial proceedings to assess a succession tax on intangible property in pursuance of laws of their State, which impose the tax only if the deceased was domiciled therein at death, can not constitutionally be interpleaded in a federal court with tax officials of another State likewise claiming the domicile and the right to tax, in order that the federal court may determine which State is in fact domiciliary and enjoin taxation in the other State, for the purpose of avoiding double taxation. P. 296.

Such a suit is in effect against the State, forbidden by the Eleventh Amendment.

A bill of interpleader, brought by an executor against tax officials of California and of Massachusetts, alleged that the California officials had determined and were asserting that the decedent, at death, was domiciled in that State, and were threatening to assess and collect under California laws, applicable in case of local domicile, a death tax upon all his intangibles, which would be in excess of any tax that would be due if the domicile was Massachusetts; and that the Massachusetts official, in behalf of his State, was asserting that the domicile was in Massachusetts and the estate taxable there upon all the intangibles; that it was impossible in law and in fact for decedent to have been domiciled in both States at the time of his death, or for his estate to be subject to death taxes in both States as asserted, and that attempted collection was a threatened deprivation of property without due process of law and denial of equal protection of the laws. The bill prayed that the court order the respondent officials of the two States to interplead their respective claims for the tax; that the court determine the domicile of decedent, the amount of the tax, and the person or persons to whom it was payable; and that respondents be enjoined from any other proceedings to collect it. *Held*, that, on objection of the California respondents, the suit was properly dismissed as, in substance, a suit against the State.

2. Under California statutes, inheritance taxes are assessed by judicial proceedings resulting, after full opportunity for presentation of evidence and a hearing, in a judgment which is reviewable on appeal by the state courts, and by this Court if it involves any denial of federal right. P. 298.
3. Conflicting decisions of the same issue of fact do not necessarily imply judicial error. P. 299.
4. Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different States as to the place of domicile, where the exertion of state power is dependent upon domicile. P. 299.
5. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, distinguished. P. 300.

89 F. (2d) 59, affirmed.

CERTIORARI, 301 U. S. 678, to review the reversal of a decree granting a temporary injunction in an interpleader suit, 14 F. Supp. 754.

Mr. Merrill S. June, with whom *Mr. Bradley B. Gilman* was on the brief, for petitioner.

Mr. James J. Ronan, Assistant Attorney General of Massachusetts, with whom *Mr. Paul A. Dever,* Attorney General, was on the brief, for Henry F. Long, Commissioner of Corporations and Taxation of Massachusetts, intervener-respondent, by special leave of Court.

Mr. George S. Fuller for Riley, Controller, et al., respondents.

By leave of Court, briefs of *amici curiae* were filed by: *Messrs. Maurice Bower Saul* and *William N. Trinkle,* on behalf of Girard Trust Co. et al.; *Mr. James A. Branch* and *Daniel MacDougald,* on behalf of Hughes Spalding et al.; *Mr. Maurice Bower Saul,* on behalf of Alpin W. Cameron; *Mr. James A. Reed,* on behalf of

Hadassah T. Boyer, — all urging issuance of the writ of certiorari—and

Messrs. David T. Wilentz, Attorney General of New Jersey, *Jack Holt,* Attorney General of Arkansas, *A. A. F. Seawell,* Attorney General of North Carolina, *Byron G. Rogers,* Attorney General of Colorado, *Cary D. Landis,* Attorney General of Florida, and *J. W. Taylor,* Attorney General of Idaho, on behalf of the States of New Jersey, Arkansas, North Carolina, Colorado, Florida, and Idaho; *Messrs. David T. Wilentz,* Attorney General of New Jersey, and *William A. Moore,* on behalf of New Jersey; *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* and *Wendell P. Brown,* on behalf of New York; and *Messrs. Casper Schenk* and *I. H. Van Winkle,* Attorney General of Oregon,—all urging affirmance of the decision of the Circuit Court of Appeals.

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the Federal Interpleader Act, § 24 (26) of the Judicial Code as amended January 20, 1936, c. 13, § 1, 49 Stat. 1096, may be availed of for the litigation and final disposition of the rival claims of two states, each asserting through its officers the right to recover death taxes on the ground that decedent was last domiciled within its boundaries.

Petitioner is the duly qualified executor named in the last will of decedent, which has been probated in Massachusetts. Ancillary administration of the estate has been granted in California. Petitioner brought the present suit in the District Court for Massachusetts, joining as defendants Commissioner of Corporations and Taxation of the Commonwealth of Massachuetts, and respondents, officers of the State of California, all charged with the duty of administering death tax statutes of their respective states. The bill of complaint is founded upon the Interpleader Act and seeks the remedy which it affords.

Section 24 (26) confers jurisdiction on the district courts in suits of interpleader or in the nature of interpleader, by plaintiffs who are under an obligation to the amount of $500 or more, the benefits of which are demanded by two or more adverse claimants who are citizens of different states. By subsection 26 (a) "Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another." And by subsection 26 (a) (ii) and (d) complainant, upon satisfying jurisdictional requirements of the Act, and depositing the money or property in the registry of the court, or upon giving a prescribed bond, is entitled to a decree discharging him from further liability and enjoining the claimants from further proceedings in other courts to recover the sum claimed.

The bill of complaint alleges that decedent left bank deposits and other intangibles in California and Massachusetts, a substantial part of which has come into the possession or custody of petitioner; that respondents, the California taxing officials, have determined and assert that decedent at death was domiciled in California, and that under the law of that state his estate is subject to death taxes upon all his intangibles; that respondents threaten to assess and collect there a tax in excess of any which would be due if decedent were domiciled in Massachusetts; that the Massachusetts Commissioner, in behalf of the state, asserts a similar claim that decedent at death was domiciled in Massachusetts, and that his estate is subject to taxes there upon all his intangibles; that it is impossible in law and in fact for decedent to have been domiciled in both states at the time of his death, or for his estate to be subject to death taxes in both states as asserted; and that the attempted collection of the tax is a threatened deprivation of property without due proc-

ess of law and a denial of equal protection of the laws. Petitioner prays that the Court order respondent officials of the two states to interplead their respective claims for the tax; that the Court determine the domicile of decedent, the amount of the tax, and the person or persons to whom it is payable; and that respondents be enjoined from any other proceedings to collect it.

Respondents, the California officers, appeared specially and moved to dismiss the complaint upon the ground, among others, that the suit was brought against respondents in their official capacity, and was in substance a suit against the state forbidden by the Eleventh Amendment. The district court overruled this contention and granted a temporary injunction restraining defendants until further order of the court, from taking any action to assess the tax. The Court of Appeals for the First Circuit reversed, 89 F. (2d) 59, holding that the maintenance of the suit is an infringement of the Eleventh Amendment, which provides that "The judicial power . . . shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ." We granted certiorari, 299 U. S. 567, the decision below being of an important question of federal law which has not been but should be settled by this Court. Supreme Court Rules, 38 (5) (b).

Petitioner does not deny that a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids, *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *Smith* v. *Reeves*, 178 U. S. 436; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Ex parte New York, No. 1*, 256 U. S. 490, 500; *Missouri* v. *Fiske*, 290 U. S. 18, 28; see *Cunningham* v. *Macon & Brunswick R. Co.*, 109

U. S. 446; cf. *Wells* v. *Roper,* 246 U. S. 335, or that generally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States. Cf. *Ex parte Young,* 209 U. S. 123; *Scully* v. *Bird,* 209 U. S. 481; *Old Colony Trust Co.* v. *Seattle,* 271 U. S. 426, with *Louisiana* v. *Jumel, supra; Hagood* v. *Southern, supra; In re Ayers, supra; Lankford* v. *Platte Iron Works, supra.* The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer.

Petitioner's contention is that here the prospective official action of respondents involves a threatened violation of the Constitution for which state law can afford no sanction. It is said that as the officers of each state assert the right to collect the tax out of decedent's property within the state, they may succeed in establishing that right by a judicial determination in each that decedent was last domiciled there, cf. *Dorrance's Estate,* 309 Pa. 151; 163 Atl. 303; *In re Estate of Dorrance,* 115 N. J. Eq. 268; 170 Atl. 601; 116 N. J. Eq. 204; 172 Atl. 503, with *New Jersey* v. *Pennsylvania,* 287 U. S. 580; *Dorrance* v. *Pennsylvania,* 287 U. S. 660; *Hill* v. *Martin,* 296 U. S. 393, although he could not be domiciled in both; that neither state could constitutionally authorize its officials to impose the tax if decedent was last domiciled elsewhere, and petitioner is thus exposed to the danger of double taxation, which the Constitution forbids. See *First National Bank* v. *Maine,* 284 U. S. 312; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204. As those officials threaten acts whose consequence may be taxation which is unauthorized by any valid state enactment, petitioner in-

sists that the suit brought to restrain such action does not run against the state.

But this argument confuses the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall, with other types of action by state officers which, because it passes beyond the limits of a lawful authority, is within the reach of the federal judicial power notwithstanding the Eleventh Amendment. This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra.* But petitioner does not assert that there are such statutes in California or Massachusetts, or that the courts in those states have ever held or threaten to hold that their laws taxing inheritances apply to intangibles of those domiciled in other states.

Although the bill of complaint states that respondents California officials "have determined" that decedent was domiciled in California, it is not contended that they have or are assuming authority to assess the tax, independently of the judgment of a court. Under California statutes, inheritance taxes are assessed by judicial proceedings resulting, after full opportunity for presentation of evidence and a hearing, in a judgment which is reviewable on appeal by the state courts, and by this Court if it involves any denial of federal right. §§ 14, 15, 16, 17 and 18, Cal. Inheritance Tax Act of June 3, 1921, Stats. 1921, p. 1500, as amended; see *Stebbins* v. *Riley,* 268 U. S. 137; *Estate of Haskins,* 170 Cal. 267; 149 Pac. 576; *Estate of Brown,* 196 Cal. 114; 236 Pac. 144.

Petitioner does not contend that respondents, the California officers, propose to do more than invoke the action

of its courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in California as the basis of its power to impose the tax. Nor is it denied that in so doing they are acting in the performance of official duty imposed upon them by state statutes, which conform to all constitutional requirements. Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error, *Central Land Co.* v. *Laidley,* 159 U. S. 103; *Tracy* v. *Ginzberg,* 205 U. S. 170, or require that pronouncements shall be consistent. *Milwaukee Electric Ry. & L. Co.* v. *Wisconsin ex rel. Milwaukee,* 252 U. S. 100, 106. Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries. *Thormann* v. *Frame,* 176 U. S. 350; *Overby* v. *Gordon,* 177 U. S. 214; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Iowa* v. *Slimmer,* 248 U. S. 115, 120, 121; cf. *Tilt* v. *Kelsey,* 207 U. S. 43. Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States. Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone

the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids. We do not pass on the construction of the Interpleader Act or its applicability in other respects.

Unlike that in *Ex parte Young, supra,* and in the many cases which have followed it, the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it. In *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, on which petitioner relies, it was held that the bill of complaint stated a cause of action in equity to enjoin a state official from proceeding to assess and collect an inheritance tax upon chattels alleged to have no tax situs within the state. The objection that the suit was one against the state within the meaning of the Eleventh Amendment was not urged or considered on the appeal to this Court.

Affirmed.

NATURAL GAS PIPELINE CO. *v.* SLATTERY ET AL.

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

No. 230. Argued November 8, 1937.—Decided December 6, 1937.

1. A Delaware corporation, engaged in piping and selling natural gas in interstate commerce, sold and delivered gas in Illinois, under a long term contract, to an Illinois corporation which, in turn, sold it in that State to distributing companies. All the stock of this local gas company and many of the outstanding shares of the pipeline company were owned by a local investment company. Two of the eight or nine directors of the pipeline company at all times since its incorporation had been directors of the investment company or of corporations wholly controlling it or the local gas company, through stock ownership. The president of the local gas

company was president and director of the investment company and a director of the pipeline company; and a director of the local gas company and of the investment company was vice-president and director of the pipeline company. An Illinois commission, in a proceeding under the Illinois Public Utility Act to determine whether the rates of the local gas company should be reduced, found, on evidence, that the pipeline company—not a party to the proceeding—was an "affiliate" of the local gas company, within the meaning of that Act, and that, in order to fix reasonable rates for the sale of gas by the local gas company, inquiry was necessary into operating charges, including the cost of gas purchased from the pipeline company. Accordingly it made an order directing the pipeline company to make available for examination by the commission all of its accounts and records relating to transactions between it and the local gas company, and to file with the commission a report of the cost of property used in, and a statement of income and expenses in connection with, supplying gas to that company; or, in the alternative, that it report to the commission a statement of the cost of all properties used by it in the business of transporting and selling natural gas, together with a statement of the income and expenses of such operations.

Held, that the Illinois statute is not unconstitutional in so far as it demands access to books and accounts of the pipeline company and requires production of the information which the order seeks. P. 306.

2. The reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price. P. 307.
3. The Constitution does not require that such an inquiry be limited to cases where common control is secured through ownership of a majority of voting stock. P. 307.
4. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority, of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry. P. 308.
5. An interstate pipeline company can not be bound by an order of a state commission, with respect to its own rates, or its contract with a local distributor, in a proceeding concerning the

distributor's rates to which the pipeline company is not a party. P. 308.

6. It is not to be presumed that information sought by a state commission for which there is a probable legitimate use, will be put to an unconstitutional use. P. 309.
7. Application for preliminary injunction challenging the powers of a state commission under the state law, the commerce clause, and the Fourteenth Amendment, to require reports from a corporation necessitating great expense, *held* premature, since recourse could have been had to the commission itself for a stay and a modification without subjecting the applicant to statutory penalties. P. 309.
8. The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, is of especial force when resort is had to the federal courts to restrain the action of state officers, and the objection has been taken by the trial court. P. 310.
9. The extent to which a federal court may relax this rule where the order of the administrative body is assailed in its entirety, rests in sound discretion; but there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority is also attacked, for there is the possibility of removal of such issues from the case by modification of its order. P. 311.

Affirmed.

APPEAL from a decree of the District Court of three judges denying a preliminary injunction.

Mr. Douglas F. Smith, with whom *Messrs. William P. Sidley* and *J. J. Hedrick* were on the brief, for appellant.

Mr. Harry R. Booth, with whom *Messrs. Otto Kerner,* Attorney General of Illinois, *Montgomery S. Winning, James G. Skinner, W. Robert Ming, Jr.,* and *Abe L. Stein* were on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal presents the question whether the court below rightly denied an application for an interlocutory

injunction restraining appellees, members of the Illinois Commerce Commission, from enforcing an order by which appellant was directed to open its records and accounts to inspection by the commission and to furnish certain statistical data for use in a proceeding pending before it. The proceeding was brought to fix rates charged for gas sold in Illinois by the Chicago District Pipe Line Company, an affiliated corporation.

Appellant, a Delaware corporation, sells in Illinois natural gas, which it transports through its pipe lines from Oklahoma to points in Illinois where, pursuant to a long term contract, it delivers the gas to the District Company, an Illinois corporation. The latter is engaged in intrastate commerce in Illinois where it sells the gas, which it purchases from appellant, to other companies which in turn distribute the gas to consumers within the state. The rates of the District Company are subject to regulation by the commission, as provided by the Illinois Public Utilities Act. All its shares of stock are owned by the Natural Gas Investment Company, an Illinois corporation, which owns 26.63% of the outstanding shares of appellant. Of the eight or nine directors of appellant, at all times since its incorporation, two have been members of the board of directors of either the Investment Company or of corporations wholly controlling it or the District Company, through stock ownership. The commission has found that the president of the District Company is president and director of the Investment Company and a director of appellant, and that a director of the District Company and of the Investment Company is a vice-president and director of appellant.

Section 8a (2) of the Illinois Public Utilities Act, Ill. Rev. Stat. 1937, c. 111⅔, § 8a, gives the commission jurisdiction over "affiliated interests having transactions, other than ownership of stock and receipt of dividends

thereon, with public utilities under the jurisdiction of the Commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions . . . and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe." The subsection defines "affiliated interests" as meaning:

"(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, . . .

"(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility." [1]

In November, 1936, the commission, in the exercise of its authority under the Act, began a proceeding to which the District Company was, and appellant was not, a party, to determine whether the rates charged by the District Company should be reduced. After hearing evidence, the commission found that appellant was an affiliate of the District Company and that in order to fix reasonable rates for the sale of gas by the latter, inquiry was

[1] Section 8 (a) (2) also provides that "affiliated interests" mean:

"(g) Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

"(h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated."

necessary into its operating charges including the cost of gas purchased from appellant. The commission accordingly made an order, the validity of which is assailed here, directing that appellant make available for examination by the commission all of its accounts and records relating to transactions between it and the District Company. It further ordered that appellant file with the commission a report of the cost of property used in, and a statement of income and expenses in connection with, supplying gas to the District Company; or, in the alternative, that it report to the commission a statement of the cost of all properties used by it in the business of transporting and selling natural gas, together with a statement of the income and expenses of such operations.

In the present suit in equity, brought in the District Court for northern Illinois, petitioner prayed that appellees be enjoined from enforcing the order and that it be set aside as made without authority of state law, and on the further grounds that the statute and order are invalid because they violate the commerce, equal protection and due process clauses of the Federal Constitution. The case comes here on appeal, Judicial Code, § 266, from the order of the district court of three judges, which denied an interlocutory injunction. It held that appellant had failed to show that the order infringed any constitutional immunity or that appellant would suffer irreparable injury by reason of the action of the commission.

The court thought that the commission, in conducting the pending rate proceeding, and in investigating the reasonableness of the operating costs of the District Company, was entitled to the information it sought, which might be disclosed by an examination of appellant's accounts and records; that for that purpose the commission would have been entitled to compel their production by subpoena; and that as appellant had failed

to present to the commission any objection to the breadth of the order, or to the use of an order rather than a subpoena to secure the information, no case was made for the interposition of a court of equity.

First. The appellant assails the statute as unconstitutional so far as it authorizes the commission to obtain from appellant's books and records any information bearing upon the reasonableness of the price of gas sold to the District Company. Appellant recognizes that the absence of "arm's length bargaining" between contracting affiliates is sufficient to support such an inquiry, and may be an adequate ground, in fixing the reasonable rates of a public utility company, for disregarding the price at which it purchases the commodity distributed. See *Western Distributing Co.* v. *Public Service Comm'n*, 285 U. S. 119. But it is said that here the statute infringes the commerce clause and the Fourteenth Amendment because it authorizes the inquiry without proof of common control or want of arm's length bargaining; that the Constitution forbids all inquiry as to the relations between the two companies and the prices at which the gas is sold by one to the other, in advance of proof of their common control or other evidence that the bargaining was not at arm's length. Assuming, without deciding, that the breadth of this attack relieves appellant of the necessity of applying to the commission to vacate its order before seeking equitable relief in the federal courts, see *Hollis* v. *Kutz*, 255 U. S. 452; cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 167, we think that the objection is not substantial.

We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations

engaged in local business. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579. It is similarly subject to garnishment and writ of attachment. *Davis* v. *Cleveland, C., C. & St. L. Ry. Co.,* 217 U. S. 157. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted. *Smith* v. *Alabama,* 124 U. S. 465; *Red "C" Oil Co.* v. *Board of Agriculture,* 222 U. S. 380; *Minnesota Rate Cases,* 230 U. S. 352, 402–412; *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n,* 296 U. S. 261, and cases cited.

This Court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price. *United Fuel & Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 320; *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 144; *Western Distributing Co.* v. *Public Service Comm'n, supra,* 124; *Dayton Power & L. Co.* v. *Public Utilities Comm'n,* 292 U. S. 290. We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of the two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, as the statute recognizes,[2] there are other methods of control of a corpora-

[2] See footnote 1, *supra.*

tion than through such ownership. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry. In these circumstances appellant can hardly object to the attempted inquiry into the fairness of the price. Cf. *Corsicana National Bank* v. *Johnson,* 251 U. S. 68, 90, and cases cited; *Geddes* v. *Anaconda Copper Mining Co.,* 254 U. S. 590, 599; *Western Distributing Co.* v. *Public Service Comm'n, supra,* 124; *Globe Woolen Co.* v. *Utica Gas & Elec. Co.,* 224 N. Y. 483; 121 N. E. 78. The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length. *Corsicana National Bank* v. *Johnson, supra.* We cannot say that the Illinois statute is subject to any constitutional infirmity in so far as it demands access to the books and accounts of appellant or requires production of the information which the order seeks.

Second. Appellant also challenges the order of the commission as a first step in the direction of unconstitutional action. But appellant is not a party to the pending proceeding, whose ultimate concern is the rates of the District Company. In that proceeding the commission can make no order binding on appellant with respect to its own rates or its contract. Cf. *State Corporation Comm'n* v. *Wichita Gas Co.,* 290 U. S. 561. There is no contention that the commission threatens to make any order modifying or cancelling either. The statute does not prescribe the effect which the commission is to give to the information sought. Assuming without deciding that it cannot rightly be made the basis for disregarding the price at which appellant sells gas to the District Company, unless as the result of the inquiry there ap-

pears to be in some form an effective single control of the two companies, we cannot also assume that the commission will arbitrarily make such use of it in fixing the District Company's rates. It will be time enough to challenge such action of the commission when it is taken or at least threatened, *First National Bank* v. *Albright*, 208 U. S. 548; *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, and to consider whether appellant has standing to make the challenge. The commission is not to be enjoined from seeking information whose probable usefulness is established, as it is in this case, by the statutory prerequisite of partial community of management or stock ownership.

Third. Appellant urges that, in requiring statistical reports, the expense of whose preparation is said to be great, the order transcends statutory authority, or exercises it so arbitrarily as to place an unconstitutional burden on commerce and infringe the Fourteenth Amendment. It is said that equity alone can afford adequate relief because of the cumulative penalties for failure to comply with the order. See §§ 76 and 77 of the Act.

We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By §§ 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was "improper, unreasonable or contrary to law." Section 67 authorizes the commission at any time, upon proper notice and hearing, to "rescind, alter or amend any . . . order or decision made by it." We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone

the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 470; 287 U. S. 346.

As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex parte Young,* 209 U. S. 123, 147; *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 349; see *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 659, but no reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Refusal of postponement would have been the occasion for recourse to the courts. Compare *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 293, with *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; *Ex parte Young, supra,* 156. But appellant did not ask postponement.

A temporary injunction was not necessary to protect appellant from penalties pending final determination of the suit. The commission agreed not to enforce the order before the decision of the lower court on the application for interlocutory injunction. In order to give appellant opportunity to appeal here the district court stayed, for thirty days, its order denying an injunction, and by an order of a Justice of this Court the operation of the commission's order and the running of penalties were enjoined pending the disposition of the cause here.

The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, *Goldsmith* v. *U. S. Board of Tax Appeals,* 270 U. S. 117, 123; *Porter* v. *Investors Syndicate, supra; Petersen Baking Co.* v. *Bryan,* 290 U. S. 570,

575; see *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463, 464–466, is of especial force when resort is had to the federal courts to restrain the action of state officers, *Matthews* v. *Rodgers,* 284 U. S. 521, 525–526; *Porter* v. *Investors Syndicate,* 286 U. S. 461; 287 U. S. 346; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271; *Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, and the objection has been taken by the trial court. *Matthews* v. *Rodgers, supra.*

The extent to which a federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. *Hollis* v. *Kutz, supra; United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 282; cf. *United States* v. *Sing Tuck, supra.* But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances the trial court is free to withhold its aid entirely until administrative remedies have been exhausted.

Affirmed.

FRAD *v.* KELLY, U. S. MARSHAL.

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

No. 87. Argued November 9, 10, 1937.—Decided December 6, 1937.

1. Where a defendant in a criminal prosecution in the federal district court pleads guilty upon three separate indictments, the court may impose a sentence of fine and imprisonment upon one indictment, and on each of the others may suspend the imposition of sentence and place the defendant on probation for a definite period to begin upon completion of service of the sentence on the first. Probation Act of 1925, §§ 1–2; 18 U. S. C., §§ 724–725. P. 315.
2. A federal district judge who, while sitting in a criminal case in a district to which he had been assigned pursuant to R. S. § 591, as amended, had, upon a plea of guilty, suspended sentence and placed the defendant upon probation, is without authority, after the termination of his service in that district, to make an order revoking the probation and terminating the proceedings against the probationer. P. 317.
3. A court other than that in which the judgment and sentence are recorded is without authority, either under the Probation Act or the statute providing for the assignment of judges, to make an order, pursuant to § 2 of the Probation Act, revoking probation and terminating the proceedings against the probationer. P. 318.
4. Limitations upon the jurisdiction of the assigned judge can not be waived by the actions of the probation officer or of the District Attorney. P. 319.

89 F. (2d) 866, affirmed.

CERTIORARI, 301 U. S. 681, to review a judgment reversing orders of the district court which discharged the petitioner upon a writ of habeas corpus and denied a motion by the Government to sentence him upon indictments under which probation had been granted.

Mr. Harris Jay Griston for petitioner.

Solicitor General Reed, Assistant Attorney General McMahon, and *Messrs. William W. Barron, Bates*

Booth and *Edward J. Ennis* were on a brief for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner pleaded guilty to three indictments in the District Court for the Southern District of New York. Judge Inch, a district judge of the Eastern District of New York, who had been designated and assigned to sit in the Southern District, pursuant to R. S. 591, as amended,[1] received the pleas and imposed a sentence under the first indictment (No. C 96–116) of two years' imprisonment and $1,000 fine. Under the other indictments he made identical orders: "Imposition of sentence suspended. Probation for four years to begin after serving sentence on C 96–116. Subject to the standing probation orders of this Court." The petitioner paid his fine and served his sentence and thereupon entered upon his period of probation.

Twenty months after Judge Inch had returned to his own district, application was made to him at chambers, to discharge the petitioner from probation and to terminate the proceedings against him, pursuant to § 2 of the Probation Act of March 4, 1925.[2] The judge directed that notice of the application be given to the probation officer of the Southern District of New York. This was done and, after a hearing on the merits in the Eastern District, at which the probation officer was present and took part, Judge Inch entered an order revoking the probation, discharging the petitioner from further supervision and terminating the proceedings against him. The order was captioned in the "United States District Court for the Southern District of New York" and was filed in the office of the clerk of that court.

[1] U. S. Code, Title 28, § 17.

[2] U. S. Code, Title 18, § 725.

About a year later, on a petition by the probation officer of the Southern District, a judge sitting in that district authorized a warrant for the petitioner's apprehension upon a charge of violation of the terms of his probation. The petitioner was arrested and admitted to bail pending a hearing.

Thereafter the United States Attorney for the Southern District moved to vacate the order of Judge Inch terminating the probation and the proceedings. By stipulation of counsel, Judge Inch returned to the Southern District to hear the parties upon this motion but he entered no order since, meantime, the petitioner had surrendered himself to the marshal and sought a writ of *habeas corpus,* and the United States Attorney had moved before a judge sitting in the Southern District that the petitioner be sentenced on the two indictments under which sentence had been suspended.[3] The petition for the writ and the motion for sentence were heard together; the petition was granted, and the motion was denied. The Circuit Court of Appeals reversed and remanded the cause "for the consideration of the revocation of [the petitioner's] probation and for sentence if warranted."[4]

We granted the writ of certiorari because of the importance of the questions presented in the administration of the Probation Act. We hold that the judgment of the court below was right.

First. The contention that the trial court was without power to suspend the imposition of sentences on the pleas of guilty to two of the indictments and place the de-

[3] In fact there were two motions. The one was for sentence on the two indictments. This apparently was not pressed. The other was for an order committing the petitioner "for the period of the unserved portion of his sentence . . . to wit, four years in a place to be designated by the Attorney General of the United States, and for such other, further, and different relief as to the court may seem just and proper."

[4] 89 F. (2d) 866.

fendant on probation effective after completion of service of sentence on the third indictment is without merit. Based upon this contention the petitioner says that when he had completed service of the sentence imposed on indictment C 96–116 there remained no sentence against him and the term having long since expired the court was without power then to impose one.

The Probation Act (*supra*) provides, in § 1, that United States courts having original jurisdiction of criminal actions, being satisfied that the ends of justice and the best interests of the public and of the defendant will be served thereby, shall have power, after conviction for any crime or offense not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," or to impose a fine and place the defendant upon probation; to revoke or modify any condition of probation or change the period thereof, provided that the period with any extensions shall not exceed five years. The act was intended to cure the lack of power indefinitely to suspend a sentence, under which district courts labored prior to the enactment.[5]

The second section provides that at any time within the probation period, or at any time after the probation period but within the maximum period for which the defendant might originally have been sentenced, the probationer may be summoned before the court and "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." The action of the trial court in suspending sentence and imposing probation on two of the indictments was in strict accordance with the authority thus explicitly conferred. The validity of the

[5] *Ex parte United States*, 242 U. S. 27.

cited provisions is not open to question.[6] The mere fact that a sentence of a fine and imprisonment had been imposed upon one of the indictments in no way militated against the prescription of probation in respect of the plea of guilty under the other two.[7]

Second. The order of Judge Inch, sitting in the Eastern District, after the termination of his service in the Southern District, was null. The statute providing for designation and assignment of a district judge to sit temporarily in another district than his own does not authorize the order, and the express provisions and obvious intent of the Probation Act negate the power of any judge, other than a judge of the Southern District of New York, to make it.

The Act of March 3, 1911, § 18, as amended,[8] provides: "Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; . . . ."

When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of

[6] *Escoe* v. *Zerbst,* 295 U. S. 490, 492.

[7] Compare *Burns* v. *United States,* 287 U. S. 216.

[8] U. S. Code, Tit. 28, § 22.

the case, notwithstanding the termination of his period of service in the foreign district. But the Act goes no farther. It clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. A criminal trial is concluded by the judgment of sentence entered upon a plea or a verdict of guilt. By express provision of the statute an assigned judge may thereafter, notwithstanding the expiration of his term of service, hear a motion for a new trial and do all things necessary to prepare a record for an appellate court, but no authority is given to hear a new matter even though that new matter may arise in the same case. An application for the termination of the probation and the proceedings against a defendant constitutes a new matter, submission of which may not be made to the assigned judge after his return to his own district. The appropriate place for its presentation is the court in which the judgment of conviction and the sentence are recorded. In the absence of express authorization no power to deal with such an application is vested in any other court.

All the relevant provisions of the Probation Act refer to the court in which the guilt of the defendant was determined and sentence imposed. The first section empowers the court having jurisdiction of the action to place the defendant upon probation, and to revoke or modify the conditions of the probation. The second requires the probation officer, when directed by the court, to report to the court as to the conduct of the probationer; authorizes the court either to discharge the probationer from further supervision or to terminate the proceedings against him or to extend the period of probation, to issue a warrant, upon a proper showing, for the probationer's arrest and, upon a hearing, to revoke the probation or the suspension of sentence and to impose a sentence which might have originally been imposed. Section three au-

thorizes the judge of any United States court to appoint one or more suitable persons as probation officers "within the jurisdiction and under the discretion of the judge making such appointment or of his successor." Section four places upon a probation officer the duty to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court, and such other duties as the court may direct.

Thus the trial court has complete supervision over the probationer for the period of his probation and for the term of the maximum sentence which might have been imposed. This jurisdiction is vested in the trial court and in no other. To hold that a judge of another district, merely because he had temporarily sat at the trial and conviction of a defendant and imposed sentence, could, from that other district, supervise, extend, modify or terminate the probation, would be to ignore the intent of the law. It would moreover result in confusion and inconvenience in the administration of the Probation Act. It would mean that the United States Attorney and his assistants, and a probation officer of the court in which the judgment is recorded, would be required to go to distant parts to be heard upon the merits of any application by the probationer and that the probationer, at his will, could institute proceedings either before a judge of the court in which his conviction is recorded or the judge in a different district who had been a temporary member of that court. Such a possibility was certainly never intended. Probation is a system of tutelage under the supervision and control of the court which has jurisdiction over the convicted defendant, has the record of his conviction and sentence, the records and reports as to his compliance with the conditions of his probation, and the aid of the local probation officer, under whose supervision the defendant is placed. This jurisdiction is not divided between that court and a distant judge who sat by designation at the defendant's trial.

Third. What has been said indicates the answer to petitioner's argument that the probation officer of the Southern District, by appearing before Judge Inch in the Eastern District upon the application for termination of the proceedings, and the United States Attorney, by stipulating that Judge Inch might return to the Southern District to hear a motion for resettlement of his order, have waived venue or are estopped to question it. Neither of these officers could confer jurisdiction upon a designated judge to perform acts not authorized by the assignment Act outside the district of designation after his term of service had ended. They could not waive the jurisdictional requirements of the Probation Act or by their conduct confer jurisdiction on a judge of another district to act for the trial court in which alone the statute vests the power to deal with the subject.

The judgment is

Affirmed.

PALKO *v.* CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 135. Argued November 12, 1937.—Decided December 6, 1937.

1. Under a state statute allowing appeal by the State in criminal cases, when permitted by the trial judge, for correction of errors of law, a sentence of life imprisonment, on a conviction of murder in the second degree, was reversed. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. *Held* consistent with due process of law under the Fourteenth Amendment. P. 322.
2. Assuming that the prohibition of double jeopardy in the Fifth Amendment applies to jeopardy in the same case if the new trial be at the instance of the Government and not upon defendant's motion, it does not follow that a like prohibition is applicable against state action by force of the Fourteenth Amendment. Pp. 322 *et seq.*

3. The Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government. P. 323.
4. The process of absorption whereby some of the privileges and immunities guaranteed by the federal bill of rights have been brought within the Fourteenth Amendment, has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. P. 326.
5. It is not necessary to the decision in this case to consider what the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him. P. 328.
6. The conviction of the defendant upon the retrial ordered upon the appeal by the State in this case was not in derogation of any privileges or immunities that belonged to him as a citizen of the United States. *Maxwell* v. *Dow*, 176 U. S. 581. P. 329.

122 Conn. 529; 191 Atl. 320, affirmed.

APPEAL from a judgment sustaining a sentence of death upon a verdict of guilty of murder in the first degree. The defendant had previously been convicted upon the same indictment of murder in the second degree, whereupon the State appealed and a new trial was ordered.

Messrs. David Goldstein and *George A. Saden* for appellant.

Mr. Wm. H. Comley, with whom *Mr. Lorin W. Willis,* State's Attorney, was on the brief, for Connecticut.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury

found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.[1] Public Acts, 1886, p. 560; now § 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State* v. *Palko,* 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of

---

[1] "Sec. 6494. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

A statute of Vermont (G. L. 2598) was given the same effect and upheld as constitutional in *State* v. *Felch,* 92 Vt. 477; 105 Atl. 23.

Other statutes, conferring a right of appeal more or less limited in scope, are collected in the American Law Institute Code of Criminal Procedure, June 15, 1930, p. 1203.

death. The Supreme Court of Errors affirmed the judgment of conviction, 122 Conn. 529; 191 Atl. 320, adhering to a decision announced in 1894, *State* v. *Lee,* 65 Conn. 265; 30 Atl. 1110, which upheld the challenged statute. Cf. *State* v. *Muolo,* 118 Conn. 373; 172 Atl. 875. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer* v. *Illinois,* 187 U. S. 71, 85, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner* v. *United States,* 195 U. S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined

to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Trono* v. *United States,* 199 U. S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U. S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, *Snyder* v. *Massachusetts,* 291 U. S. 97, 114, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California,* 110 U. S. 516; *Gaines* v. *Washington,* 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be

compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi,* 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet,* 92 U. S. 90; *Maxwell* v. *Dow,* 176 U. S. 581; *New York Central R. Co.* v. *White,* 243 U. S. 188, 208; *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States,* 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana,* 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Herndon* v. *Lowry,* 301 U. S. 242, 259; or the like freedom of the press, *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707; or the free exercise of religion, *Hamilton* v. *Regents,* 293 U. S. 245, 262; cf. *Grosjean* v. *American Press Co., supra; Pierce* v. *Society of Sisters,* 268 U. S. 510; or the right of peaceable assembly, without which speech would be unduly trammeled, *De Jonge* v. *Oregon, supra; Herndon* v. *Lowry, supra;* or the right of one accused of crime to the benefit of counsel, *Powell* v. *Alabama,* 287 U. S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific

pledges of particular amendments[2] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra,* p. 105; *Brown* v. *Mississippi, supra,* p. 285; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who

---

[2] First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

would limit its scope, or destroy it altogether.[3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown* v. *Mississippi, supra.* Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining* v. *New Jersey, supra,* p. 99.[4] This is true, for illustration, of freedom of thought, and speech.

[3] See, e. g. Bentham, Rationale of Judicial Evidence, Book IX, Pt. 4, c. III; Glueck, Crime and Justice, p. 94; cf. Wigmore, Evidence, vol. 4, § 2251.

Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra,* p. 824; Garner, Criminal Procedure in France, 25 Yale L. J. 255, 260; Sherman, Roman Law in the Modern World, vol. 2, pp. 493, 494; Stumberg, Guide to the Law and Legal Literature of France, p. 184. Double jeopardy too is not everywhere forbidden. Radin, Anglo American Legal History, p. 228.

[4] ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[5] The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near* v. *Minnesota ex rel. Olson, supra; De Jonge* v. *Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott* v. *McNeal,* 154 U. S. 34; *Blackmer* v. *United States,* 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell* v. *Alabama, supra,* pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

[5] The cases are brought together in Warren, The New Liberty under the 14th Amendment, 39 Harv. L. Rev. 431.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert* v. *Louisiana, supra.* The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State* v. *Felch,* 92 Vt. 477; 105 Atl. 23; *State* v. *Lee, supra.* This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State* v. *Carabetta,* 106 Conn. 114; 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment.

Maxwell v. *Dow, supra,* p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

MR. JUSTICE BUTLER dissents.

SMYTH, EXECUTOR, *v.* UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 42. Argued November 18, 19, 1937.—Decided December 13, 1937.

1. Bonds of the United States promising payment of principal and interest in United States gold coin of the standard of value in force at the time of their issuance (25.8 grains of gold 9/10ths fine per dollar) were called by the Secretary of the Treasury for redemption and payment prior to their stated day of maturity, pursuant to provisions therein which reserved this right to the United States to be exercised through a published notice, and which declared that from the date of redemption designated in such notice interest on the called bonds should cease and all coupons thereon maturing after that date should be void. Prior to the notices, the Joint Resolution of June 5, 1933, providing for the discharge of "gold clause" obligations upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for private debts, had been adopted; and in two of the cases the notices were later than the decisions of this Court in the *Gold Clause Cases,* including *Perry* v. *United States,* 294 U. S. 330. *Held:*

(1) That the effect of the published notice was to accelerate the maturity of the bonds, the new date specified in the notice

---

* Together with No. 43, *Dixie Terminal Co.* v. *United States,* also on writ of certiorari to the Court of Claims; and No. 198, *United States* v. *Machen,* on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

supplanting the old one stated in the bonds as if there from the beginning. P. 353.

(2) Holders of the bonds had no claim against the United States on interest coupons covering a period subsequent to the new date, since by the terms of the bonds interest ceased to run on that date. P. 353.

In the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in payment of the principal. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution.

(3) The proposition that the notices of call were void, upon the ground that they must be read with the Joint Resolution of June 5, 1933, and, thus supplemented, promised payment different from that promised by the bonds, can not be maintained. P. 354.

The notices of call were not promises, and did not commit the Government, either expressly or by indirection, to a forbidden medium of payment. Notice that the bonds were called for redemption on the specified date implied that at that accelerated maturity the bondholders would be entitled to payment of principal and accrued interest in such form and measure as would discharge the obligation in accordance with the Constitution, statutes and any controlling decisions.

The contention that the existence of the Joint Resolution, *supra*, amounted to an anticipatory breach, is examined and rejected. The doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to contracts for the payment of money only. Moreover, an anticipatory breach, if it were made out, could have no effect upon the right of the complaining bondholders to postpone the time of payment to the date of natural maturity. The Government was not subject to a duty to keep the content of the dollar constant during the period intervening between promise and performance. The duty of the Government was to pay the bonds when due. P. 356.

The fact that the statutory provisions for payment in any legal tender remained unrepealed did not affect the date of maturity as accelerated by the notices.

(4) No question of constitutional law, nor of fraud, is involved in the decision of these cases. P. 359.

(5) The Secretary of the Treasury did not exceed his lawful powers by issuing the calls without further authority from the Congress than was conferred by the statutes under which the bonds were issued. P. 359.

2. The Act of March 18, 1869 (R. S. § 3693; 16 Stat. 1), which in its day placed restrictions upon the redemption by the Government of interest-bearing bonds, was for the protection of holders of United States obligations not bearing interest, the "greenbacks" of that era. Upon the resumption of specie payments in 1879 the aim of the statute was achieved, and its restrictions are no longer binding. P. 360.

85 Ct. Cls. 318; 83 Ct. Cls. 656, affirmed.

87 F. (2d) 594, reversed.

CERTIORARI, 301 U. S. 679, 680; *post*, p. 672, to review judgments in three suits against the United States to recover on interest coupons attached to Government bonds containing the gold clause, which had been called for redemption. In Nos. 42 and 43, the Court of Claims dismissed the claims. In No. 198, the District Court gave judgment for the United States, which was reversed by the Circuit Court of Appeals. In the first two cases the plaintiffs had presented their bonds to the Treasurer of the United States and demanded payment in gold dollars each of 25.8 grains of gold 9/10ths fine, and declined a tender in coin or currency other than gold or gold certificates. They had then demanded, unsuccessfully, that coupons for interest periods subsequent to the date fixed in the calls for redemption of the bonds, be paid either in gold or in legal tender currency. Their suits were for the amounts of the coupons in current dollars. In No. 198 the situation was similar. There had been no presentation of the bond or coupon for payment, but it was stipulated that the Treasurer of the United States and other fiscal agents had not at any time been directed by the Secretary of the Treasury to redeem the bonds in gold coin, but had been authorized and directed to redeem in legal tender currency; also that there was a refusal to

pay similar coupons for interest accruing after the date of redemption.

Mr. Robert A. Taft for petitioners in Nos. 42 and 43.

1. The provisions of the bond and circular with respect to payment in gold coin are valid under the *Perry* decision, in spite of the legislation adopted by Congress.

In view of this decision, there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value, and that this obligation remains binding upon the conscience of the sovereign.

The lack of remedy is not material, because the plaintiff is not suing for gold. The plaintiff in the *Perry* case failed to recover because he attempted to obtain arbitrarily an amount of currency in excess of the face amount of his bond, without alleging or proving any direct damages to himself resulting from the Government's repudiation of its obligation. But in this case the plaintiff is not seeking a remedy; it is the Government which is attempting to exercise a privilege given to it by the terms of the bond, at the same time that it is repudiating its obligation contained in that bond. The petitioner contends that he may hold his bond until maturity, at which time the gold standard may be restored, or the value of the gold dollar increased. If not, the petitioner will no doubt be obliged to accept currency in payment of the bond. Although the Government is legally and morally obligated to pay this bond in gold, it is now trying to exercise the power given to it in the bond to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. The plaintiff is seeking to recover only the currency value of his coupon; he is not seeking damages for failure to pay gold; he is merely insisting that the Government cannot repudiate its obligations in one

breath, and avail itself of privileges conferred on it at the same time.

2. The attempt to redeem was void *ab initio,* because the notice published was not a notice of intention to redeem in gold in accordance with the terms of the bond.

It is clear that "notice published at least three months prior to the redemption date" is a condition precedent to the right to redeem. What kind of a notice does this refer to? It must obviously be a notice to pay the bond in accordance with its terms. A notice to pay the bond in real estate, or by transferring municipal bonds or other securities, would be exactly as good as no notice at all. Under the circumstances existing on March 14, 1932, and the legislation then in effect, this notice was not a notice to redeem in gold in accordance with the terms of the bond, but a notice to redeem in currency.

On March 14, 1935, when the notice to redeem First Liberty Loan Bonds was issued in Treasury Department Circular No. 535, there was in full effect the Gold Reserve Act of 1934, which provided: "No gold shall hereafter be coined and no gold coin shall hereafter be paid out or delivered by the United States." We respectfully submit, in the first place, that the Secretary of the Treasury, while that statute was in effect, could not issue a notice of intention to pay the bond in accordance with its terms. The Secretary of the Treasury is an administrative officer, subject in all respects to the legislation of Congress. Except for enactment by Congress, the right to redeem "at the pleasure of the United States" does not mean the right to redeem at the pleasure of the Secretary of the Treasury. As far as he has any power to issue a notice, it exists by congressional enactment. Since Congress prohibited him from paying out gold, there can certainly be no authority implied in any way for him to give a notice of intention to redeem in gold.

In the second place, no matter what the power of the Secretary of the Treasury, the notice issued was not a

notice to redeem in gold. It was silent as to the medium of payment, but in view of the legislation then in effect, it was clearly a statement of intention to redeem in currency and not in gold. We have already referred to the Joint Resolution of June 5, 1933, and the Gold Reserve Act of 1934. We have referred to the various other acts of Congress and the President nationalizing gold and prohibiting the holding of gold by private persons. The notice issued must be construed in the light of these enactments as a notice to redeem in currency. It must be presumed that the Secretary of the Treasury, an administrative officer, was merely carrying out the intention of Congress.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. The Secretary of the Treasury would never have called the bonds if he had had the slightest expectation of having to pay in gold.

The President had also devalued the dollar, and established, with the approval of Congress, a dollar having a different standard of value from that prescribed in the bond, so that even if gold could have been paid out, it would have been a different amount of gold than that called for by the terms of the bond.

A call for payment in currency is clearly not in accord with the provisions of the bond and the circular under which the bond was issued, which provisions this Court has held to be valid. It seems manifest, therefore, that the so-called "call" of March 14, 1935, may be treated by the bondholder as completely void, and his bond will continue to draw interest until maturity, or until after a bona fide call for redemption in accordance with the terms of the bond.

The whole argument that the Government can distinguish itself as contractor and sovereign in the matter of Government Bonds was destroyed once and for all in the *Perry* case. The Government's contention in that case was that in its capacity as sovereign it could effectually destroy its obligation as contractor on its own bonds. It was a strong argument, which prevailed with one of the Justices of this Court, and it drew support from the very cases which the Government attempts to rely on here. But the Court found that the Government's own obligations on its public debt were assumed in the exercise of its sovereign powers, and that they could not be changed or abrogated through the exercise of any other sovereign power.

It is suggested by the Government that because the Supreme Court of the United States, in *Perry* v. *United States,* treated the call as valid, and considered Perry's claim for payment of the principal, therefore that case is an authority to establish the validity of the Government's call. In the first place, this question was not considered by this Court at any point. Both the Government and the plaintiff were willing to proceed on the assumption that the bond had been called, so that the point was not brought to the attention of the Court. In the second place, it is entirely possible that the bondholder may have an option to treat the call as valid if he so desires. If a private corporation issued a call, and then failed to have funds to pay the bonds, the bondholder certainly could hold his bonds until maturity, but he should also in reason have an option to treat the bonds as called and insist upon their payment. Such a corporation would be estopped to assert the invalidity of its own call.

The Government in the lower court contended that the tender to petitioner of currency in payment of his bond was a compliance with the terms of the bond, on the ground that currency is the "equivalent" of gold. To sup-

port this position, they quote from the opinion of the Chief Justice in *Perry* v. *United States*, at page 357, in which he states that the word "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purpose for which it could legally be used. But in that case the plaintiff sued for $10,000 in gold coin, or its equivalent in currency, which the plaintiff claimed to be $16,931.25. The Chief Justice held that this was not necessarily the equivalent in currency, and that many other circumstances, such as the price level and the intrinsic worth of the currency, had a bearing on the question. The entire discussion related solely to the question of damages. In this case, however, the question of damages does not arise, nor is the petitioner asking for any "equivalent." It is the Government which is tendering the petitioner something, in redemption of his bond prior to maturity, which the Government is claiming to be the "equivalent" of gold.

Certainly currency is not the same as gold coin. This Court necessarily holds that it is different in holding the Joint Resolution of June 5, 1933, unconstitutional. The very thing which Congress was attempting to do was to make legal-tender currency the equivalent of gold coin. When this Court stated that "the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power," it necessarily held that legal-tender currency was not the equivalent of gold coin.

The right of redemption is based on exact compliance with the terms of the bond. Petitioner is not obligated to allow his bond to be redeemed, even though the Government does offer an equivalent or far more than an equivalent. The right of redemption rests on the words of the bond and the circular, which say nothing whatever about an "equivalent."

We respectfully submit, therefore, that the entire procedure by which the Government attempted to call Liberty Bonds in advance of maturity, when it had no intention to pay the bonds in accordance with their terms and statutes expressly forbade such payment, was void *ab initio,* because the notice published was not the notice provided for by the bond. It follows, therefore, that interest did not cease to run on the date fixed for redemption, but continued as part of the original contract entered into by the Government in its bond.

3. Even if the purported call were considered valid, the running of interest on petitioner's bond did not cease on June 15, 1935, because the United States was not ready and willing at that time or at any time to redeem the petitioner's bond in accordance with its terms.

The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity: *Chicago, etc. Railroad Co.* v. *Pyne,* 30 Fed. 86; *Missouri Railroad Co.* v. *Union Trust Co.,* 156 N. Y. 592, 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph* v. *Middleton,* 26 N. J. Eq. 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States.

While the petitioner's bond provided that from the date of redemption designated in any notice of call, inter-

est on the called bonds should cease, yet the bond also contained the express provision that "all or any of the bonds of the series of which this is one, may be redeemed *and paid* [italics ours] . . . ." Certainly this provision for redemption and payment would not have been inserted in the bond, if it were the intention of the parties that interest should cease upon a date set for redemption, regardless of the willingness and ability of the United States to redeem.

The Government relies on the phrase used in the first sentence of the bond, in which the United States promises to pay the principal sum "with interest at the rate of three and one-half percentum per annum payable semi-annually on December fifteenth and June fifteenth in each year until the principal hereof shall be payable." The Government points out that the United States does not undertake to pay interest until the principal shall be "paid." Of course it is clear why the word "payable" is used. Many holders of such bonds do not turn in their bonds on the call date, through oversight or otherwise, and it is proper that interest should cease to run at that time in the ordinary case when the Government is meeting its obligations. In order to provide for this contingency, the word "payable" is used.

If it had been thought necessary to provide for the contingency that the Government would repudiate its bonds, only a very complicated phrase could have expressed the Government's obligation. It would have had to refer to a repudiation, which nobody thought likely or desired to refer to. Contracts seldom provide for what shall occur in case of default because they are made to be carried out and not to be broken. It is usual to leave to the courts the question of the parties' rights when such a default does occur. This is particularly true in the case of the Government, for, as stated by Mr. Justice Strong in *United States* v. *Sherman,* 98 U. S. 565: "But delay

or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes."

Furthermore, the word "payable" refers to the maturity of the bond, and not to any date on which it may be redeemable. Citing: *Morgan* v. *United States,* 113 U. S. 476; *Sterling* v. *H. F. Watson Co.,* 241 Pa. 105, and *Corbett* v. *McClintic-Marshall Corp.,* 17 Del. Ch. 165. Distinguishing *Spaulding* v. *Lord,* 19 Wis. 533. See 50 Harv. L. Rev. 986. If there is any ambiguity, the bond should be construed most strongly against the Government because drafted by its own officials, and sold to persons who did not even contemplate the repudiation of its obligations by the United States. Certainly this Court should not countenance an interpretation of the bond which necessarily means that the Government may at any time call a bond without the slightest intention of paying it, and thereby stop the running of interest after the call date, whether or not the Government is prepared to redeem the bond on that date. This is not the contract which the bondholders thought they were getting.

4. The purported call issued on March 14, 1935, was void, because the Secretary of the Treasury had no authority to issue a call without further action by Congress.

The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry* v. *United States,* 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have

the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. The purported call issued on March 14, 1935, was void because forbidden by the Act of March 18, 1869, 16 Stat. 1; 31 U. S. C. § 731.

The reason for the original passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a depreciated currency. United States notes, or "greenbacks," were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Neither on March 4, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of § 731 was intended to permit the redemption of bonds should the Government be in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that government bonds, when this call was issued in 1935, could not be sold for gold coin. There was no gold coin except in minor hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States bonds, whether on their face they were payable in gold or in currency.

It is suggested that United States bonds might have been sold for silver coin. Obviously the Government has

never sold bonds and required payment in silver coin, and it is not a practical operation. An examination of the testimony and schedule presented by the Treasury shows that the total amount of silver coin in existence in 1935 was approximately eight hundred fifty-nine million dollars, considerably less that the amount of the First Liberty Loan Bonds called. Furthermore, all of the bullion and nearly all of the standard silver dollars were in the Treasury already, and of course the subsidiary silver coin not in the Treasury, amounting to about $300,000,000, is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins, and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold either for gold or silver coin today. In short § 731 was intended to prevent exactly what the Government is now trying to do.

Solicitor General Reed, with whom *Attorney General Cummings, Assistant Attorney General Whitaker,* and *Messrs. Harry LeRoy Jones, Edward First, Clarence V. Opper,* and *Bernard Bernstein* were on the brief, for the United States.

The bondholders rest their case upon a contractual obligation. By the terms of the agreement between the parties the obligation to pay interest upon the bonds was specifically to cease upon the issuance of a public notice calling the bonds for redemption and the passage of time to the date designated in such notice. Since this condition has occurred the contractual obligation of the Government to pay interest has terminated.

The issuance of a notice of call for redemption in the usual form, operated to create, and was intended to

create, the same right to payment assured by the bonds themselves. That the call was effective to entitle the bondholders to demand payment of the principal amounts of their bonds is established by the decision in *Perry* v. *United States,* 294 U. S. 330. By the same token the call was effective to terminate the obligation to pay interest. The suggestion that the bondholders may have an option to demand payment of the principal or to sue for interest has no basis in the contract and, if accepted, would introduce confusion in public and private finance. Termination of the obligation to pay interest was not conditioned upon actual performance of the principal obligation. Distinguishing *Sterling* v. *H. F. Watson Co.,* 241 Pa. 105. Imposition of this additional condition by implication would be unwarranted by judicial authority and would defeat by indirection the rule that interest is not allowed on claims against the Government in the absence of specific statutory authorization.

The terms of the Acts of Congress pursuant to which the bonds were issued, as well as the bonds themselves, establish the authority of the Secretary of the Treasury to issue the notice of call which terminated the obligation to pay interest. This authority has been recognized and confirmed by other legislation of the Congress.

The Act of March 18, 1869, R. S. 3693; 16 Stat. 1, does not affect the validity of the calls for redemption. Examination of the purposes and circumstances surrounding the enactment of that statute establishes that it was intended to apply only to Government bonds then outstanding and that it ceased to have significance when the Government, in 1879, resumed specie payments on its United States notes and maintained all coins and currencies at a parity of value. Even if the validity of the calls for redemption here involved were to be tried by the requirements of that Act, however, the conclusion would be compelled that these requirements have been fully met.

The contention that the United States has failed to tender the performance due under the bonds appears to rest exclusively upon its refusal to make payment in gold dollars, "each containing twenty-five and eight-tenths grains of gold, nine-tenths fine." For a double reason this contention cannot be supported. The gold clause in the plaintiffs' bonds is not a promise for payment solely in gold coin, but a promise to pay the value of gold coin. *Perry* v. *United States, supra; Feist* v. *Société Intercommunale Belge d'Electricité,* L. R. [1934] A. C. 161, 172, 173; *R.* v. *International Trustee for the Protection of Bondholders Akt.,* [1937] 2 All Eng. L. R. 164; *Case of Serbian Loans,* P. C. I. J., series A. Nos. 20–21, pp. 32–41. Compare *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 296, 302; *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, 336. Under the *Perry* decision, no claim of breach of the bond is maintainable which does not allege and prove also a failure to pay the equivalent in value of the gold coin. Even if the gold clause could properly be construed as promising payment in gold coin itself, however, the *Perry* decision does not warrant an assumption that the failure to make such payment, under the circumstances there and here presented, would constitute a breach of obligation. The power of the Congress to prohibit payment of gold coin from the Treasury is an essential aspect of its power "to deal with gold coin as a medium of exchange," and has received ample recognition in the decisions of this Court. Compare *Ling Su Fan* v. *United States,* 218 U. S. 302; *Nortz* v. *United States,* 294 U. S. 317; *Holyoke Water Power Co.* v. *American Writing Paper Co., supra,* at 336, 337.

Even if the bondholders were in a position here to urge that the failure of the United States to pay them a number of dollars in legal tender currency in excess of the face amount of the bonds constituted a breach of con-

tract, no such contention would be tenable. The assertion of the Circuit Court of Appeals in No. 198 that the dollars stated in the bonds were each "worth" 1.69 dollars in legal tender currency is in direct conflict with the decision of this Court in *Perry* v. *United States, supra,* which flatly rejected any method of computing equivalence or worth mathematically, in accordance with the ratios of the statutory gold content of the past and present dollars, regardless of actual loss. The maintenance of all forms of money at a parity in the economy of the country, this Court there held, precluded such a method of computation.

Nothing short of a position of material and present default on the part of the United States would in any event warrant the effort here made to work a forfeiture of the option of redemption. So long as the bondholders have been tendered the substantial equivalent of the performance due, no equitable ground can be urged for disregarding the express terms of the bonds and of the calls for redemption. Nor do intimations that the position of the United States, which under the circumstances now existing has been held to be correct, might under different circumstances be incorrect, afford a ground in these cases for forfeiture of its option of redemption. In claiming such a forfeiture, the bondholders are, in effect, insisting upon payment of an uncontemplated premium, consisting of the added capital value of their bonds under present rates of interest. Acceptance of their contention would jeopardize huge savings of interest effected by refunding operations in recent years. In thus interfering with the sound administration of the public debt, it would tend to restrict the very power which—in the opinion in the *Perry* case upon which the bondholders rely—it was deemed necessary to protect.

The bondholders misinterpret the statements in the opinion delivered by the Chief Justice in the *Perry* case

reflecting upon the constitutionality of the Joint Resolution of June 5, 1933. If those statements mean that borrowing contracts of the United States may not in any fashion be affected by a subsequent exercise by Congress of the monetary power, they should be reconsidered, since by the settled doctrines of this Court they were not made under such circumstances as to constitute a precedent. *Alaska* v. *Troy,* 258 U. S. 101, 111. Compare *City of New York* v. *Miln,* 8 Pet. 120; *United States* v. *Celeste Macarty et al.,* Archives, December Term, 1851, p. 199. See also *Myers* v. *United States,* 272 U. S. 52, 142; *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *United States* v. *Hastings,* 296 U. S. 188, 192, 193. The principle that governmental action taken in pursuance of sovereign governmental powers may affect rights arising out of transactions entered into between the Government and private individuals may justly be considered a postulate of American public law. It seems clear, however, that the statements in question were made in answer to a contention, which the Government was understood as making, importing that Congress is free to disregard the obligations of the Government at its discretion. The Government is bound, under the law, upon its contracts as individuals are bound. Far from asserting that Government contracts may not be affected as individual contracts are affected by a subsequent exercise of general legislative power, the opinion delivered by the Chief Justice recognizes and reaffirms the principle that they may be so affected.

Mr. H. Vernon Eney for Machen, respondent in No. 198.

I. The respondent in the case at bar is suing on a coupon and he has not asked for "an amount in legal tender currency in excess of the face amount of the" coupon. He is not suing for any damages caused by the refusal of the Government to pay the bond in gold on the

redemption date; nor is he asking for any damages caused by the refusal to pay the coupon in gold rather than in other currency. If the respondent were demanding $29.57 in legal tender currency, the *Perry* case might be in point, but since he is demanding only $17.50, it is clearly not in point. This Court decided that inasmuch as Perry had elected to surrender his bond and sue for damages for breach of contract, but had failed to prove damage, he could not recover. This Court did *not* decide that Perry's *only* remedy was to surrender his bond and sue for damages for breach of contract. The question whether the obligation of the United States to pay interest ceased upon the giving of a notice of redemption without any intention to pay in gold was not considered by the Court. The only provision of the bond construed by the Court was the clause requiring payment in gold. The clauses as to the payment of interest, the meaning of which is here presented to the Court for determination, were not even quoted or referred to in the opinion of the Court in the *Perry* case, much less construed by it.

If payment in gold or an honest intention to pay in gold, was a condition precedent to redemption, and we strongly contend that it was, then the respondent had a right to refuse to surrender his bond except upon a strict compliance with that condition and the question as to whether or not the failure to comply therewith caused him damage was entirely immaterial.

The Government reserved to itself an option to redeem its Liberty Bonds prior to maturity. It gave notice that it would redeem, not in accordance with its contract, but on its own terms. The plaintiff in the *Perry* case elected to treat the Government as having exercised its option and sued for damages for its failure to do so in accordance with the terms of its contract. The respondent, on the other hand, as we contend he had every right

to do, elected to treat the Government as having failed to exercise its option. The two cases are manifestly quite different.

The contract is governed by the ordinary legal principles. The only substantial question in this case arises out of the interpretation of the contract in suit and for that reason it is necessary to keep always in mind three important and fundamental rules of construction.

First, the contract should be so construed as to effectuate its general purpose, to give effect to the intention of the parties, and to give their ordinary meaning to the words used.

Second, in cases of ambiguity, a contract should be most strongly construed against its author.

Third, when contracts are optional in respect to one party, they are strictly construed in favor of the party bound and against the party who is not bound.

The power of the United States to issue callable bonds or otherwise manage the public debt is not at issue.

II. The right to redeem depended upon the performance of two conditions, neither of which was in fact performed, although strict performance of each was required.

An exact compliance with the conditions attached to a right of redemption is necessary.

As said by this Court in the *Perry* case "the terms of the bond are explicit" (294 U. S. 348). It provides: "The principal and interest of this bond shall be payable in *United States gold coin* of the present standard of value." The statute pursuant to which the bonds were issued (40 Stat. 35) and the general law (U. S. C., Tit. 31, § 768) likewise required payment of both principal and interest in gold coin.

The provisions of the bond remain unaltered by the Joint Resolution of June 5, 1933, and the United States are clearly obligated to pay the respondent $1,000.00 in gold coin in order to redeem his bond.

The provision requiring the giving of a notice of redemption was the condition precedent. The requirement that the principal be paid in gold coin was the concurrent condition. Under the rule laid down by the cases strict compliance with both conditions was required. But the fact is that there was compliance with neither condition. Consequently, the respondent's bond was not redeemed on June 15, 1935.

The notice issued on March 14, 1935, was not a valid and bona fide notice such as was contemplated in the bond.

The interest coupons did not become void except upon actual redemption of the bond by payment in gold coin.

The question of whether or not the respondent would sustain any damage by reason of the refusal of the United States to pay the bond in gold coin is entirely immaterial.

III. Regardless of whether the respondent's bond be construed as a "gold coin" contract or as a "gold value" contract, payment of the principal, dollar for dollar, in legal tender currency, would not be a fulfillment of the obligation.

Payment in gold coin is required.

Even if it be assumed that the gold clause is a "gold value" contract, the burden is upon the Government to prove that it has tendered the equivalent of the gold coin, and this it has not done.

IV. The Joint Resolution of June 5, 1933, was unconstitutional in so far as it attempted to override the obligation created by Liberty Loan bonds.

Opinion of the Court by MR. JUSTICE CARDOZO, announced by the CHIEF JUSTICE.

Three cases present a single question: Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate

the running of interest on the bonds from the designated redemption date?

Petitioner in No. 42 is the owner of a $10,000 First Liberty Loan 3½% bond of 1932–1947, serial number 6670. The bond was issued pursuant to the Act of April 24, 1917 (40 Stat. 35), and Treasury Department Circular No. 78, dated May 14, 1917, and was purchased by petitioner in December, 1934, for $10,362.50 and accrued interest. Its provisions, so far as material, read as follows:

"The United States of America for value received promises to pay to the bearer the sum of Ten Thousand Dollars on the 15th day of June, 1947, with interest at the rate of three and one-half per centum per annum payable semi-annually on December 15 and June 15 in each year until the principal hereof shall be payable, upon presentation and surrender of the interest coupons hereto attached as they severally mature. The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

On March 14, 1935, the Secretary of the Treasury published a notice of call for the redemption on June 15, 1935, of all the bonds so issued. "Public notice is hereby given:

1. All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935. The

various issues of First Liberty Loan bonds (all of which are included in this call) are as follows:

First Liberty Loan 3½ percent bonds of 1932–47 (First 3½'s), dated June 15, 1917; . . .

2. Interest on all such outstanding First Liberty Loan bonds will cease on said redemption date, June 15, 1935."

Thereafter, on April 22, 1935, the Secretary of the Treasury issued a circular (Department Circular, No. 535) prescribing rules for the redemption of First Liberty Loan bonds, and providing, among other things, as follows: "Holders of any outstanding First Liberty Loan bonds will be entitled to have such bonds redeemed and paid at par on June 15, 1935, with interest in full to that date. After June 15, 1935, interest will not accrue on any First Liberty Loan bonds."

Nearly two years before the publication of the notice of call Congress had adopted the Joint Resolution of June 5, 1933 (48 Stat. 112) by which every obligation purporting to be payable in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, was to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and private debts. Nearly four weeks before the publication of the notice of call, the validity of that Joint Resolution had been the subject of adjudication by this court in the Gold Clause Cases, *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, *Nortz* v. *United States*, 294 U. S. 317, and *Perry* v. *United States*, 294 U. S. 330, all decided February 18, 1935. We may presume that the call was issued with knowledge of those rulings.

About six months after the date designated for redemption, petitioner, on December 28, 1935, presented his bond (with coupons due on and before June 15, 1935, detached) to the Treasurer of the United States, and demanded the redemption by the payment of 10,000 gold dollars each

containing 25.8 grains of gold nine-tenths fine, which was the gold content of a dollar in 1917. The Treasurer refused to comply with that demand, but offered payment of the face amount of the principal in legal tender coin or currency other than gold or gold certificates. Petitioner declined to accept the tender and retained the bond. Thereafter, on the same day, petitioner presented to the Treasurer of the United States, the interest coupon for the six months period June 15 to December 15, 1935, and demanded payment either in gold coin or legal tender currency. The Treasurer refused payment on the ground that the bond to which the coupon was attached had been called for redemption on June 15, 1935.

An action followed in the Court of Claims, petitioner resting his claim upon the interest coupon only, and limiting his demand to a recovery in current dollars.[1] The Court gave judgment for the United States on the ground that on the designated redemption date, all coupons for later interest became void. Because of the important interests, public and private, affected by the judgment, a writ of certiorari was granted by this court.

Petitioner in No. 43 is the owner of a $50 Fourth Liberty Loan 4½% bond of 1933–1938, which it bought on March 9, 1935. The bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288) as amended, and Treasury Department Circular, No. 121. It was to mature on October 15, 1938, subject, however, to re-

[1] The Joint Resolution of Aug. 27, 1935 (49 Stat. 938, 939), withdrawing the consent of the United States to suit where the claimant asserted against it a right, privilege or power "upon any gold-clause securities of the United States or for interest thereon" makes an exception of any suit begun by January 1, 1936, as well as any proceeding "in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding." Petitioner has brought himself within each branch of the exception.

demption on October 15, 1933 or later. The terms of redemption are stated in Circular No. 121, which is incorporated by reference into the bond itself. Six months notice by the Secretary of the Treasury was required, "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease." On October 12, 1933, the Secretary of the Treasury published a notice of call for redemption on April 15, 1934, of certain bonds of this issue. The bond now owned by petitioner is one of them. There were tenders and refusals similar to those described already in the statement of the other case. An action followed in the Court of Claims. Petitioner prayed for judgment in the sum of $1.07, the amount of the interest coupon for the six months period ending October 15, 1934.[2] The court dismissed the claim and the case is here on certiorari.

Respondent in No. 198 is the owner of a $1,000 First Liberty Loan 3½% bond of 1932–1947, No. 47084, purchased on March 22, 1933, for $1,011.25. This is the same bond issue involved and described in No. 42. Respondent did not present his bond for payment either on the redemption date or later. He did not present the coupon which is the foundation of the suit. However, the fact is stipulated that the Treasurer of the United States and other fiscal agents have not at any time been directed by the Secretary of the Treasury to redeem the bonds in gold coin, but have been authorized and directed to redeem in legal tender currency. The fact is also stipulated that there was a refusal to pay similar coupons for interest accruing after the date of redemption. Respondent brought suit upon his coupon in the United States Dis-

[2] The coupon reads as follows: "The United States of America will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933–1938 unless called for previous redemption."

trict Court for the District of Maryland. The District Court gave judgment in favor of the United States. The Court of Appeals for the Fourth Circuit reversed and ordered a new trial (87 F. (2d) 594), declining to follow the ruling which had been made by the Court of Claims. The case is here on certiorari on the petition of the Government.

Hereafter, for convenience of reference, the bondholder in each of the three cases will be spoken of as a "petitioner," without adverting to the fact that in one of them (No. 198) he is actually a respondent.

First. The so-called redemption provisions of the bonds are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice of call for the period stated in the bonds the new date became substituted for the old one as if there from the beginning.

The contract is explicit. "From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void." The contract is not to the effect that interest shall cease upon or after payment. Cf. *Sterling* v. *H. F. Watson Co.,* 241 Pa. 105, 110; 88 Atl. 297. The contract is that interest shall cease upon the date "designated" for payment. The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal. *U. S. ex rel. Angarica* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American T. & T. Co.,* 253 U. S. 330, 336; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304. The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497;

United States v. *Rogers,* 255 U. S. 163, 169. If the bonds in suit had matured at the date of natural expiration, interest would automatically have ended, whether the bonds were paid or not. Maturity at a different and accelerated date does not make the obligation greater. In the one case as in the other the interest obligation ends, and this for the simple reason that the contract says that it shall end. Upon non-payment of principal at the original maturity, the bondholder, if unpaid, has a remedy by suit to recover principal, with interest then overdue, but not interest thereafter. Upon non-payment of principal at the accelerated date, he has a like remedy, but no other. Default, if there has been any, is as ineffective in one situation as in the other to keep interest alive.

Petitioners insist, however, that the notices of call were not adequate to accelerate maturity, with the result that interest continued as if notice had not been given. This surely is not so if we look to form alone and put extrinsic facts aside. "All outstanding First Liberty Loan bonds of 1932–47 are hereby called for redemption on June 15, 1935." "All outstanding Fourth Liberty Loan 4¼ per cent bonds of 1933–38, hereinafter referred to as Fourth 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows," (the serial numbers being thereupon stated). Nothing could be simpler, nothing more clearly adequate, unless the notices are to be supplemented by resort to extrinsic facts, the subject of judicial notice, which neutralize their terms. Petitioners maintain that such extrinsic facts exist. In their view, each of the two forms of notice must be read as if it incorporated within itself the Joint Resolution of June 5, 1933, and promised payment in the manner called for by that Resolution, and not in any other way. Thus supplemented, we are told, the notice is a nullity, for the payment that it promises is not the payment owing under the letter of the bond.

The notice of call for the redemption of the bonds was a notice, not a promise. The Secretary of the Treasury was not under a duty to make any promise as to the medium of payment. He did not undertake to make any. The obligation devolving upon the United States at the designated date was measured by the law, and the law includes the Constitution as well as statutes and resolutions. The medium of payment lawful at the time of issuing the call might be different from that prevailing at the accelerated maturity. This might happen as a consequence of an amendment of the statute. It might happen through judicial decisions adjudging a statute valid and equally through judicial decisions adjudging a statute void. The interval between notice and redemption was three months in the case of the First Liberty bonds; it was six months for the Fourth. The Secretary of the Treasury understood these possibilities when he sent out his notices for the redemption of the bonds in suit. Indeed, *Perry* v. *United States, supra,* had already been decided when bonds of the First Liberty issue were made the subject of his call. In each form of notice the implications of the call are clear. What the bondholders were told was neither more nor less than this, that at the accelerated maturity they would be entitled to payment in such form and in such measure as would discharge the obligation. The Secretary's beliefs or expectations as to what the proper form or measure would be at the appointed time are of no controlling importance, even if they were shown. The obligation was not his; it was that of the United States. His own beliefs and expectations and even those of the Government might be changed or frustrated by subsequent events. The bondholders had the assurance that the bonds would be redeemed, and they were entitled to no other. Whatever medium of payment would discharge the obligation if maturity had been attained through the natural lapse of time would dis-

charge it as completely at an accelerated maturity. The same money that would "pay" would serve also to "redeem." There is no reason to believe that the one situation was distinguished from the other in the minds of the contracting parties. The sum total of existing law—Constitution and statutes and even controlling decisions, if there were any—would say how much was due.

If this analysis is sound, it carries with it the conclusion that the call did not commit the Government either expressly or by indirection to a forbidden medium of payment. The case for the petitioners, if valid, must rest upon some other basis. A suggested basis is that the existence of the Joint Resolution amounted without more to an anticipatory breach, which made the notice of redemption void from its inception, if there was an election so to treat it, and this though the notice left the medium of payment open. But the rule of law is settled that the doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only. *Roehm* v. *Horst,* 178 U. S. 1, 17; *Nichols* v. *Scranton Steel Co.,* 137 N. Y. 471, 487; 33 N. E. 561; *Kelly* v. *Security Mutual Life Ins. Co.,* 186 N. Y. 16; 78 N. E. 584; Williston, Contracts, rev. ed., vol. 5, § 1328; Restatement, Contracts, §§ 316, 318. Whatever exceptions have been recognized do not touch the case at hand. *New York Life Ins. Co.* v. *Viglas,* 297 U. S. 672, 679, 680. Moreover, an anticipatory breach, if it were made out, could have no effect upon the right of the complaining bondholders to postpone the time of payment to the date of natural maturity. The sole effect, if any, would be to clothe them with a privilege to declare payment overdue, which is precisely the result that they are seeking to avoid. The conclusion therefore follows that for the purpose of the present controversy the breach would be immaterial even if it were not unreal. But its unreality is the feature we

prefer to dwell upon. The Government was not subject to a duty to keep the content of the dollar constant during the period intervening between promise and performance. The erroneous assumption of the existence of such a duty vitiates any argument in favor of the petitioners as to an anticipatory breach just as it vitiates their argument as to the implications of the call. The duty of the Government and its only one was to pay the bonds when due. If the statutes had been amended before the date of redemption or if the courts had decided that payment must be made in gold or in currency proportioned to the earlier content of the dollar, there is little likelihood that any one would judge the efficacy of the notice by the test of the law in force at the date of its announcement.

The petitioners being dislodged from the position that the notices of call were void in their inception are perforce driven to the stand that they became nullities thereafter, when the statutes were unrepealed at the designated date. But at the designated date the accelerated maturity was already an accomplished fact. The duty of payment did not arise in advance of maturity. In the very nature of things it presupposes maturity as a preliminary condition. If there had been any different intention, the bonds would have provided that interest should cease upon payment or lawful tender, and not from the date of redemption stated in the call. This is not a case of mutual promises or covenants with performance to be rendered on each side at a given time and place. The obligees were not under a duty to do anything at all at the accelerated maturity, though they were privileged, if they pleased, to present the bonds for payment. Most of the learning as to dependent and independent promises in the law of bilateral contracts (*Loud* v. *Pomona Land & W. Co.*, 153 U. S. 564, 576) is thus beside the mark. This is a case of a unilateral contract where

the only act of performance, the payment of the bonds, was one owing from the obligor, and arose by hypothesis upon maturity and not before. Let maturity, whether normal or accelerated, be accepted as a postulate, and it must follow that default in payment will not change the date again. If the Government were to come forward with a tender a day or a week after the designated date, the obligees would not be sustained in a rejection of the payment on the theory that the original date of maturity had been restored by the delay. If the obligees were to sue after the designated date, the Government would not be heard to say that because of the default in payment, the proposed acceleration was imperfect and inchoate. As pointed out already, the bondholders became entitled, when once the notice had been published, to a measure and medium of payment sufficient to discharge the debts. If the then existing Acts of Congress were valid altogether, payment would be sufficient if made in the then prevailing currency. If the Acts were invalid, either wholly or in some degree, there might be need of something more, how much being dependent upon the operation of an implied obligation, read into the bonds by a process of construction, to render an equivalent. Whatever the form and measure, the bondholders had a remedy if they had chosen to invoke it.

We do not now determine the effect of a notice given in bad faith with a preconceived intention to withhold performance later. Fraud vitiates nearly every form of conduct affected by its taint, but fraud has not been proved and indeed has not been charged. There is no reason to doubt that a Secretary of the Treasury who was willing to give notice of redemption after knowledge of the decision in *Perry* v. *United States* understood that the obligation of the Government would be measured by the Constitution and not by any statute, in so far as the two might be found to be in conflict. Never for a moment

was there less than complete submission to the supremacy of law. At the utmost, there was honest mistake as to rights and liabilities in a situation without precedent. Fraud being eliminated, the case acquires a new clarity. When we reach the heart of the matter, putting confusing verbiage aside and fixing our gaze upon essentials, the obligation of the bonds can be expressed in a simplifying paraphrase. "This bond shall be payable on June 15, 1947, or (upon three months notice by the Secretary of the Treasury) on June 15, 1932, or any interest date thereafter." That is what was meant. That in substance is what was said.[3]

No question of constitutional law is involved in the decision of these cases. No question is here as to the correctness of the decision in *Perry* v. *United States*, or as to the meaning or effect of the opinion there announced. All such inquiries are put aside as unnecessary to the solution of the problem now before us. Irrespective of the validity or invalidity of the whole or any part of the legislation of recent years devaluing the dollar, the maturity of the bonds in suit was accelerated by valid notice. As a consequence of such acceleration the right to interest has gone.

Second. The Secretary of the Treasury did not act in excess of his lawful powers by issuing the calls without further authority from the Congress than was conferred by the statutes under which the bonds were issued.

---

[3] Important differences exist, and are not to be ignored, between the retirement of shares of stock (*Sterling* v. *H. F. Watson Co., supra; Corbett* v. *McClintic-Marshall Corp.*, 17 Del. Ch. 165; 151 Atl. 218), and the accelerated payment of money obligations, and also between the acceleration of the obligations of the Government and those of other obligors. In the case of private obligations, a liability for interest survives the acceleration of the debt and continues until payment. In the case of Government obligations, interest does not continue after maturity (in the absence of statute or agreement) though payment is not made.

The argument to the contrary is inconsistent with the plain provisions of the statutes and also of the bonds themselves.

There was also confirmation of his power in subsequent enactments. Victory Liberty Loan Act, § 6, 40 Stat. 1311, as amended, March 2, 1923, c. 179, 42 Stat. 1427, and January 30, 1934, § 14 (b), 48 Stat. 344; Gold Reserve Act of 1934, § 14, 48 Stat. 343; Act of February 4, 1935, §§ 2, 4, 49 Stat. 20.

Third. In issuing the calls, the Secretary of the Treasury was not limited by the Act of March 18, 1869 (R. S. 3693; 16 Stat. 1) which in its day placed restrictions upon the redemption by the Government of interest-bearing bonds.

The aim of that statute was the protection of holders of United States obligations not bearing interest, the "greenbacks" of that era. "The bonds of the United States are not to be paid before maturity, while the note-holders are to be kept without their redemption, unless the note-holders are able at the same time to convert their notes into coin." Statement of Robert C. Schenck, one of the House Managers, Congressional Globe, March 3, 1869, p. 1879. Upon the resumption of specie payments in 1879 the aim of the statute was achieved, and its restrictions are no longer binding.

The judgments in Nos. 42 and 43 should be affirmed, and that in No. 198 reversed.

Nos. 42 and 43, affirmed.
No. 198, reversed.

Dissenting: MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER. See *post*, p. 364.

MR. JUSTICE STONE.

I concur in the result.

I think the court below, in the *Machen* case, 87 F. (2d) 594, correctly interpreted the bonds involved in

these cases as reserving to the government the privilege of accelerating their maturity by paying them or standing ready to pay them on any interest date according to their tenor, and upon giving the specified notice fixing the "date of redemption." The words "redeemed" and "redemption" as used in the bonds [1] point the way in which the privilege was to be exercised as plainly as when they are written in the bonds of a private lender. *Lynch* v. *United States,* 292 U. S. 571, 579; cf. *Perry* v. *United States,* 294 U. S. 330, 352. If payment, or readiness to pay the bonds in accordance with their terms was essential to "redemption," the one or the other, equally with the required notice, was a condition of acceleration.

The obligation of the bonds, read in the light of long established custom and of our own decision in *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, 336, decided since the *Perry* case, must, I think, be taken to be a "gold value" undertaking to pay in gold dollars of the specified weight and fineness or their equivalent in lawful currency. Compare *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 302. *Feist* v. *Société Intercommunale Belge, &c.,* L. R. [1934] A. C. 172, 173. The suppression of the use of gold as money, and the restriction on its export and of its use in international exchange, by acts

[1] The redemption clause is as follows:

"The principal and interest of this bond shall be payable in United States gold coin of the present standard of value, . . . All or any of the bonds of the series of which this is one may be redeemed and paid at the pleasure of the United States on or after June 15, 1932, or on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date, and published thereafter from time to time during said three months period as the Secretary of the Treasury shall direct. . . . From the date of redemption designated in any such notice interest on the bonds called for redemption shall cease, and all coupons thereon maturing after said date shall be void. . . ."

of Congress, 48 Stat. 1, 337, did not relieve the government of its obligation to pay the stipulated gold value of the bonds in lawful currency. Hence it has not complied, or ever stood ready to comply, with one of the two conditions upon performance of which the bonds "may be redeemed and paid" in advance of their due date—the payment to the bondholder of the currency equivalent of the stipulated gold value.

It will not do to say that performance of this condition can be avoided or dispensed with by the adoption of any form of words in the notice. Nor can it be said that a declaration, in the notice, of intention to pay whatever can be collected in court, see the *Perry* case, *supra,* 354, is equivalent to a notice of readiness to pay the currency equivalent of the gold value stipulated to be paid, or that a statement of purpose to pay what will constitutionally satisfy the debt suffices to accelerate although no payment of the currency equivalent is made or contemplated or is permitted by the statutes. It follows that judgment must go for the bondholders unless the Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, requiring the discharge of all gold obligations "dollar for dollar" in lawful currency, and declaring void as against public policy all provisions of such obligations calling for gold payments, is to be pronounced constitutional.

Decision of the constitutional question being in my opinion now unavoidable, I am moved to state shortly my reasons for the view that government bonds do not stand on any different footing from those of private individuals and that the Joint Resolution in the one case, as in the other, was a constitutional exercise of the power to regulate the value of money. Compare *Norman* v. *B. & O. R. Co., supra,* 304, 309. Without elaborating the point, it is enough for present purposes to say that the undertaking of the United States to pay its obligations in gold, if binding, operates to thwart the exercise of the

constitutional power in the same manner and to the same degree *pro tanto* as do bonds issued by private individuals, *Norman* v. *B. & O. R. Co., supra,* 311 *et seq.,* except insofar as the government resorts to its sovereign immunity from suit. Had the undertaking been given any force in the *Gold Clause Cases,* or the meaning which we have since attributed to it when used in private contracts, it would, if valid and but for the immunity from suit, have defeated the government policy of suspension of gold payments and devaluation of the dollar. Compare the *Norman* case, *supra,* with the concurring memorandum in *Perry* v. *United States, supra,* 360–361.

The very fact of the existence of such immunity, which admits of the creation of only such government obligations as are enforceable at the will of the sovereign, is persuasive that the power to borrow money "on the credit" of the United States cannot be taken to be a limitation of the power to regulate the value of money. Looking to the purposes for which that power is conferred upon the national government, its exercise, if justified at all, is as essential in the case of bonds of the national government as it is in the case of bonds of states, municipalities and private individuals. See *Norman* v. *B. & O. R. Co., supra,* 313 *et seq.* Its effect on the bondholders is the same in every case. Compare *Norman* v. *B. & O. R. Co., supra,* with *Nortz* v. *United States,* 294 U. S. 317. No reason of public policy or principle of construction of the instrument itself has ever been suggested, so far as I am aware, which would explain why the power to regulate the currency, which is not restricted by the Fifth Amendment in the case of any obligation, is controlled, in the case of government bonds, by the borrowing clause which imposes no obligation which the government is not free to discard at any time through its immunity from suit. I cannot say that the borrowing clause which is without force to compel the sovereign to

pay nevertheless renders the government powerless to exercise the specifically granted authority to regulate the value of money with which payment is to be made.

Mr. Justice Black, concurring.

Agreeing altogether with the opinion of Mr. Justice Cardozo, which deals only with the construction of the contract and the rights flowing from the notice, I find it unnecessary and therefore inappropriate to express any opinion as to the validity of the Joint Resolution of 1933 or other acts of legislation devaluing the dollar.

Mr. Justice McReynolds, dissenting.*

Mr. Justice Sutherland, Mr. Justice Butler and I cannot acquiesce in the conclusion approved by the majority of the Court. In our view it gives effect to an act of bad faith and upholds patent repudiation. Its wrongfulness is betokened by the circumlocution presented in defense.

The suit is to recover in currency of today the face value of a past due coupon originally attached to a three and one-half per cent bond of the United States issued in 1917 and payable 1947—nothing else.

The opinion of the Circuit Court of Appeals, to which little can be added, sets out the important facts and adequately supports its judgment.

In 1917, when gold coins contained 25.8 grains to the dollar, the United States obtained needed funds by selling coupon bonds—among them the one here involved. They solemnly agreed to pay the holder one thousand dollars on June 15, 1947, with semi-annual interest, in "gold coin of the present standard of value" subject to the following option:—"All or any of the bonds of the

* This opinion was entitled in only one of the three cases, No. 198.

series of which this is one may be redeemed [1] and paid at the pleasure of the United States on or after June 15, 1932, on any semi-annual interest payment date or dates, at the face value thereof and interest accrued at the date of redemption, on notice published at least three months prior to the redemption date. . . . From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease, and all coupons thereon maturing after such date shall be void."

The promise is to pay one thousand dollars in gold coin, 1917 standard. The face value of the bond is one thousand gold dollars. The option reserved is to redeem and pay after notice by giving the holder that number of such dollars. The notice required is nothing less than a declaration of *bona fide* purpose to redeem or pay off the obligation as written—no other right was reserved. A notice divorced from that purpose could amount to nothing more than a dishonest effort to defeat the contract and defraud the creditor. It would not come within the fair intendment of the contract; would not, in truth, designate a "date of redemption"; and, therefore, could not hasten the maturity of the principal or cause interest to cease. All this seems obvious, if respect is to be accorded to the ordinary rules of construction and principles of law governing contracts.

The obligation of the bond was declared by this Court in *Perry* v. *United States,* 294 U. S. 330, 351, 353, 354, to be a pledge of the credit of the United States and an assurance of payment as stipulated which Congress had no power to withdraw or ignore. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudia-

[1] Redeem—5. To buy off, take up or remove the obligation of, by payment or rendering of some consideration; as to redeem bank notes with coin.

Webster's New International Dictionary.

tion, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." "The power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers" was there denied. "The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign."

The right to redeem and pay the bond at face value after notice was reserved—nothing else. Did the United States give notice of a *bona fide* purpose so to redeem and pay? If not they cannot properly claim to have exercised their option to mature the obligation. That they did not honestly comply with this necessary preliminary becomes obvious upon consideration of the circumstances and pertinent legislation.

There is no question here concerning the Government committing itself through notice sent out by the Secretary of the Treasury expressly or indirectly to a forbidden medium of payment. No question of an anticipatory breach of contract. The Government simply has not in good faith complied with a condition precedent. It has never given notice of purpose to pay the obligation according to its terms. Its suggestion was to make payment of another kind.

The Circuit Court of Appeals well said—

"The notice calling the bond for payment was in the usual form; and there is no question but that it would have had the effect of stopping the running of interest and avoiding the coupons maturing after June 15, 1935, except for the legislation of Congress affecting the currency, which limited the power of the Secretary of the Treasury and must be read into the notice. At the time of the issuance of the bond the gold dollar was the standard of value in our monetary system and was defined by law as consisting of twenty-five and eight tenths grains of gold nine-tenths fine. Act of Mar. 14, 1900, c. 41, sec. 1, 31 Stat. 45, 31 U. S. C. A. 314. And the statutes provided for the use of gold coin as a medium of exchange. R. S. 3511. By Presidential Proclamation of January 31, 1934, issued under the act of May 12, 1933 (38 Stat. 52, 53), as amended by the act of January 30, 1934 (48 Stat. 342), the content of the dollar was reduced to 15-5/21 grains of gold nine-tenths fine; and, at the time of the publication of the notice calling the bond for payment, gold coin had been withdrawn from circulation, its possession had been prohibited under penalty, and payment in gold coin by the United States had been prohibited. 48 Stat. 337, 340. By joint resolution of June 5, 1933 (48 Stat. 112, 113), the payment of gold clause bonds in any legal tender currency 'dollar for dollar' had been authorized; and it was paper currency based on the 15-5/21 grain dollar, and nothing else, that was offered in payment of gold clause bonds which were called for payment by the Treasury. The notice of redemption calling the bond in question for payment was equivalent, therefore, to a notice that the United States elected to redeem the bond in paper currency based on a 15-5/21 grain dollar, notwithstanding that it was payable in gold coin based on a 25-8/10 grain dollar and might be redeemed only at its face value. . . .

"It is manifest that when the bonds were payable in gold coin of the standard of value at the time of issue,

i. e., 25-8/10 grains of gold to the dollar, a proposal to redeem them in paper money based upon 15-5/21 grains of gold to the dollar was not a proposal to redeem them at face value; and a notice that the government would redeem them on such basis, which is what the notice in question means when considered as it must be in connection with the legislation binding upon the Secretary of the Treasury, was not such a notice as the bonds prescribed for the exercise of the option retained by the government."

We are not now concerned with the power of the United States to discharge obligations at maturity in depreciated currency or clipped coin. Did they cause respondent's bond to mature before the ultimate due date by proper exercise of the option reserved when they sent out a notice which in effect stated that payment would not be made as provided by the bond, but otherwise? The answer ought not to be difficult where men anxiously uphold the doctrine that a contractual obligation "remains binding upon the conscience of the sovereign" and reverently fix their gaze on the Eighth Commandment.

We concur in the views tersely expressed in the following paragraph excerpted from the opinion below—

"No amount of argument can obscure the real situation. It is this: the government has promised to pay the bonds in question in gold coin of the standard of value prevailing in 1917. By their terms, it is permitted to redeem them only by paying them at their face value. It is proposing to redeem them, not by paying them at that face value but in paper money worth only about 59% thereof. The notice which it has issued means this and nothing else. Such a notice is not in accordance with the condition of redemption specified in the bond and consequently does not stop the running of interest or avoid the coupons."

The challenged judgment was correct and should be affirmed.

McNAIR, RECEIVER, *v.* KNOTT, TREASURER OF FLORIDA, ET AL.

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

No. 32. Argued November 10, 11, 1937.—Decided December 13, 1937.

1. The Enabling Amendment of June 25, 1930, provides that any National Bank Association "may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." *Held* applicable by intention, to security given and deposits made before the date of the amendment. P. 371.
2. Thus construed retroactively, the amendment was within the power of Congress. P. 372.

87 F. (2d) 817, affirmed.

CERTIORARI, 301 U. S. 677, to review the affirmance of a decree dismissing a bill by the receiver of a national bank praying for the cancellation of a pledge agreement made by the bank.

Messrs. J. Turner Butler and *George P. Barse* for petitioner.

Mr. J. Compton French, Assistant Attorney General of Florida, with whom *Messrs. Cary D. Landis,* Attorney General, and *H. E. Carter,* Assistant Attorney General, were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether the National Bank Enabling Amendment of June 25, 1930, which granted power to National Banks to secure deposits of public funds, validates or makes enforceable previous pledge agreements made to protect such funds deposited before the Enabling Amendment became effective.

That Enabling Act [1] provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Before, and at the time this Enabling Amendment was passed, the laws of Florida authorized state banks to give security for public deposits and also imposed upon public officials a duty to obtain such security.[2] In 1929 and 1930, before the passage of this amendment, the First National Bank of Perry, Florida, by agreement with the officials of Taylor County, Florida, pledged collateral security for the protection of county funds thereafter to be deposited from time to time in the bank.

This contractual relationship, established by the pledge agreement and deposits made thereunder, continued to exist until the bank was closed October 18, 1930. The Receiver for the closed bank at first recognized the pledge agreement as valid and enforceable and accordingly paid the county the income he received from the pledged securities. In 1935, however, the receiver filed this suit in equity in the Federal District Court for the Northern District of Florida, alleging that the pledge agreement was *ultra vires* and illegal and praying that it be cancelled and annulled. Upon motion of the county, the district court dismissed the bill. 13 F. Supp. 963. The Circuit Court of Appeals for the Fifth Circuit affirmed. 87 F. (2d) 817. This Court granted certiorari. 301 U. S. 677.

---

[1] Ch. 604, 46 Stat. 809, 12 U. S. C. 90.

[2] *First American Bank & Trust Co.* v. *Palm Beach,* 96 Fla. 247; 117 So. 900, 65 A. L. R. 1398; *Davis* v. *Knott,* 109 Fla. 60; 147 So. 276.

The issues raised require that we determine:

(1) Did Congress intend to validate existing *ultra vires* pledges?

(2) Could this pledge agreement be validated by changing the law which was in force when the transaction was initiated?

First. The language of the amendment, read in the light of the conditions that brought about the necessity for its passage, leads irresistibly to the conclusion that Congress did intend to make existing pledges enforceable.

The amendment does not expressly exclude existing contracts from its field of operation. On the contrary it extended a general grant of the broad power to give security for public deposits, with a single limitation relating to the kind of security given by state banks. If Congress had desired to limit the remedial grant to subsequent security contracts, it would doubtless have provided an additional limitation relating to prior agreements. This it did not do. Congress alone had the power to write such a limitation in the bill.[3]

Agreements to secure public deposits did not violate any express statutory prohibition; no statute imposed a penalty for making such agreements. Since the banking act of 1863 Congress has passed many laws requiring that security be given to protect deposits of certain public funds.[4]

For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The

[3] *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 479; *James* v. *Milwaukee,* 16 Wall. 159, 161.

[4] *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245, 257, note 11.

weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits.[5]

The Senate Committee on Banking and Currency which made a favorable report on the Enabling Amendment gave information to the Senate in its report that millions of dollars worth of collateral had been pledged by National banks as security for public deposits.[6] The Senate and House committee reports show that the sponsors of the amendment desired it not merely to permit future pledges but also to assure that agreements under which "millions of dollars" of pledges had been made by National banks would be enforceable. One of the chief reasons for the enactment of the amendment was the need for validation of pledges already made. The amendment was designed to meet this need. To determine that Congress did not intend to validate pledge agreements existing when the amendment was passed would greatly limit its curative effect. Such a construction would be an unwarranted departure from the plain intent of this curative and enabling statute.

Second. Appellant insists that the contract could not be validated by changing the law which was in force when the pledge agreement was made.

There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as "remedial," "curative," or "enabling," merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relat-

[5] See cases collected in 42 Harvard Law Rev. 272; 79 University of Pennsylvania Law Rev. 608.

[6] Senate Report No. 67, 71st Cong., 2d Sess.

ing to mortgages, deeds, bonds, and other contracts.[7] Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made.[8]

This Court held that the Enabling Amendment removed the obstacle that prevented the enforcement of a contract of a National bank to give security to the State of Georgia for its deposits.[9] In that case as in this case, the bank made an *ultra vires* agreement to secure public deposits. In that case the deposits were made after the law was passed and were legal. In this case the deposits were made before the law was passed and were legal. In that case as in this case, the only illegal element of the agreement was the attempt to give security for public deposits. In that case as in this case, the parties permitted the original illegal security agreement to remain unaltered in its terms after the amendment was enacted. In that case it was held that the security agreement—

[7] *Watson* v. *Mercer,* 8 Pet. 88 (defective acknowledgment in deed validated by general law); *Galveston Railroad* v. *Cowdrey,* 11 Wall. 459 (mortgage validated by general statute); *Randall* v. *Kreiger,* 23 Wall. 137 (defective power of attorney validated by general statute); *Ewell* v. *Daggs,* 108 U. S. 143 (note validated by general statute); *Gross* v. *U. S. Mortgage Co.,* 108 U. S. 477 (mortgage validated by general statute); *Utter* v. *Franklin,* 172 U. S. 416 (bonds validated by general law); *West Side Belt R. Co.* v. *Pittsburgh Construction Co.,* 219 U. S. 92 (contract validated by general statute); *Brown* v. *Boston & Maine Railroad,* 233 Mass. 502; 124 N. E. 322; (agreement to purchase stock validated).

[8] *Ewell* v. *Daggs, supra.*

[9] *Lewis* v. *Fidelity & Deposit Co.,* 292 U. S. 559.

originally *ultra vires*—became enforceable from the date the amendment became effective. In this case, we hold that the security agreement—originally *ultra vires*—became enforceable from the date the amendment became effective. Let the judgment of the Circuit Court of Appeals be

Affirmed.

Mr. Justice McReynolds, concurring.

The challenged judgment, I think, should be affirmed upon the theory that subsequent to the enabling amendment of June 25, 1930, both parties recognized an existing obligation to observe the terms of the pledge agreement, and on this understanding maintained the relationship of debtor and creditor. Discussion of other questions seems unnecessary.

Prior to June 25, 1930, the Perry National Bank obtained deposits of public funds by undertaking to hypothecate certain of its assets to secure their payment. This went beyond the corporate power theretofore conferred. *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245; *Marion* v. *Sneeden,* 291 U. S. 262; *Lewis* v. *Fidelity & Deposit Co.,* 292 U. S. 559.

The amendment empowered the bank to secure such deposits by a pledge of assets. For more than three months thereafter the securities originally hypothecated were allowed to remain in the keeping of the trustee without suggestion of change in the outstanding agreement. And during that period prior deposits were allowed to remain with the bank. It closed October 18, 1930. Earlier insolvency is not relied upon.

The receiver claims that as the hypothecation was unlawful when made he became entitled to the assets free of lien.

After the amendment the bank had full power to do what it had undertaken to do. For three months it

accepted the benefits of the agreement and allowed the assets to remain with the trustee. All parties assumed the validity of the arrangement and acted in reliance upon it. The result was the same as if the assets had been repossessed by the bank after June 25, 1930, and again hypothecated under an agreement identical with the original one.

HONEYMAN *v.* HANAN, EXECUTOR.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 583. Motion to dismiss.—Decided December 20, 1937.

Sections 1083–a and 1083–b of the New York Practice Act, which provide that an action to recover a money judgment for any indebtedness secured by mortgage may not be maintained after the mortgaged premises have been sold under a judgment of foreclosure and sale, unless the right to a deficiency judgment has been determined in the foreclosure suit, did not impair the contract rights (Const. Art. I, § 10) of one who, having foreclosed a mortgage and been denied a deficiency judgment, was prevented by the statute from enforcing, by separate action, a bond securing the mortgage debt collaterally, against one who was party to the foreclosure suit, and against whom a deficiency judgment might have been awarded in the foreclosure suit, but as to whom it was discontinued after a motion for deficiency judgment was denied. The question relates to the distribution of jurisdiction in the state courts. P. 378.

275 N. Y. 382; 9 N. E. (2d) 970, appeal dismissed.

APPEAL from affirmance of a judgment dismissing an action on a bond. An earlier phase of the case is reported in 300 U. S. 14.

Mr. Robert B. Honeyman was on the brief for appellant.

Messrs. Anthony F. Tuozzo and *James S. Brown, Jr.* were on the brief for appellee.

PER CURIAM.

Upon the prior appeal, the cause was remanded for further proceedings to the end that uncertainty might be removed and that the precise nature of the federal question, how it was raised and the grounds of its disposition, might be definitely set forth. 300 U. S. 14, 26. The Court of Appeals of the State has heard reargument and has defined the federal question which it has decided. 275 N. Y. 382; 9 N. E. (2d) 970. The court affirmed a judgment which dismissed the amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The case comes here on appeal which appellee moves to dismiss for the want of jurisdiction.

The bond in suit is a collateral bond "which binds the obligor indirectly to pay the existing mortgage indebtedness." The amended complaint set forth the obligation of the bond and the breach of condition. It alleged that an action, to which defendant was a party, had been brought to foreclose the mortgage; that pursuant to judgment therein the mortgaged premises were sold and the proceeds were applied on account of the indebtedness; and that in the foreclosure action a motion was duly made for a deficiency judgment which was denied. Section 1083-a of the New York Civil Practice Act forbids a judgment for any residue of the debt remaining unsatisfied after sale of the mortgaged property except as therein provided. Section 1083-b governs actions, other than foreclosure actions, to recover judgment for any indebtedness secured solely by a mortgage upon real property, "against any person or corporation directly or indirectly or contingently liable therefor." The state court has held that § 1083-a is intended to provide "an exclusive procedure for the entry of a judgment for any residue of a debt secured by a mortgage after sale of the mortgaged

premises." The state court has also ruled that the defendant was a party to the foreclosure action and upon proper proof the final judgment therein "might have awarded payment by him of the residue of the debt remaining unsatisfied after a sale of the mortgaged property, and 'application of the proceeds, pursuant to the directions contained therein.'" The foreclosure action was discontinued as to him only after a motion for a deficiency judgment was denied.

Appellant challenges the validity of §§ 1083–a and 1083–b. As to the federal question involved in the present suit the state court has said:

"We are not advised whether in the foreclosure action the plaintiff challenged the validity of section 1083–a. Even if the plaintiff did properly challenge in that action the validity of section 1083–a, we could not upon this appeal consider that challenge, for no order or judgment in that action is before us for review. On this appeal we review only the decision that after denial of a deficiency judgment in the foreclosure action upon a motion made pursuant to section 1083–a, the plaintiff is not entitled to maintain an action to recover upon the bond which the defendant's testator, Herbert W. Hanan, signed as obligor. The challenge to the constitutional validity of the statute raises the constitutional question whether the obligations of the contract are impaired and article I, section 10, of the Constitution of the United States violated by the provisions of sections 1083–a and 1083–b, which provide that during the emergency period an action to recover a money judgment for any indebtedness secured by mortgage may not be maintained after the mortgaged premises have been sold under a judgment of foreclosure and sale, unless the right to a deficiency judgment has been determined in the foreclosure action. We decided that question against the appellant after the original argument. We adhere to that decision now."

In view of this ruling as to the exclusive procedure for which § 1083–a provides, it appears that the federal question now raised is simply whether the state legislation which requires that the right to a deficiency judgment must be determined in the foreclosure action violates the contract clause of the Federal Constitution. Article I, § 10. That question relates to the distribution of jurisdiction in the state courts. The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided. The question of the validity of the state legislation could have been raised in the foreclosure action and brought to this Court in accordance with the applicable rules.

The requirement that the right to a deficiency judgment should be determined in the foreclosure action as against one who was a party to that action raises no substantial federal question. *Terry* v. *Anderson,* 95 U. S. 628, 633; *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569; *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30, 37; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369; *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Lansing Drop Forge Co.* v. *American State Bank,* 297 U. S. 697; *Chisholm* v. *Gilmer,* 299 U. S. 99, 102. The appeal is

Dismissed.

NARDONE ET AL. *v.* UNITED STATES.

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

No. 190. Argued November 15, 1937.—Decided December 20, 1937.

1. In view of the provisions of § 605 of the Communications Act of 1934, 47 U. S. C. § 605, evidence obtained by federal agents by tapping telephone wires and intercepting messages is not admissible in a criminal trial in the federal district court. P. 382.
2. In the provision of § 605 of the Communications Act of 1934, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ." the phrase "no person" embraces federal agents engaged in the detection of crime; and to "divulge" an intercepted communication to "any person" embraces testimony in a court as to the contents of such a communication. P. 383.
3. Evidence in congressional committee reports indicating that the major purpose of the Federal Communications Act was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission, and other circumstances in the legislative history of the Act, *held* insufficient to negative the plain mandate of the provisions of § 605 forbidding wire-tapping. P. 382.
4. Whether wire-tapping as an aid in the detection and punishment of crime should be permitted to federal agents is a question of policy for the determination of the Congress. P. 383.
5. The canon that the general words of a statute do not include the Government or affect its rights, unless that construction be clear and indisputable from the language of the Act, is inapplicable to this case; but applicable is the principle that the sovereign is embraced by general words of a statute intended to prevent injury and wrong. Pp. 383–384.

90 F. (2d) 630, reversed.

CERTIORARI, *post*, p. 668, to review a judgment affirming a judgment of conviction on an indictment charging violation of the Anti-Smuggling Act and conspiracy.

Messrs. Louis Halle and *Thomas O'Rourke Gallagher,* with whom *Mr. Joseph P. Nolan* was on the brief, for petitioners.

Mr. William W. Barron, with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. John T. M. Reddan, W. Marvin Smith,* and *Bates Booth* were on the brief, for the United States.

Mr. Justice Roberts delivered the opinion of the Court.

The importance of the question involved,—whether, in view of the provisions of § 605 of the Communications Act of 1934,[1] evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court,—moved us to grant the writ of certiorari.

The indictment under which the petitioners were tried, convicted, and sentenced, charged, in separate counts, the smuggling of alcohol, possession and concealment of the smuggled alcohol, and conspiracy to smuggle and conceal it. Over the petitioners' objection and exception federal agents testified to the substance of petitioners' interstate communications overheard by the witnesses who had intercepted the messages by tapping telephone wires. The court below, though it found this evidence constituted such a vital part of the prosecution's proof that its admission, if erroneous, amounted to reversible error, held it was properly admitted and affirmed the judgment of conviction.[2]

Section 605 of the Federal Communications Act provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication

[1] Ch. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, § 605.

[2] 90 F. (2d) 630. See also *Smith* v. *United States,* 91 F. (2d) 556.

by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employes, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority; and "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ." Section 501 [3] penalizes wilful and knowing violation by fine and imprisonment.

Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena.

The government contends that Congress did not intend to prohibit tapping wires to procure evidence. It is said that this court, in *Olmstead* v. *United States,* 277 U. S. 438, held such evidence admissible at common law despite the fact that a state statute made wire-tapping a crime; and the argument proceeds that since the *Olmstead* decision departments of the federal government, with the knowledge of Congress, have, to a limited extent, permitted their agents to tap wires in aid of detection and conviction of criminals. It is shown that, in spite of its knowledge of the practice, Congress refrained from adopting legislation outlawing it, although bills, so providing, have been introduced. The Communications Act, so it is claimed, was passed only for the purpose of reën-

[3] Ch. 652, 48 Stat. 1064, 1100, U. S. C. Tit. 47, § 501.

acting the provisions of the Radio Act of 1927 [4] so as to make it applicable to wire messages and to transfer jurisdiction over radio and wire communications to the newly constituted Federal Communications Commission, and therefore the phraseology of the statute ought not to be construed as changing the practically identical provision on the subject which was a part of the Radio Act when the *Olmstead* case was decided.

We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *"no person"* shall divulge or publish the message or its substance to *"any person."* To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.

True it is that after this court's decision in the *Olmstead* case Congressional committees investigated the wire-tapping activities of federal agents. Over a period of several years bills were introduced to prohibit the practice, all of which failed to pass. An Act of 1933 included a clause forbidding this method of procuring evidence of violations of the National Prohibition Act.[5] During 1932, 1933 and 1934, however, there was no discussion of the matter in Congress, and we are without contemporary legislative history relevant to the passage of the statute in question. It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission. But these circumstances are,

[4] Act of Feb. 23, 1927, c. 169, 44 Stat. 1162.

[5] Department of Justice Appropriation Act of March 1, 1933, 47 Stat. 1381.

in our opinion, insufficient to overbear the plain mandate of the statute.

It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

The canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest.[6] A classical instance is the exemption of the state from the operation of general statutes of limitation.[7] The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.[8]

---

[6] *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Herron*, 20 Wall. 251, 263; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554; *United States* v. *Stevenson*, 215 U. S. 190, 197; *Title Guaranty & Surety Co.* v. *Guarantee Title & Trust Co.*, 174 Fed. 385, 388; Maxwell, Interpretation of Statutes (7th ed.) 117, 121; Black on Interpretation of Laws (2d ed.) 94.

[7] *United States* v. *Hoar*, 2 Mason 311, 314–315.

[8] "The prohibitions [against any form of action except that specified in the statute] if any, either express or implied . . . are for others,

The second class,—that where public officers are impliedly excluded from language embracing all persons,—is where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.[9]

For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.[10]

---

not for the government. They may be obligatory on tax collectors. They may prevent any suit at law by such officers or agents." *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239. "These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others." *United States* v. *Arizona*, 295 U. S. 174, 184. Compare *Stanley* v. *Schwalby*, 147 U. S. 508, 515; *Donnelley* v. *United States*, 276 U. S. 505, 511.

[9] *Balthasar* v. *Pacific Electric Ry. Co.*, 187 Cal. 302; 202 Pac. 37; *State* v. *Gorham*, 110 Wash. 330; 188 Pac. 457.

[10] *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Herron*, 20 Wall. 251, 263; Black on Interpretation of Laws (2d ed.) 97.

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE SUTHERLAND, dissenting.

I think the word "person" used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime. The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court. If Congress thus intended to tie the hands of the government in its effort to protect the people against lawlessness of the most serious character, it would have said so in a more definite way than by the use of the ambiguous word "person." *Commonwealth* v. *Welosky,* 276 Mass. 398, 403–404, 406; 177 N. E. 656. For that word has sometimes been construed to include the government and its officials, and sometimes not. I am not aware of any case where it has been given that inclusive effect in a situation such as we have here. Obviously, the situation dealt with in *United States* v. *Arizona,* 295 U. S. 174, was quite different. There, a federal statute forbade the construction of any bridge, etc., in any port, etc., "until the consent of Congress . . . shall have been obtained." The mere building of the designated structure, in the absence of congressional consent, violated the statute. There was no ambiguous term, such as we have here, or anything else in the language, requiring construction.

32094°—38——25

There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. It is fair to conclude that the word "person" as here used was intended to include the former but not the latter. This accords with the well-settled general rule stated by Justice Story in *United States* v. *Hoar,* 2 Mason 311, 314–315; 26 Fed. Cas. 329, 330: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." And see *In the Matter of Will of Fox,* 52 N. Y. 530, 535. Compare *State* v. *Gorham,* 110 Wash. 330; 188 Pac. 457; *Balthasar* v. *Pacific Electric Ry. Co.,* 187 Cal. 302, 305–308; 202 Pac. 37. A case in point is that of *People* v. *Hebberd* (Sup. Ct. N. Y.), 96 Misc. 617, 620–621; 162 N. Y. S. 80.

In the investigations of the congressional committees, referred to in the opinion of the court, it appeared that the Attorney General had ordered that no tapping of wires should be permitted without the personal direction of the chief of the bureau, after consultation with the Assistant Attorney General in charge of the case; and that such means were to be adopted only as an emergency method. The Attorney General himself appeared before one of the committees and pointed out that crime had become highly organized, with strong political connections and illegal methods of procedure; that gangsters and desperate criminals had equipped themselves with every

modern convenience and invention; that modern gangsters have no regard for life, property, decency or anything else; and he had no doubt that they tapped wires leading to offices of the United States attorneys to find out what was being done. He cited the case of a Bureau of Investigation agent who had been found shot to death under circumstances which indicated that a gang of narcotic traffickers had murdered him; and he posed the question whether, if it had appeared that the perpetrators of the crime could be detected and brought to justice by tapping their telephone wires, nevertheless, that ought not to be done.

The answer of Congress to the question has been a refusal to pass any of the bills which comprehensively proposed to forbid the practice.

My abhorrence of the odious practices of the town gossip, the Peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General, and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.

I think the judgment below should be affirmed.

MR. JUSTICE MCREYNOLDS joins in this opinion.

RAILROAD COMMISSION OF CALIFORNIA ET AL. *v.* PACIFIC GAS & ELECTRIC CO.

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

No. 804 (October Term, 1936). Argued April 30, 1937. Reargued November 11, 1937.—Decided January 3, 1938.

1. Having acquired jurisdiction by virtue of federal questions, the District Court may determine all questions in the case, local as well as federal. P. 391.
2. The respondent in this case has not shown that the Commission, in fixing its rates for gas, denied it the hearing required by the California Public Utilities Act. P. 391.
3. Whether the Commission's findings found support in the evidence before it, cannot be determined upon a record not containing that evidence. P. 392.
4. When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for this Court, or a lower federal court, is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the rates it fixes will result in confiscation. P. 393.
5. Affidavits used before the court below and the Commission's official opinion disprove the respondent's contention that, in fixing its rates, the Commission refused to receive evidence of the cost of reproduction or to consider that or other evidence offered by respondent with respect to the value of its property. P. 395.
6. In fixing rates of a public utility, a state commission may weigh the evidence of reproduction cost, etc. and may determine the probative force of estimates of value. P. 397.
7. Historical cost, as well as cost of reproduction, is admissible evidence of the value of a public utility's property. P. 398.
8. The findings of the Commission contained in its official opinion in this case show that the Commission found what it regarded as a reasonable value for respondent's property for the purpose of fixing rates and fixed the rates on that basis. P. 400.

9. One who complains in a federal court of the constitutional invalidity of state-made rates, has the burden of showing that invalidity by convincing proof. P. 401.
10. The Court sees no sufficient reason for directing that the evidence be sent up for the purpose of aiding in determining the procedural points presented on this appeal. The main issue in the case is whether the rates as fixed are confiscatory—an issue which was not, but should be, decided, by the District Court. P. 401.

13 F. Supp. 931; 16 *id.* 884, reversed.

APPEAL from a decree of the District Court, of three judges, permanently enjoining the enforcement of an order fixing the rates for gas supplied by the above-named respondent. The case was heard at the last term and the decree affirmed by a divided court, 301 U. S. 669. Rehearing was granted and reargument was ordered, *post*, p. 771.

Mr. Ira H. Rowell for appellants, on the original argument and the reargument.

Mr. Warren Olney, Jr. for appellee, on the original argument and the reargument. *Messrs. Allen P. Matthew* and *Robert L. Lipman* were with him on the briefs.

Mr. Oswald Ryan, General Counsel, (with whom *Messrs. Thomas J. Tingley* and *William C. Koplovitz* were on a brief submitted by *Solicitor General Reed*), for the Federal Power Commission as *amicus curiae,* by special leave of Court, on the reargument, in support of appellants.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Hampson Gary,* General Counsel, *Carl I. Wheat, Milford Springer, Robert E. May, Frank B. Warren* and *Basil P. Cooper,* on behalf of the Federal Communications Commission; *Messrs. John C. Kelley* and *Charles J. Margiotti,* Attorney General of Pennsylvania, on behalf of the Pennsylvania Public Utility Commission; *Messrs. John E. Benton* and *Clyde S. Bailey,* on behalf of the

National Association of Railroad and Utilities Commissioners,—all in support of appellants.

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

This is an appeal from a final decree of the District Court, composed of three judges (28 U. S. C. 380), permanently enjoining an order of the Railroad Commission of the State of California.

The Commission by its order on November 13, 1933, in a proceeding instituted on its own motion, fixed rates for gas supplied by respondent. In this suit, the validity of the order was challenged as depriving respondent of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. An interlocutory injunction was granted and the cause was referred to a special master. The parties stipulated for the submission of the cause upon the record made before the Commission with certain supplementary evidence. Following a hearing, the master on the basis of findings as to value, expenses and revenues, concluded that the rates prescribed were confiscatory and void. 13 F. Supp. pp. 931, 932. The District Court expressly stated that it did "not pass upon the factual exceptions to the master's report" and did "not approve or reject his findings as to the fair value" of the property "or determine the net income" which would result from the assailed rates, "or determine what would be a fair rate of return," but rested its decision "solely upon the denial of due process of law by the Commission in fixing the rates in question." *Id.*, p. 936. Rehearing was denied. 16 F. Supp. 884. On appeal here the decree was affirmed by an equally divided court. 301 U. S. 669. Reargument was ordered (October 11, 1937) and has been had.

The parties have not brought before us the evidence that was taken before the Commission or that was before

the court below, with the exception of certain affidavits by the president of the respondent and the president of the Commission, respectively, in relation to the proceedings before the Commission. Respondent has in effect challenged the action of the Commission as invalid upon the face of its opinion and order. 39 Cal. R. Com. 49. Appellants have accepted that challenge.

1. Respondent seeks to sustain the decree upon the ground that the Commission's order was not authorized by the state law. Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 303; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 307.

The state statute to which our attention is directed (§ 32 of the California Public Utilities Act, Cal. Stat., 1923, p. 837, set forth in the margin)[1] provides that whenever the Commission after a hearing shall find the existing rates charged by a public utility to be unjust, unreasonable, discriminatory or preferential, the Commission shall

---

[1] "Sec. 32. *Power to change unjust rates. Power to fix new rates. Preservation of adequate service.* (a) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided."

determine the just and reasonable rates to be thereafter in force. In this instance, the Commission's order shows on its face that the Commission found the existing rates to be unjust and unreasonable. 39 Cal. R. Com., p. 77. So far as respondent contends that this finding was not sustained by evidence, it is sufficient to say that the evidence is not here and we cannot say that the ruling lacked support.

Respondent states that it was denied a proper hearing, but the record shows that the Commission held extended hearings, at which the evidence offered by respondent was received and its arguments were presented.[2] 39 Cal. R. Com., p. 51. While these hearings were in progress, and on June 16, 1933, respondent was cited to show cause why interim rates should not be put into effect pending the proceeding. Respondent stipulated that it would complete the presentation of its evidence before October 1, 1933, and that the rates which the Commission established in the proceeding might, if lower than the existing rates, be made retroactive so as to apply to meter readings made after July 16, 1933, and before November 15, 1933. That date was later changed by stipulation to January 1, 1934. *Id.*, pp. 52, 53.

We have not been referred to any state decisions warranting the conclusion that the Commission did not afford a hearing in accordance with the state law. We turn to the constitutional question.

2. As the District Court did not deal with the issue of confiscation and the evidence is not before us, we are concerned only with the question of procedural due proc-

[2] The opinion of the Commission states that "In all, 81 exhibits were introduced presenting in great detail the underlying data of this proceeding, and 3729 pages of testimony and argument were transcribed. Many witnesses testified upon various issues pertaining to a general rate case." The opinion lists the witnesses on both sides. 39 Cal. R. Com., pp. 51, 52.

ess, that is, whether the Commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution. We examine this question in the light of well settled principles governing the proceedings of rate-making commissions.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 304, 305. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51, 73; *Morgan* v. *United States,* 298 U. S. 468, 480–481; *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n, supra.* As we have seen, the respondent was heard, the Commission received the testimony of respondent's witnesses, its exhibits and arguments. There is nothing whatever to show that the hearing was not conducted fairly.

The complaint is not of the absence of these rudiments of fair play but of the method by which the Commission arrived at its result. As to this a fundamental distinction must be observed. While a fair and open hearing must be accorded as an inexorable safeguard, we do not sit as an appellate board of revision but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446. When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are

met, and the question that remains for this Court, or a lower federal court, is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the rates it fixes will result in confiscation.

We have recently had occasion to emphasize this distinction in passing upon an order of the appellant Commission in the case of *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 304, 305. We said:

"The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

This controlling principle was reiterated, with due emphasis upon the necessity of a fair hearing, in the case of *West Ohio Gas Co.* v. *Public Utilities Comm'n, (No. 1),* 294 U. S. 63, 70, in these words:

"Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern Ry. Co.* v. *Virginia,* 290 U. S. 190) to challenge the result, there is no denial of due process, though the proceeding is shot through with

irregularity or error." The statement is equally applicable, as the *Los Angeles* case shows, when the order of a state commisison is assailed in a federal court.

3. The gravamen of respondent's complaint is that the Commission refused to consider the fair value of respondent's property and in fixing the rate base "gave weight and effect solely to the historical cost."

Respondent supports its contention by referring to the statement of the Commission that during its entire history, "to determine a proper rate base this Commission has used the actual or estimated historical costs of the properties undepreciated, with land at the present market value," and, consistently with that, the Commission has "used the sinking fund method to determine the allowance for depreciation to be included in operating expenses." The Commission gave its reasons why this "historical method has dominated the Commission's findings." 39 Cal. R. Com., pp. 57, 58. The text of this portion of the Commission's statement is given in the margin.[3] Refer-

[3] "During its entire history in establishing reasonable rates for utilities similar to this company, to determine a proper rate base this Commission has used the actual or estimated historical costs of the properties undepreciated, with land at the present market value. Consistent with this, it has used the sinking fund method to determine the allowance for depreciation to be included in operating expenses.

"This historical method has dominated the Commission's findings for several principal reasons. It is well grounded upon established facts, is not subject to the vagaries of pet theories, unlimited imagination and abrupt fluctuation of current prices and passing conditions, and therefore indicates a truer measure of value upon which, through the application of rates, a return may be allowed to reimburse the owner for his enterprise and insure the integrity of his capital honestly and prudently invested. At the same time it prevents unwarranted demands upon the consumer through the projections of future rates on ephemeral values and stabilizes rates so that economic shocks from such changes are reduced to a minimum.

"It is an economical procedure, where the books of the companies are reasonably well kept, as obtains in practically all of the major

ence is also made to statements of the Commission in its supplemental investigation in the light of the opinion of the District Court on the motion for an interlocutory injunction. *Id.*, pp. 198, 202; 5 F. Supp. 878.

But it does not follow from these statements that the Commission refused to receive evidence of the cost of reproduction or to consider that or other evidence presented by respondent with respect to the value of its property. The contrary clearly appears.

Respondent submitted to the District Court affidavits of its president setting forth its contention that no consideration was given to reproduction cost. This contention was combatted by an affidavit of the president of the Commission in which it is stated that the Commission gave careful consideration to all the testimony of record relative to value and to the testimony offered by respondent respecting reproduction cost. These affidavits are of slight value as we have the official opinion of the Commission stating the course which it pursued. That opinion shows precisely what the Commission has done in this instance. The Commission states, 39 Cal. R. Com. p. 64:

"Testimony regarding the cost to reproduce the properties here under consideration was presented by the company's valuation engineer on several price bases, all being developed through the application of price translation factors, and not through the application of appropriate prices to an inventory of the property. In each pricing period offered the estimate to reproduce was higher than the historical cost. For the first six months' period of 1933 the reproduction cost was shown as 8 per cent higher than historical. A perusal of price trend charts intro-

---

utilities of this State, full compliance with which will prevent unwarranted expenditures of money by the Commission, the public and the company, which inures to the benefit of both the consumers and the utility. It is a more rapid procedure insuring quicker compliance with necessities as they arise."

duced by the company elsewhere in the proceedings indicates that the estimate must be in error. It is not conceivable that a property, 80 per cent. of which has been constructed in the high price period following 1919, could not be reproduced for a lesser cost under prices prevailing in the first six months of 1933. Witness for the city of San Francisco clearly indicated why the estimate was erroneous when he showed that the method used ignored certain factors tending in later years to decrease cost, such as improvement in construction materials and methods, increased use of mechanical equipment and a lessening in the width of the excavations and pavement cut. The estimates of cost to reproduce are not at all convincing and cannot be of positive value in this proceeding."

The Commission was entitled to weigh the evidence introduced, whether relating to reproduction cost or to other matters. The Commission was entitled to determine the probative force of respondent's estimates. That the Commission did so is apparent from both its statement to that effect and the reasons it gives for considering these estimates to be without positive value. The Commission compared them with other evidence and found the estimates to be erroneous. It found that 80 per cent. of the property had been constructed in the prior "high price period" and the Commission thought it inconceivable that the property could not be reproduced "for a lesser cost under prices prevailing in the first six months of 1933." These statements not only do not suggest but definitely rebut an inference of arbitrary action.

There is no principle of due process which requires the rate making body to base its decision as to value, or anything else, upon conjectural and unsatisfactory estimates. We have had frequent occasion to reject such estimates. *Minnesota Rate Case,* 230 U. S. 352, 452; *Los Angeles Gas Co.* v. *Railroad Commission, supra,* pp. 307, 310, 311;

Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 163, 164. Whether in this instance the Commission was in error in treating respondent's estimates as without probative force, we have no means of knowing as the evidence is not before us, but its error in that conclusion, if error there be, was not a denial of due process. *Los Angeles Gas Co.* v. *Railroad Commission, supra; Ohio Bell Telephone Co.* v. *Railroad Commission, supra.*

Nor did the ruling with respect to the weight of evidence as to reproduction cost leave the Commission without evidence of the value of respondent's property. We have frequently held that historical cost is admissible evidence of value. For example, in the *Los Angeles* case we said that "no one would question that the reasonable cost of an efficient public utility system 'is good evidence of its value at the time of construction,'" and that "such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices," citing *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 411. And we added that "when such a change in the price level has occurred, actual experience in the construction and development of the property, especially experienced in a recent period, may be an important check upon extravagant estimates." *Los Angeles Gas Co.* v. *Railroad Commission, supra,* p. 306. While the Court has frequently declared that "in order to determine present value, the cost of reproducing the property is a relevant fact which should have appropriate consideration," we have been careful to point out that "the Court has not decided that the cost of reproduction furnishes an exclusive test" and in that relation we have "emphasized the danger in resting conclusions upon estimates of a conjectural character." *Los Angeles Gas Co.* v. *Railroad Commission, supra,* p. 307. And in the *Los Angeles* case, with the evidence before us which had been

taken by the Commission and by the District Court, we held that on that evidence it did not appear to be "unfair to the Company, in fixing rates for the future, to take the historical cost as found by the Commission as evidence of the value of the Company's structural property at the time of the rate order." *Id.*, p. 309. In the instant case we cannot say that the Commission in taking historical cost as the rate base was making a finding without evidence and therefore arbitrary.

The decisions cited by respondent do not require a different conclusion. In *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 43–45, we said that the Commission's action in reducing rates by an order dependent wholly "upon a finding made without evidence" or "upon a finding made upon evidence which clearly does not support it" in the face of unchallenged evidence of probative value showing that the rates were already confiscatory, was an arbitrary act and a denial of due process. In so ruling, we fully recognized the principle that "mere error in reasoning upon evidence introduced" does not invalidate an order. In *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Comm'n,* 274 U. S. 344, the Idaho Commission and the state court had refused "to consider the evidence introduced by the carriers to show that the rates in question are too low and confiscatory." In *West* v. *Chesapeake & Potomac Telephone Co.,* 295 U. S. 662, upon which the District Court relied, the Court took the view that the Commission had based its action upon the application of "general commodity indices to a conglomerate of assets constituting a utility plant," and had resorted, on account of the wide variation of results caused by the use of different indices, to what the Court described as a "rule of thumb corrective" by "weighting the several indices upon a principle known only to itself," and had substituted that sort of calculation "for such factors as historical cost and cost of re-

production." In that view, the Court thought that the Commission had acted arbitrarily, and hence that its order fell within the principle of the *Northern Pacific* case. No such procedure appears here. In *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, the Court was not dealing with the order of a state commission, or with a question of due process, but with the command of Congress addressed to the Interstate Commerce Commission in relation to its valuations of railway property. The Court construed that command and found that it had not been obeyed.

4. The contention that the Commission failed to find the fair value of respondent's property presents substantially the same question in another form. What the Commission found appears by its own opinion. The court below was bound to go to that opinion to ascertain the Commission's findings. The Commission specifically found what it considered to be the rate base. 39 Cal. R. Com., p. 76. The Commission found that rate base to be reasonable. *Id.,* p. 77, note. The import of its opinion is that the rate base represented the Commission's conclusion as to the value which should be placed upon respondent's property for the purpose of fixing rates. It was upon that valuation that the Commission distinctly ruled that the rates it established would "assure the Company a fair return on its properties." Respondent was entitled to contest the value thus placed upon its properties, or any part of them, to insist that the value taken as the rate base was too low, and that in consequence the prescribed rates were confiscatory. That was the issue upon which the court below should have passed. But respondent cannot successfully contend that it was not heard by the Commission, that the evidence respondent offered was not received and considered, and its competency and weight determined by the Commission, or that the Commission did not place its valuation upon

the property and fix the rates upon the basis of that valuation. Respondent utterly fails to show that in the procedure of the Commission it was denied due process of law.

5. There is a further contention as to the burden of proof. But the applicable rule is clear. Respondent is in a federal court complaining of the constitutional invalidity of state-made rates and respondent is held to the burden of showing that invalidity by convincing proof. *Los Angeles Gas Co.* v. *Railroad Commission, supra,* p. 305; *Lindheimer* v. *Illinois Bell Telephone Co., supra,* p. 169; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 298.

Respondent suggested in the argument at bar that the Court should direct the evidence to be sent up for the purpose of determining the points presented on this appeal. We see no sufficient reason for that course. The parties agreed upon the record to be submitted.

The main issue in this litigation is whether the rates as fixed by the Commission's order are confiscatory. The District Court did not determine that issue. The District Court should determine it. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BLACK concurs in the reversal of the decree.

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

MR. JUSTICE BUTLER, dissenting.

The district court held that the commission refused to consider the company's evidence of the cost of reproduction and failed to find the value of the property used to furnish the gas covered by the challenged rates. On that basis of fact, it was bound by our decisions to set aside

the order as repugnant to the due process clause of the Fourteenth Amendment.[1]

This Court holds that the commission did consider the cost of reproduction and that error, if any, in appreciation of that item of evidence would not be a denial of due process. But as to whether the commission found or did not find value, the opinion is not clear. It states that the commission "specifically found what it considered to be the rate base," found "that rate base to be reasonable," and that "The import of its opinion is that the rate base represented the Commission's conclusion as to the value which should be placed upon respondent's [appellee's] property for the purpose of fixing rates."[2] If the decision goes on the ground that the commission found and based its order on the value of the company's property, it rests on a fundamental fact without support in the record and contrary to the special master's opinion and the district court's finding, which appellants do not here challenge. If the decision goes on the ground that the commission based its determination upon historical cost, then it is directly contrary to our earlier decisions, and reverses the lower court for doing what they required it to do—enter a decree setting aside the order as having been made without procedural due process of law.

As to value.—Since by legislation fixing their charges, public utilities are compelled to use their properties in the service of the public, due process of law requires that

---

[1] *Northern Pacific Ry. Co.* v. *Dept. Public Works,* (1925) 268 U. S. 39; *Chicago, M. & St. P. Ry.* v. *Public Utilities Comm'n,* (1927) 274 U. S. 344; *West* v. *C. & P. Tel. Co.,* (1935) 295 U. S. 662. See also the opinions of the district court in this case, 5 F. Supp. 878, 13 F. Supp. 931 and 16 F. Supp. 884.

[2] See the Court's opinion, *ante,* p. 400. It there quotes part of a sentence near the end of the commission's report: "assure the Company a fair return on its properties." (39 C. R. C. 49, 76.) Taken with other parts of the report, these words emphasize the commission's purpose not to find value.

the rates prescribed shall be sufficient to yield them just compensation; i. e., reasonable rates of return upon the value of their properties.[3] The value to be ascertained is the money equivalent of the property, the amount to which the owner would be entitled upon expropriation.[4] It is elementary that cost is not the measure of value.[5]

In *Smyth* v. *Ames,* (1898) 169 U. S. 466, the Court said (p. 546): "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a

[3] *Railroad Commission Cases,* (1886) 116 U. S. 307, 331; *Dow* v. *Beidelman,* (1888) 125 U. S. 680, 691; *Georgia Railroad & Banking Co.* v. *Smith,* (1888) 128 U. S. 174, 179; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* (1890) 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan & T. Co.,* (1894) 154 U. S. 362, 399; *Ames* v. *Union Pacific Ry. Co.,* (1894) 64 F. 165, 176; *Smyth* v. *Ames,* (1898) 169 U. S. 466, 526, 541, 542, 544, 546.

[4] *Monongahela Navigation Co.* v. *United States,* (1893) 148 U. S. 312, 327; *Seaboard Air Line Ry.* v. *United States,* (1923) 261 U. S. 299, 304; *Brooks-Scanlon Corp.* v. *United States,* (1924) 265 U. S. 106, 123; *Jacobs* v. *United States,* (1933) 290 U. S. 13, 16–17; *Olson* v. *United States,* (1934) 292 U. S. 246, 255.

[5] *Smyth* v. *Ames,* (1898) 169 U. S. 466, 546, 547; *Willcox* v. *Consolidated Gas Co.,* (1909) 212 U. S. 19, 52; *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n,* (1923) 262 U. S. 276, 287.

fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *Minnesota Rate Cases,* (1913) 230 U. S. 352, the Court said (p. 434): "The basis of calculation is the 'fair value of the property' used for the convenience of the public. . . . The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. . . . [p. 454.] It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. . . . As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is the property, and not the original cost of it, of which the owner may not be deprived without due process of law. . . ."

The principle applied in *Smyth* v. *Ames* has long governed wherever judicial action has been invoked to enforce the rule of just compensation.[6] It is binding upon

---

[6] For example, see:

San Diego Land Co. v. *National City,* (1899) 174 U. S. 739, 757; *San Diego Land Co.* v. *Jasper,* (1903) 189 U. S. 439, 442; *Stanislaus County* v. *San Joaquin C. & I. Co.,* (1904) 192 U. S. 201, 215; *Knoxville* v. *Knoxville Water Co.,* (1909) 212 U. S. 1, 13, 18; *Willcox* v. *Consolidated Gas Co.,* (1909) 212 U. S. 19, 41; *Lincoln Gas Co.* v. *Lincoln,* (1912) 223 U. S. 349, 358; *Minnesota Rate Cases,* (1913) 230 U. S. 352, 434, 454; *Missouri Rate Cases,* (1913) 230 U. S. 474, 498; *Denver* v. *Denver Union Water Co.,* (1918) 246 U. S. 178, 190; *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n,* (1923) 262 U. S. 276, 287; *Bluefield Co.* v. *Public Service Comm'n,* (1923)

state courts and commissions. But the California commission refuses to follow the established rule. It does not ascertain or use present value but in its place takes historical cost, actual or estimated, as the basis of its determination in rate judging and rate making.

In Rules, etc., of Los Angeles Gas & Electric Corp., (1930) 35 C. R. C. 443, 445, the commission said: "This commission for many years . . . has fixed rates to yield upon the historical or actual cost of the property, taking land, however, at current values and depreciation calculated on a sinking fund basis, a return somewhat in excess of the cost of the money invested in the property. . . ." [7]

So, in the practice of the commission, actual cost of all items other than land, which is included at its market value, comes to be called "historical cost," which when found to be, or modified to make it "reasonable," is called

---

262 U. S. 679, 690; *Dayton-Goose Creek Ry. Co.* v. *United States,* (1924) 263 U. S. 456, 481; *Ohio Utilities Co.* v. *Public Utilities Comm'n* (1925) 267 U. S. 359, 362; *Board of Comm'rs* v. *N. Y. Tel. Co.,* (1926) 271 U. S. 23, 31; *McCardle* v. *Indianapolis Water Co.,* (1926) 272 U. S. 400, 408, 409; *United Railways* v. *West,* (1930) 280 U. S. 234, 253–254; *Los Angeles Gas Co.* v. *Railroad Comm'n,* (1933) 289 U. S. 287, 305, *et seq.; West* v. *C. & P. Tel. Co.,* (1935) 295 U. S. 662, 671.

Alton Water Co. v. *Illinois Commerce Comm'n,* (1922) 279 F. 869, 872; *Minneapolis* v. *Rand,* (1923) 285 F. 818, 827; *Mobile Gas Co.* v. *Patterson,* (1923) 293 F. 208, 214; *New York Telephone Co.* v. *Prendergast,* (1924) 300 F. 822, 825; *Southern Bell Tel. & Tel. Co.* v. *Railroad Comm'n,* (1925) 5 F. (2d) 77, 91, 92; *Middlesex Water Co.* v. *Board of Public Utility Comm'rs,* (1926) 10 F. (2d) 519, 533; *Idaho Power Co.* v. *Thompson,* (1927) 19 F. (2d) 547, 552.

[7] See, e. g.: Re Coast Valleys Gas & Electric Co., (1917) 14 C. R. C. 460; Southern Sierras Power Co., (1920) 18 C. R. C. 818; Southern California Edison Co., (1921) 19 C. R. C. 595 and (1923) 23 C. R. C. 981; San Joaquin Light & Power Corp., (1922) 21 C. R. C. 545; Pacific Gas & Electric Co., (1922) 22 C. R. C. 744; Great Western Power Co., (1923) 22 C. R. C. 814; Pacific Tel. & Tel. Co., (1929) 33 C. R. C. 737.

"prudent investment" or "rate base." [8] The commission takes cost without regard to age of the items, changes in price levels, present cost to construct, depreciation, obsolescence or usefulness.

In that case, Commissioner Decoto, dissenting, said (p. 474): "The California Commission . . . has clung ostensibly and theoretically to the historical rate base. In reality it has given effect to the different elements mentioned by the federal courts including fair value including going value by allowing a rate return between 8 per cent and 8½ per cent on historical cost if there be added to the historical rate base an amount between 10 per cent and 12½ per cent, the rate base so obtained will approximate fair value including going value. So, also if there is deducted from 10 per cent to 12½ per cent from a rate of return of 8 per cent or 8½ per cent on an historical cost rate base, it is readily seen that there is an actual return varying from 7 per cent to 7.75 per cent upon fair value including therein a reasonable amount for going value. . . . During the last two years this commission has shown a tendency to cut the rate return upon an historical rate base from between 8 per cent and 8½ per cent to 7 per cent, which reduced the rate of return upon a fair value base to 6.12½ per cent and 6.3 per cent."

While the dissenting opinion is not authoritative and may not be taken to express the views of the commission, it usefully interprets and discloses the opinions, attitude and practice of the commission as to ascertainment of the figure or base on which it tests existing and prescribes future rates.

---

[8] For convenience these phrases, "historical cost," "actual cost," "prudent investment," and "rate base," will be used to mean the figure produced by the application of the formula expressed by the commission in Rules, etc. of Los Angeles Gas & Electric Corp., (1930) 35 C. R. C. 443, 445, without pausing to point out that land is included at present value.

In the case now before us, the commission used the formula generally applied by it. Its report states (39 C. R. C. 49, 57): "During its entire history in establishing reasonable rates for utilities similar to this company, to determine a proper rate base this Commission has used the actual or estimated historical costs of the properties undepreciated, with land at the present market value. . . . This historical method has dominated the Commission's findings for several principal reasons. It is well grounded upon established facts, is not subject to the vagaries of pet theories, unlimited imagination and abrupt fluctuation of current prices and passing conditions, and therefore indicates a truer measure of value. . . . At the same time it prevents unwarranted demands upon the consumer through the projections of future rates on ephemeral values and stabilizes rates so that economic shocks from such changes are reduced to a minimum."

The commission's figures show that it did not attempt or intend to find value. Historical cost was not fully disclosed by the company's records. A part was estimated. The company's total was $104,043,472; the commission found $103,252,004. From historical cost ascertained by it, the commission deducted "Donations in Aid of Construction, $34,325," added to the remainder "Materials and Supplies, $638,828," and "Working Cash Capital, $773,300," making a total of $104,629,807; and took the round figure, $105,000,000 as rate base. The commission made no appraisal to ascertain value, as distinguished from cost incurred for the original plant plus additions and betterments through all the years of operation. The exclusion of "Donations in Aid of Construction" is inconsistent with ascertainment of the value, for obviously the worth of property is the same whatever the source of the title or the money with which it was purchased.[9]

[9] *San Joaquin Co.* v. *Stanislaus County*, 233 U. S. 454, 459; *Board of Comm'rs* v. *N. Y. Tel. Co.*, (1926) 271 U. S. 23, 31; *Smith* v.

The report states that "In this case a return will be allowed substantially in excess of the reasonably determined cost of money in order that there be provided a safety factor in accordance with the principles adopted by this Commission to protect the financial structure as well as to allow for intangible values not covered by business development costs allowed in the operating expenses." [10]

The commission included nothing in its rate base to cover intangible elements of value. It said (p. 65): "Even if going value could be found here in a definite amount there are no proper elements of physical value found to which it might be related to obtain fair value. Under the record there is no tenable depreciated reproduction cost figure and it is wholly inconsistent to attempt to relate going value to undepreciated historical cost." This statement clearly and rightly implies that properly ascertained reproduction cost—condition and usefulness considered—indicates only the value attributable to the tangible elements and that to it there must be added the amount attributable to the intangible elements in order to find the value of both; i. e., the worth of the plant as a going concern.

Having taken cost of physical elements, the commission deemed it inappropriate to add anything to cover

---

Illinois Bell Tel. Co., (1930) 282 U. S. 133, 158; *Public Service Co.* v. *Public Utility Comm'rs*, 84 N. J. L. 463, 481; 87 Atl. 651. See also *Minnesota Rate Cases*, (1913) 230 U. S. 352, 434, 456. Cf. dissenting opinion, *United Railways* v. *West*, (1930) 280 U. S. 234, 257.

[10] Our decisions unquestionably show that cost of development of the business is not the measure of the amount to be attributed to intangible elements of the property, or the measure of going value. *Des Moines Gas Co.* v. *Des Moines*, (1915) 238 U. S. 153, 168–171; *Denver* v. *Denver Union Water Co.*, (1918) 246 U. S. 178, 191, 192; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 395, *et seq.*; *Los Angeles Gas Co.* v. *Railroad Comm'n*, (1933) 289 U. S. 287, 314, 315.

existing going value. It must have found that in fact a large amount was justly attributable to going value, for it declared (p. 65) that it would accredit the company with "a reasonable recognition of going value through allowance as an operating expense of over $800,000 a year for development expense, which is approximately 7 per cent on the company's claimed going value figure, and by the additional allowance of return over reasonable cost of money."

But an allowance in operating expenses adds nothing to value or to return on value. It is not the equivalent of and may not be substituted for inclusion of an appropriate amount to cover intangible elements. Inclusion of an amount for development expenses increases deductions from gross revenue and so reduces annual net earnings, if any, by that amount, whereas the addition of $800,000 capitalized at 7 per cent would increase by over $11,000,000 the base on which to calculate return. The commission's treatment of donated property, going value and rate of return shows that it did not find value, and that it intended to and did adopt cost figures as the basis on which it condemned existing rates and ordered the new schedule.

Immediately after announcement of the report the company filed a petition for rehearing, in which it directly charged that the commission failed to find value, "considered solely the historical cost . . . and failed to consider or give any effect to the cost" of reproduction. The commission denied rehearing, but without in any manner suggesting that these allegations were not true.

In this suit, the complaint alleges that the commission failed to give any weight or effect to reproduction cost; "that, in fixing the rate base, the Commission gave weight and effect solely to the historical cost"; and that it prescribed the rates "without any finding of fair value."

The answer is a studied denial. The defendants do deny that the commission failed to give due weight to competent evidence of reproduction cost and allege that it gave proper weight to all the evidence, including evidence of reproduction cost; deny that the commission gave weight solely to the historical cost; "admit that in fixing and prescribing rates . . . the Commission did so without any specific finding as to 'fair value' . . . but . . . allege that in substance and effect the Commission concluded and found in its said decision that the fair value of the used and useful properties before allowing for accrued depreciation did not exceed the sum fixed therein as a reasonable rate base, to wit: $105,000,000."

The district court referred the case to a special master. There was introduced before him evidence in addition to that submitted to the commission. The record here does not contain the evidence, his findings or report.[11] But the trial court's opinion (13 F. Supp. 931, 932) states that, "While the master expressed the opinion that it appeared plain to him that the Commission used cost as the only measure of the rate base, itself offering no evidence on reproduction cost and rejecting that offered upon the subject by the company, he preferred not to pass upon the question of law thus presented, but to examine the whole matter on the merits."

In its opinion on temporary injunction (5 F. Supp. 878, 881), the court found that the commission rejected the company's estimates of reproduction cost, did not have

[11] It does contain the complaint, to which are attached the opinion and order of the commission; the company's petition for rehearing and order denying it; appellants' answer; the court's findings of fact, conclusions of law and final decree; the commission's petition for rehearing and affidavit in support of it; the company's answer to that petition, a supporting affidavit and one replying to it; the opinions of the court on motion for temporary injunction, on permanent injunction, and on petition for rehearing.

any detailed estimates of reproduction cost before it, and did not determine the reproduction cost of the property. Upon final submission of the case, the court found that the commission on its own motion instituted the investigation and "caused to be introduced evidence as to the past or so-called historical cost . . . solely for the purpose of determining such past or historical cost as in and of itself constituting the rate base by which to judge the reasonableness of the plaintiff's existing rates and to prescribe new rates, and . . . neither introduced nor caused to be introduced any evidence for the purpose of determining the fair value of the plaintiff's property or any evidence as to its reproduction cost. . . . Plaintiff introduced evidence as to the reproduction cost of its said property and as to its fair value." No evidence was introduced to rebut that offered by the plaintiff.

". . . On the conclusion of said hearings . . . the Commission made its order . . . finding that the existing rates of the plaintiff were unjust and unreasonable and prescribing lower rates whereby the plaintiff's income would be reduced by approximately $2,100,000 annually. In so finding . . . the Commission declined to give and did not give consideration or effect to the reproduction cost . . . or to the fair value of said property, but, except for lands constituting less than 5% in value of the property, . . . took into consideration for the purpose of determining the rate base . . . only the past or historical cost." The commission applied for rehearing. Its petition indicates no claim that it did find value or that the court erred in holding that it did not; nor does the petition suggest that historical cost is value or was found or intended by the commission to be the value of the property. Indeed it sought a rehearing on the ground that the court failed to find the value of the property.

There is nothing in the commission's statement as to the jurisdiction of this Court, Rule 12, or in its briefs

here to indicate that it ever claimed or now claims that it found present value or that historical cost was not the sole basis of its calculations. Reversal is sought, not on the ground that the court erred in holding that the commission failed to find the value of the property, but upon the claim that the court is without power to restrain the enforcement of the prescribed rates "unless it be found that the enforcement of the order will result in the actual confiscation of the utility's property."

But that contention is directly contrary to our decisions. It may be taken as certain that if in truth it could claim that it did base its determination on present value, the commission would rely on that fact, for then it would not be necessary to have overruled, distinguished, explained away, glossed over or disregarded the line of decisions rightly followed by the lower court.

As to reproduction cost.—It is true that sometimes estimates of present cost of construction are not reasonably made and are therefore worthless as evidence of value.[12] It is also true that, when reasonably made, estimates of reproduction cost as of the valuation date constitute good evidence of present value.[13]

In *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n*, 262 U. S. 276, we said (p. 287): "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast

[12] *Minnesota Rate Cases*, (1913) 230 U. S. 352, 452; *Lindheimer* v. *Illinois Tel. Co.*, (1934) 292 U. S. 151, 163, 164.

[13] *Minnesota Rate Cases*, (1913) 230 U. S. 352, 452, 455; *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n*, (1923) 262 U. S. 276, 287, 288; *Bluefield Co.* v. *Public Service Comm'n*, (1923) 262 U. S. 679, 691, 692; *Standard Oil Co.* v. *Southern Pacific Co.*, (1925) 268 U. S. 146, 156; *McCardle* v. *Indianapolis Water Co.*, (1926) 272 U. S. 400, 410; *Los Angeles Gas Co.* v. *Railroad Comm'n*, (1933) 289 U. S. 287, 307.

of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day."

In *McCardle* v. *Indianapolis Water Co.,* (1926) 272 U. S. 400, the court said (page 410): "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. The decision of this court in *Smyth* v. *Ames,* 169 U. S. 466, 547, declares that to ascertain value 'the present as compared with the original cost of construction' are, among other things, matters for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure. The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand. By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time. . . ." [14]

The passage which includes the statement quoted on page 398, *ante,* of this Court's decision just given, follows: "Undoubtedly, the reasonable cost of a system of water-

[14] The opinion here cites: *Standard Oil Co.* v. *Southern Pacific Co.,* (1925) 268 U. S. 146, 157; *Georgia Ry.* v. *Railroad Comm'n,* (1923) 262 U. S. 625, 630, 631; *Bluefield Co.* v. *Public Service Comm'n,* (1923) 262 U. S. 679, 691–692; *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n,* (1923) 262 U. S. 276, 287.

works, well-planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices. And, as indicated by the report of the commission, it is true that, if the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property. The validity of the rates in question depends on property value January 1, 1924, and for a reasonable time following. While the values of such properties do not vary with frequent minor fluctuations in the prices of material and labor required to produce them, they are affected by and generally follow the relatively permanent levels and trends of such prices."

The estimate of reproduction cost that the company submitted to the commission in this case is not before us. It is referred to in the commission's report, but it is not disclosed sufficiently to enable this Court to decide whether it was made reasonably, was admissible in evidence or was entitled to any weight. This Court may not speculate concerning it. The record in this case and earlier reports of the commission above referred to compel the conclusion that no estimate of reproduction cost as of valuation date would have influenced the commission to modify or abandon the basis of historical cost.

The commission was bound by our decisions to ascertain and consider present cost as compared with original cost of construction. It refused to do so. The method it followed conflicts with fundamental principles established here in that it condemned the company's existing rates as excessive and prescribed lower ones without any

basis of fact to warrant that action. When the State, acting through the commission, set aside existing rates and ordered lower ones for the future, it exerted power to take, or to compel use of, private property for service of the public. Due process required just compensation—rates sufficient to yield a reasonable rate of return on the value of the property used to furnish the gas. Without a finding of value it is impossible to ascertain the required amount. To take mere cost of physical elements, instead of total value, and to deduct development expenses from revenue instead of including in value the amount found properly attributable to intangible elements and going value, and then, because of that error, to fix a rate of return on historical cost greater than would be required on value, is to leave the order without known or discoverable foundation. It is to make individual views as to what is just serve in place of the definite principles. The formula followed by the commission prevents consideration of present value or of the estimated present cost, in comparison with the original; i. e., the historical cost of the property. The commission gave no weight to the company's evidence of present cost of construction. It made no investigation to ascertain, did not attempt to find and would not use, present cost or present value. It seems to me very clear that, save merely to reject it as inadmissible, the commission refused to pay any attention to the company's evidence of reproduction cost.

The commission having failed to find value, our decisions required the district court to enter the decree appealed from.

In *Northern Pacific Ry. Co.* v. *Dept. Public Works* (1925), 268 U. S. 39, the superior court and the supreme court of Washington upheld an order of the state commission reducing railroad rates for intrastate transportation of logs as against attack by the carriers on the grounds

that the order was made without evidence and that the rates were confiscatory. This Court held the order would deprive carriers of their property without due process of law, upon the sole ground that the commission found cost of service without any evidence, or upon evidence that did not clearly support the finding. We said (p. 44): "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be incompetent, *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 288, or mere error in reasoning upon evidence introduced, does not invalidate an order. But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached. An order based upon a finding made without evidence, *Chicgo Junction Case,* 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process." That decision was reached without regard to any question of confiscation.

Chicago, M. & St. P. Ry. Co. v. *Public Utilities Comm'n,* (1927) 274 U. S. 344, presented the question whether an order of the Idaho commission reducing railroad rates for intrastate transportation of logs would deprive carriers of their property without due process of law. On the carriers' appeal to the state supreme court, the action of the commission was upheld. Following the state practice, the case was there heard on the record made before the commission. The evidence introduced by the carriers was sufficient to warrant a finding that as to the lines of all the carriers, the intrastate log rates were low in comparison with rates on other commodities, and that as to two of the carriers they were confiscatory. But

the state court held the commission authorized to reduce the rates without finding them unjust or unreasonable. And, as to the carriers' insistence that the prescribed rates were confiscatory, it ruled that, even if the evidence showed existing rates insufficient, the prescribed lower rates would not necessarily be confiscatory, and supported that view by the suggestion that the intrastate haul from forest to saw mills was only one step in production and transportation to markets in other States.

Writ of certiorari brought the case here. We reversed the judgment of the state court, and in the opinion said (p. 350): "But, as appears from their opinions, the respondent [commission] and the court refused to consider and give weight to that evidence because, as they held, the intrastate log rates were not to be dealt with separately but were to be considered in connection with the interstate lumber rates, and because the carriers made no showing as to the gains or losses resulting from the interstate transportation. That cannot be sustained . . . This case is in principle the same as *Northern Pacific* v. *Dept. of Public Works*. . . . It is impossible to sustain the refusal to consider the evidence introduced by the carriers to show that the rates in question are too low and confiscatory. The commission and the court erred in holding that the reasonableness or validity of the intrastate log rates depends on the amounts received by petitioners for the interstate transportation of lumber. It is clear that the methods by which respondent reached its conclusion were arbitrary and constitute a denial of due process of law."

In *West* v. *C. & P. Tel. Co.*, (1935) 295 U. S. 662, the company brought suit in the federal district court for Maryland to set aside as confiscatory an order of the Maryland commission reducing telephone rates. The controversy involved value, depreciation expense, and return. The commission made no appraisal of the prop-

erty, but attempted to determine present value by translating the dollar value of the plant as it was found in an earlier case, as of December 31, 1923, plus net additions in dollar value in each subsequent year, into an equivalent dollar value at December 31, 1932, its theory being (p. 667): "Value signifies in rate regulation the investment in dollars on which a utility is entitled to earn." After pointing out fundamental defects in the commission's method of finding value, we held that the case was controlled by the principle announced and applied in *Northern Pacific Ry. Co.* v. *Dept. Public Works* and *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Comm'n.* No decision here has challenged the principle established by these cases. *West* v. *C. & P. Tel. Co., supra,* 675.

I cannot refrain from protesting against the Court's refusal to deal with the case disclosed by the record and reasonably to adhere to principles that have been settled. Our decisions ought to be sufficiently definite and permanent to enable counsel usefully to advise clients. Generally speaking, at least, our decisions of yesterday ought to be the law of today.

I would affirm the decree of the district court.

MR. JUSTICE MCREYNOLDS joins in this dissent.

McCART ET AL. *v.* INDIANAPOLIS WATER CO.

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

No. 90. Argued December 15, 1937.—Decided January 3, 1938.

1. A suit for a permanent injunction of state-made rates alleged to be confiscatory, no interlocutory injunction being prayed, is properly heard in the District Court by one judge. P. 420.
2. In a suit praying a permanent, but not a temporary, injunction against state-made rates already in effect, upon the ground of confiscation, it was erroneous to value the plaintiff's property as of the date of decree upon proofs taken and concluded thirty-two months previously and to dismiss the bill on that valuation, without regard to known economic changes, and the actual results of the plaintiff's business, in the interval. P. 422.

89 F. (2d) 522, affirmed with modification.

CERTIORARI, *post*, p. 665, to review the reversal of a decree, 13 F. Supp. 110, which dismissed a bill to enjoin the enforcement of water rates fixed by the Public Service Commission of Indiana.

Mr. Urban C. Stover, with whom *Messrs Floyd J. Mattice, Edward H. Knight* and *James E. Deery* were on the brief, for petitioners.

Messrs. William L. Ransom, Joseph J. Daniels and *G. R. Redding* were on the brief for respondent.

PER CURIAM.

This suit was originally brought by the Indianapolis Water Company to restrain the enforcement of an order of the Public Service Commission of Indiana fixing a temporary schedule of rates pending the Commission's investigation. The District Court of three judges (28 U. S. C. 380) denied an interlocutory injunction and the temporary rates became effective. The Commission on

December 30, 1932, adopted a different and permanent schedule of rates to be effective January 1, 1933. The Company then filed an amended and supplemental bill assailing those rates as confiscatory and invoking the Fourteenth Amendment of the Constitution of the United States. An interlocutory injunction was not sought and the case was properly heard in the District Court by a single judge. *Indianapolis Water Co.* v. *McCart,* 13 F. Supp. 107; *Smith* v. *Wilson,* 273 U. S. 388; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10; *Healy* v. *Ratta,* 289 U. S. 701. Pursuant to the Commission's final order, the Company filed the schedule of rates as prescribed, and these rates went into effect on January 1, 1933, and under that order have since been in effect without limitation of time.

The Commission found that the fair value of the Company's property as of November 1, 1932, was not less than $22,500,000 and that the income under the new rates would be "approximately $1,400,000, or a return slightly in excess of six per cent" on that amount. The District Court appointed a Special Master, who received evidence between May 1, 1933, and August 10, 1933, and held a further and reopened session on October 18, 1933, when the hearing of evidence was closed. On April 18, 1934, the Master offered to receive evidence as to the actual operations of the Company for 1933 but the respective parties informed the Master that they did not desire to offer any such testimony. The Master filed his report on May 18, 1934. The appraisals before the Master were made as of April 1, 1933. He found the fair value of the Company's property to be $20,282,143 as of that date and also as of the time of filing his report. He estimated and found that the income applicable to return for the year 1933 and for a reasonable time thereafter would be $1,294,566.51. He concluded that the rates were not confiscatory.

After a hearing upon exceptions to the Master's report, the District Court entered a final decree on November 29, 1935, dismissing the amended and supplemental bill of complaint. 13 F. Supp. 110. The court found that the value of the Company's property was $21,392,-821 as of April 1, 1933, and although the evidence of value had been addressed to that date, the court went further and found in its decree that this amount "was the fair and reasonable value thereof as of the time of filing the report of the Special Master herein and as of the date of these findings and that such value will continue to be a fair and reasonable value of the plaintiff's used and useful property for a reasonable time in the future." The court adopted the finding of the Master that the income would be not less than $1,294,-566.51 for the year 1933 and for a reasonable time thereafter.

Upon appeal, the Circuit Court of Appeals, reviewing the evidence upon disputed points, found that there should be certain increases, amounting to $975,437, in the rate base, making it $22,368,258. The court observed that from April 1, 1933, the valuation date, to the date of the decree of the District Court, November 29, 1935, thirty-two months had intervened; that this period was no longer one for prophecy but had passed "from the field of speculation to one of experience"; and that experience had shown that in that period there had been "a constant and definite trend upward in commodity values." 89 F. (2d) 522, 525, 526. With respect to income, the court said that the amount found by the Master for 1933 ($1,294,566.51) was about $57,000 higher than that indicated by the testimony of any witness, but the finding was not overruled in view of the failure of the Company to take advantage of its opportunity to show the actual receipts and disbursements for that calendar year. *Id.,* pp. 527, 528. Holding that the District Court

had erred in determining in its decree that the valuations as of April 1, 1933, were applicable to the date of the decree in November, 1935, without taking appropriate account of changed conditions in the interval, the court reversed the decree and remanded the cause for further proceedings in accordance with the views expressed in its opinion. *Id.*, p. 528.

Petitioners urge that the Court of Appeals has virtually required the District Court to find confiscation. We do not think that this is the necessary import of the opinion. The appellate court took judicial notice of an upward trend in prices but did not attempt to make a specific application of that trend. The reversal of the decree requires a hearing anew in the District Court, and upon that hearing all questions pertinent to the issue of confiscation should be open. The economic changes to which the Court of Appeals has referred may affect income as well as values.

In the instant case, we do not have a situation in which rates as fixed by a Commission have been enjoined. Here the rates prescribed by the Commission's order have been in effect all through this litigation, and are now in effect. A decree for injunction could operate only as to the future. Another special circumstance is that the decree of the District Court expressly provided that the value it found was the value as of the date of the decree, November 29, 1935, although the evidence before the court related to April 1, 1933. A decree speaking as of the later date and operating thereafter should have a basis in evidence. On the hearing required by the Circuit Court of Appeals, the District Court will be able to ascertain what have been the actual results of the Company's business during the intervening years and thus to base its decree upon known conditions as to those years which may show clearly, in the light of the economic changes which have occurred, whether the prescribed rates are or

are not of a confiscatory character and whether an injunction restraining the enforcement of the rates should be granted or denied.

To leave no question as to the authority of the District Court thus fully to rehear and determine the cause the decree of the Circuit Court of Appeals is modified so as to provide that the cause is remanded to the District Court for further proceedings in conformity with the views expressed in this opinion. As thus modified, the decree of the Circuit Court of Appeals is affirmed.

Modified and affirmed.

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

MR. JUSTICE BLACK, dissenting.

I cannot agree that this cause brought here by the Public Service Commission and the Attorney General of the State of Indiana should be sent back to the District Court for a new trial. After an examination of the record, I am persuaded that the action of the Court of Appeals was wrong and that its judgment should not be affirmed either as rendered or in any modified form. The importance of the questions here involved leads me to set out some of my reasons for this belief.

Six years ago (1931) the City of Indianapolis filed a petition with the Public Service Commission of Indiana against the Indianapolis Water Company, seeking a reduction of water rates for small consumers. The commission fixed the rates in December, 1932. A *master* appointed by the District Court reported that there was *no confiscation* May 18, 1934. The *District Court* held there was *no confiscation* November, 1935. The *Court of Appeals* found there *was confiscation* March, 1937. Now, January, 1938, *this Court* sends the case back to the District Court for *trial "anew."* The cause goes back to the District Court with the admonition from the Court of Appeals

that a "general and persistent rise in prices should have been given effect in fixing a fair valuation." Affirmance of the Court of Appeals' decree necessarily approves this statement and this statement requires an increased valuation of the Company's property. Experience demonstrates that rate cases continue to come to this Court until final decisions are reached. If the second trial follows the course of the first, the case should return to this Court by 1943. However, it will now be the duty of the District Court, in trying the case anew, to make a forecast as to probable commodity values covering this future period up to 1943.[1] If its forecast should be wrong, the present case will be a precedent for reversing the cause in 1943 for still another trial. Sending the case back indicates that the Court of Appeals was right in reversing the District Court.

I believe the Court of Appeals was in error, that the evidence did not show confiscation, and I cannot agree to the action of the majority. This Court has announced the doctrine that the States have full and complete rights to regulate the rates of local intrastate utilities and that the federal courts cannot and will not interfere with this regulation unless the rates are confiscatory. Furthermore, "upon that question (of confiscation) the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."[2] The judicial function does not extend beyond the decision of the constitutional question. Unless, therefore, the water company satisfactorily overcame the presumption that the rate set by the commission is not confiscatory, this Court should not invade the constitutional sphere of state rate regulation.[3]

---

[1] *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408, 409.

[2] *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 305.

[3] *Chicago & G. T. Ry. Co.* v. *Wellman*, 143 U. S. 339.

I cannot say that the evidence in the District Court "compelled a conviction that the rate would prove inadequate"; [4] or that the rates were "palpably and grossly unreasonable"; [5] nor was the evidence sufficient to overcome the presumption that the rates, as fixed by the commission and reinforced by the judgment of the master and the District Court, were not confiscatory.[6]

The master reported the value of the Company's property to be $20,282,143.00 as of April 1, 1933. December, 1935, the District Court after a review of the evidence and the report of the master, refused to enjoin the enforcement of the rates fixed by the commission. That court excluded from consideration for rate making purposes a group of farms owned by the Company and estimated by the master to have a value of $264,050.00, but increased the master's estimate of the value of "water rights" to $500,000.00. Evidence having been given of the "reproduction value" of the Company's property, the District Court increased by $1,333,333.00 the master's "estimate" of the "estimated cost" of labor necessary to "reproduce" the Company's property; it raised the master's total "estimate" of this wholly imaginary reproduction from $20,282,143.00 to $21,392,821.00.

March 23, 1937, six years after the City of Indianapolis had originally initiated its efforts to obtain a reduction in water rates, the Court of Appeals reversed and remanded this cause. In doing so, it ordered that the Company's Indiana farms be included in the total valuation upon which the people of Indianapolis must pay the Company an income; added $361,308.00 to the "estimate" of the master and District Court for "undistributed construction costs"; and raised "going value" $250,079.00.

---

[4] *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 401.

[5] *San Diego Land Co.* v. *National City,* 174 U. S. 739, 750.

[6] *Darnell* v. *Edwards,* 244 U. S. 564, 569.

The principal reason given for the reversal, however, was that general price levels had risen, during the thirty-two months intervening between the date at which valuations were fixed (April 1, 1933) to the date of the District Court's decree (November 29, 1935). Looking at price index figures, the Court of Appeals decided that prices had ascended about twenty-five per cent. during that period, and that if the District Court had given proper consideration to this increase in determining the value of the Company's property, that court would have found that the rate fixed by the commission was "clearly confiscatory."

One month and three days, however, after the price index method had been used by the Court of Appeals in finding the Indianapolis water rates confiscatory, this Court, in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, struck down a reduced telephone rate fixed by the Ohio Public Service Commission. The people of Ohio were deprived of the benefit of a reduced telephone rate because the decision of the Public Service Commission rested upon price indices. Yet, if the District Court follows the opinion of the Court of Appeals which is here affirmed, the people of Indianapolis will be deprived of a reduced water rate because a price index, not introduced in evidence, indicated to the Court of Appeals that the valuation fixed by the District Court was wrong. This opinion of the Court of Appeals as to value is not repudiated by the affirmance. The majority does not reverse the Court of Appeals' finding of confiscation.

I cannot agree that the District Court should be reversed for failure to prophesy the exact future course of commodity prices. The *legal* knowledge of few judges is such that they can accurately foresee and forecast all price fluctuations. In the delays incident to rate litigation it is probably true that prices will fluctuate many

times between the beginning of a litigation and the time when the cause is won, lost or abandoned.

It has now been more than five years since the commission fixed a valuation for this water works property and it has been more than four years since the master reached his conclusion. If it requires four more years for this case to return to the Court of Appeals, there can be no doubt but that some price index can be found to show other changes in prices. Such a result will add still further to the confusion and chaos of judicial rate making. I believe it forecasts a day when the present long delays in rate regulation will be endless.

The City of Indianapolis should not be subjected to another trial unless this Court believes the rates to be confiscatory. When the District Court tries the case anew it will be constrained to follow the decision of the Court of Appeals that a "general and persistent rise in prices should have been given effect in fixing a fair valuation." In the meantime, can a judge be found who can accurately divine all future prices of commodities to be used for imaginary reproductions of this Company's property?

I believe this cause should be brought to a conclusion at this time.[7] My belief that the Court of Appeals should be reversed is strengthened by a study of the record in the case of *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, of which record we take judicial notice.[8]

For the first hundred years of this Nation's history, federal courts did not interfere with state legislation fixing maximum rates for public services performed within the respective states. The state legislatures, according to a custom which this Court declared had existed "from time immemorial" [9] decided what those maximum rates should

[7] See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 16; also *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 420.

[8] *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336.

[9] *Munn* v. *Illinois*, 94 U. S. 113, 133.

be. This Court also said that "for protection against abuses by legislatures the people must resort to the polls, not to the courts." [10] It was not until 1890 that a divided court finally repudiated its earlier constitutional interpretation and declared that due process of law requires judicial invalidation of legislative rates which the courts believe confiscatory.[11] The dissenting Justices adhered to the long existing principle that regulation of public utilities was a "legislative prerogative and not a judicial one." [12]

From this decision in 1890, *supra,* has come the doctrine that the federal courts have jurisdiction to determine whether a rate fixed by a state for a purely local utility is confiscatory. This doctrine does not purport to give to federal courts more than the limited jurisdiction to determine whether a given state rate is so low as to be confiscatory.

The determination by the Court of Appeals that the rates in the present case are confiscatory can only be supported, if at all, by giving undeserved weight to evidence given to support the "reproduction cost" theory. The experience of the people of Indianapolis in their efforts to obtain fair and reasonable water rates from this company which has long had a monopoly in their community, discloses what appears to me to be the complete unreliability of the "reproduction cost" theory. Wherever the question of utility valuation arises today, it is exceedingly difficult to discern the truth through the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of those who seek inflated valuations to support excessive rates. Even the testimony of engineers, with wide

[10] *Id.*, p. 134; see *Peik* v. *Chicago & N. W. Ry. Co.*, 94 U. S. 164, 178.

[11] *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418.

[12] *Id.*, Bradley, J., dissenting, 461.

experience in developing this theory and expounding it to courts, is not in agreement as to the meaning of the vague and uncertain terms created to add invisible and intangible values to actual physical property. Completely lost in the confusion of language—too frequently invented for the purpose of confusing—commissions and courts passing upon rates for public utilities are driven to listen to conjectures, speculations, estimates and guesses, all under the name of "reproduction costs." In the testimony of professional witnesses employed by the litigants, courts listen to guesses about "going value"; "undistributed construction costs"; "water rights."[13] This Court has even said, "Reproduction value, however, is not a matter of outlay, but of *estimate*, and . . . proof of actual expenditures originally made, while it would be helpful, is not indispensable."[14] [Italics added.] Courts have gone further and further away from considering cost in determining the value of utility property. The cost of this Company's property apparently was given little weight

---

[13] Compare:

". . . and the conclusion of the court below rested upon *that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties.*" *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, at 18;

"While the experts representing the opposing interests were thoroughly competent and of high standing, the wide difference in the results reached led the commission to the 'irresistible conclusion that *each was not unmindful of his client's interest.*'" *Plymouth Electric Light Co.* v. *State*, 81 N. H. 1, 4; 120 Atl. 689.

"To these perturbing tendencies, all operating to weaken the persuasive force of their (expert) opinions, there must be added still another, that of interest or bias, conscious or unconscious." *Dayton Power & L. Co.* v. *Public Utilities Comm'n*, 292 U. S. 290 at 299;

"'Skilled witnesses come with such prejudice on their minds that hardly any weight should be given to their evidence.'" *Appleton Water Works Co.* v. *Railroad Comm'n*, 154 Wis. 121, at 154; 142 N. W. 476. [Italics added.]

[14] *Ohio Utilities Co.* v. *Public Utilities Comm'n*, 267 U. S. 359, 362.

in previous litigation which came to this Court.[15] This Company's property was valued by this Court at $19,000,000.00 in the prior litigation although the commission's valuation was $16,495,000.00. It is interesting to note what this property valued at $19,000,000.00 actually cost.

The record in the *McCardle* case, *supra*, showed: that the property was bought at a judicial sale in 1881 by the present Company at a cost of not more than $535,000.00, the purchase being financed by a sale of bonds; that apparently no cash was paid for the $500,000.00 face value of stock issued at that time; that the maximum book value of the Company's assets on December 31, 1923, was $9,195,908.00 but a witness called by the commission testified that the Company's records disclosed the actual book value of the property used for the public *convenience* to be only $7,967,649.00; that from 1881 to December 31, 1923, stockholders' average annual net profits were $189,255.00; that practically all of the added book value was the result of additional investments financed by borrowing and not by investment by stockholders; that no other investment was made by the stockholders in the Company since 1881, but in 1909 a write-up of $5,556,071.85 was made on the books by virtue of which a common stock dividend of $4,500,000.00 was declared in 1910, making the total common stock $5,000,000.00; that the $5,000,000.00 stock was thereafter carried on the books of the Company; that the stockholders not only paid no additional money for stock, but that the profits made by the Company between 1881 and 1932 were not reinvested in the Company but were substantially all drawn out in dividends.[16]

---

[15] See *McCardle* v. *Indianapolis Water Co., supra.*

[16] The books of the company indicate that the company spent for additions between 1881 and December 31, 1923, $8,112,399.00 but the books also show that on December 31, 1923, the outstanding in-

This Court found in the *McCardle* case that the Company was entitled to a rate based on a $19,000,000.00 valuation as of December 31, 1923, although the record indicates: that the total actual investment made by the Company up to that time was less than $9,000,000.00 and was not stockholders' investment but was substantially all borrowed money; that the stockholders apparently had made no investment unless (which is very doubtful from the record) they paid for the $500,000.00 stock in 1881; and that the stockholders had received the following percentage of return on common stock on a $500,000.00 valuation for the five years preceding this $19,000,000.00 appraisal:

1919	69%
1920	75%
1921	88%
1922	96%
1923	96%

While it is difficult to find in the present record what additional investments have been made since the $19,000,000.00 appraisal, it does appear that the commission found

---

debtedness of the company on which it paid interest was $8,231,000.00. During the same period, from 1881 to December 31, 1923, the books showed available for dividends $8,337,232.74. Dividends paid out were as follows:

Cash Dividends	$4,585,533.50
Bond Dividends	3,000,000.00
Stock Dividends	4,500,000.00
Total Dividends paid between 1881 and December 31, 1923	$12,085,533.50

During the same period the record shows that interest was paid by the company on the bonds issued to the stockholders as dividends and that interest amounted to $3,076,250.00.

It thus appears from the books that the stockholders received an average of practically 38% profit on $500,000.00 from 1881 to December 31, 1923.

that the books of the Company showed an additional investment of $6,661,292.00. If this is added to the 1923 book value, it would appear that there is a possibility that when the appraisal in this cause was made, there may have been between $13,000,000.00 and $16,000,000.00 invested through the Company's borrowing activities. But the indebtedness kept pace with the investments and was $13,746,900.00 at this time. The District Court is now reversed, however, because the Court of Appeals found that rates based on an obviously inflated value of $21,392,821.00 fixed by the District Court would confiscate the property of the Company's stockholders.

There is a marked disparity between the actual cost of this Company's property and its imaginary "reproduction value." I shall comment upon a few of many reasons for this disparity.

First, the so-called "water rights"—The Company takes the position that water rights should have been valued at about $2,000,000.00. Expert witnesses for the city valued these rights from nothing to $75,000.00, and expert witnesses for the Company at $1,000,000.00 or more. This illustration is typical of the wide variations in expert evidence on "reproduction cost"; it is a typical "estimate." The Company claims that the element of greatest value in the water rights is the "diversion right." This "diversion right" is based, in part, on the theory that for a long number of years the Company has diverted water from the White River. According to one theory, it is claimed water which would otherwise flow down stream is diverted by the Company; that the Tom Taggart Park in Indianapolis might possibly be injured by this diversion (but the city has not complained); that the stream offers possibilities of scenic beauty if there were adequate water and if it should be made suitable for navigation by small pleasure craft. It does not appear that this formula evolved as a result of anyone's

expressed or frustrated desire to sail this stream. From the possibility, however, that the stream could be used for this purpose if imaginary people should so desire, an imaginary damage to these imaginary sailors is discovered. Based upon this potential menace to these imaginary people and their imaginary desire to use this stream, an imaginary value of $200,000.00 is suggested as the cost which the Company might incur in discharging its imaginary duty to improve the stream for these imaginary sailors.

It is difficult to believe that such concepts of property can establish clear proof that the Constitution of the United States has been violated. Nor do I believe that, even if the people of Indianapolis and the surrounding community have permitted the Water Company to use this stream for a public service, there has been a grant of a prescriptive property right which can be capitalized by the Company, in order to exact higher water rates from the very people who granted the privilege.

If the Company had made actual investments in its property between 1933 and 1935, resort to illusory property concepts would not be necessary. Clearly, it would be entitled to a reasonable return upon such actual investment. Such is not the case. The order for a new trial is not based on a claim that the Company has invested even one additional dollar. It is not claimed that the Company bought additional land; added an inch to any of its dams; extended its distribution pipes; improved its filtration system; or purchased one additional piece of property.

This Court has frequently declared that in reaching a conclusion as to a reasonable rate, the public must be considered as well as the stockholders and bondholders.[17] The doctrine against confiscatory rates is based upon

[17] See *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 587; *Chicago & G. T. Ry. Co.* v. *Wellman*, *supra*, 346.

the theory of protecting the right of bondholders to their interest and that of stockholders to a fair return upon the value of their actual investments. While this matter has been confused by the "reproduction cost" theory, the fact remains that, as applied to corporations, it is the interest of the stockholders and bondholders which the due process clause protects.

The evidence in this case clearly establishes that the bondholders have never been, and are not now, in any jeopardy as to their interest payments. In the margin appears the record of stockholders' dividends since the $19,000,000.00 valuation.[18] In view of these dividends on this stock of uncertain cost, these stockholders were in no imminent peril because of the District Court's valuation of more than $21,000,000.00.

[18] Since the approval of a $19,000,000.00 valuation on this company's property was made, dividends were paid as follows:

Year	Amount	Rate paid on inflated $5,000,000 stock valuation	Rate paid on possible $500,000 valuation
1924	500,000.00	10%	100%
1925			
1926	600,000.00	12%	120%
1927	950,000.00	19%	190%
1928	1,000,000.00	20%	200%
1929	650,000.00	13%	130%
1930	1,225,000.00	24½%	245%
1931	600,000.00	12%	120%
1932	375,000.00	7½%	75%

"Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent *the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company;* for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." [Italics added.] *Chicago & G. T. Ry. Co.* v. *Wellman, supra,* 345.

This case is an illustration of the almost insuperable obstacles to rate regulation today. It involves a single Company supplying water to a single community. It does not present the difficulties of a far-flung utility system covering much territory with many separate corporate creatures. Nevertheless, this particular case has already consumed more than six years and is apparently destined to remain suspended for six more years.[19] More than 2000 pages of records and exhibits appear in this Court in the appeal.

This case was first heard by the Public Service Commission. Evidence and arguments were there introduced and the questions of value, rates, etc., were fully explored. Thereafter the Commission which had been specially created by the State of Indiana to investigate such cases rendered its decree.

Next, the case was investigated by a master in the District Court. This Court has admonished the lower court

[19] The following illustrate the delays in rate litigation:

	Bill Filed	Decided	Time
United Fuel Gas Co. *v.* Railroad Comm'n, 278 U. S. 300.	Dec. 1923	Jan. 1929	5 years
United Fuel Gas Co. *v.* Public Service Comm'n, 278 U. S. 322.	April 1925	Jan. 1929	3 yrs. 8 mos.
Ottinger *v.* Brooklyn Union Gas Co., 272 U. S. 579.	June 1923	Nov. 1926	3 yrs. 5 mos.
Ottinger *v.* Kings County Lighting Co., 272 U. S. 579.	June 1923	Nov. 1926	3 yrs. 5 mos.
Ottinger *v.* Consolidated Gas Co., 272 U. S. 576.	June 1923	Nov. 1926	3 yrs. 5 mos.
Patterson *v.* Mobile Gas Co., 271 U. S. 131.	Aug. 1922	April 1926	3 yrs. 8 mos.
McCardle *v.* Indianapolis Water Co., 272 U. S. 400.	Dec. 1923	Nov. 1926	2 yrs. 11 mos.
Average			3 yrs. 7 mos.

See, also, Brandeis, J., concurring, *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 88 *et seq.*

Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151. Commission's order made 1923; cause last appeared in this Court in 1933.

Ohio Bell Telephone Co. v. *Public Utilities Comm'n*, 301 U. S. 292. This case started before the Commission in 1921. By 1931 the Commission announced its tentative order. 1934 the Commission made what purports to be a final valuation. April, 1937, this Court returned the cause for further action.

that a master should be appointed for such purposes.[20] Extensive hearings before the master produced voluminous testimony at tremendous expense to the litigants. While this expense may appear on the books of the Company it will ultimately be borne by the consumers.

After the master heard the evidence, it went to the District Court for a third review. Thereafter it appeared in the Court of Appeals where it was again reviewed. Since it has come to this Court, I believe that the ends of justice require that it be concluded. History indicates that if it is not concluded, this is not likely to be the last journey made by the cause from Indianapolis to Washington. Litigation costs in rate regulation today constitute a heavy burden.

In the main, the dispute in this case, as in most rate cases, revolves around "intangibles" and "reproduction costs."

"Intangibles," as expounded by hired experts in rate litigations, might well be defined as "properties" that can neither be seen nor touched and which can rarely be understood. They can have little meaning when applied to property which is not for sale but for use. These property concepts are so uncertain, tenuous and elusive that no two witnesses give them the same value except on occasions when several witnesses have been employed by the same litigant.[21]

Witnesses in the present case varied as to "organization" costs from $81,000.00 to $325,000.00. Experts differed as to "going value" between $1,000,000.00 and $2,700,000.00, and on water rights from nothing to $2,000,000.00.

---

[20] *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167.

[21] For example, in the *McCardle* case, *supra,* the highest estimate was three times as great as the lowest. See Brandeis, J., dissenting, *Missouri ex rel. S. W. Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. at 299.

Such differences are not exceptional. They occur in most cases that have reached this Court which involve expert appraisal of such phantom concepts of property.

The estimates made by witnesses of "reproduction costs" of pipes for this water-works system strikingly illustrate this method of valuation. A Company expert estimated that the reproduction cost of the Company's "main" pipes, as of 1923, was $7,024,289.00. In this guess it was assumed that the pipe had a life of 125 years and that "as a matter of fact, it does not wear out in use." If these pipes last 125 years, the reproduction cost theory will subject the water consumers of Indianapolis to innumerable increases in the price of water during the next century. Experts can undoubtedly be found who will testify from time to time during the coming century, that the hypothetical digging up of old pipes and the hypothetical laying of hypothetical new pipes, will constantly increase the hypothetical reproduction value of pipes. In fact the actual pipes will not be dug up. They will continue to lie untouched and at rest—under the soil.

Under this reproduction cost theory, the constitutional water rate in Indianapolis must fluctuate during the next century with the price of cast iron pipes. One of the principal elements of the so-called "reproduction value" in this case is this very pipe. I do not believe that the constitutionality of action by a sovereign State of this Union is dependent upon the market fluctuations of cast iron pipe.

Testimony was given in this case as to the "reproduction cost" of a canal used by the water company. The State of Indiana constructed this canal for navigation purposes a hundred years ago. Some years after its completion, it was obtained by the Water Works Company of Indianapolis and, while the record is not clear, the price might have been as great as $35,000.00. When the

reorganization of the company occurred in 1881, this canal was placed upon the books of the present company at $50,000.00. It remained on the books at this figure until the write-up in 1909 which preceded the $4,500,000.00 stock dividend. At that time, it was hoisted to $1,773,874.00. By 1911, this same canal apparently was carried at $2,746,538.00. In the rate valuation case in 1923, experts of the Company valued it at more than $3,000,000.00. Extensive testimony has been given in this and the *McCardle* case, *supra,* concerning the "reproduction value" of this canal. The expert who was "reproducing" the canal in 1923 "assumed a similar set of conditions to those existing at the time the canal was originally constructed." In other words, the witness took himself and his staff back a hundred years to the conditions that existed in Indiana at the time and place of the construction of this State navigation canal. Thus projecting himself back into history, he found that the water consumers of Indianapolis should pay to the present owners of the canal 6% income on more than $3,000,000.00. I cannot subscribe to the belief that it would violate the Constitution of the United States for the State of Indiana to deny the Company 6% income on a still higher valuation of a canal that never, at the outside, cost the Company more than $50,000.00. The question in the federal courts in connection with rates is not what would be a reasonable rate to be charged by such a company, but it is limited wholly and exclusively to a decision as to whether or not a rate will confiscate the property of the company. The evidence in this case is not so "compelling" as to justify a reversal of the District Court's valuation, which valuation, itself, necessarily contains a finding of value far in excess of what this canal cost or what it is reasonably worth. In a dissenting opinion by certain commissioners of the Public Service Commission of Indiana in the *McCardle* case, they said:

"Would any reasonable man entertain the proposition of duplicating the canal, if a new water works system were to be constructed in Indianapolis? Certainly not.

"In the estimated reconstruction new cost there is the highly fancied estimate of the cost of duplicating the canal as it was constructed ninety years ago. It would be just as germane to the ascertainment of the actual value of the petitioner's property used and useful in the present water service of Indianapolis to indulge in a magnified imagination of the expense of repopulating the canal banks with the Indians."

The State of Indiana did not appeal from the judgment of the District Court. We, therefore, are not called upon to decide whether the rates now in force are so extortionate as to confiscate the property of the consumers. The Company appealed from the District Court seeking a higher valuation. The Court of Appeals decided that the Company was entitled to a higher valuation.

As a reason for reversing and remanding this cause, the majority opinion points to the fact that no interlocutory injunction has been issued. I believe that the fact that no injunction was issued after the Public Service Commission of Indiana, the master in the federal court, and the District Court had all found that the rates were not confiscatory, is but an added reason why this Court should not agree to overturn that finding and should reverse the cause. It will be wholly impossible in my judgment for any trial court to try this cause again free from the plain implication, in the action of this Court, that the value of the Company's property should be found to be approximately twenty-five per cent. greater than $22,000,000.00. How can any trial court ignore the fact that the Court of Appeals has indicated a strong belief that the value should be raised twenty-five per cent? How can any trial court escape the conclusion that an injunction should *now be issued* to prevent the enforcement of the rates that have been in effect?

There is nothing strange or unusual about the decree of the District Court fixing a value as of November 23, 1935, as well as of April 1, 1933. Any other action by the court would have gone directly in the teeth of the plain mandates of this Court in other cases. Not only was the District Court compelled to attempt to find the value as of 1933 and as of 1935, but under the opinions of this Court it was necessary that it attempt to lift the veil of the future, peer into its mysteries, and determine the value of the Company's property for a reasonable time after 1935. Its action was dictated by the command of this Court that "an honest and intelligent forecast of probable future values made upon a view of all relevant circumstances, is essential." *Missouri ex rel. S. W. Bell Tel. Co.* v. *Public Service Comm'n,* 262 U. S. 276, 288. If this language was not sufficient as an imperative admonition for the judge to become a prophet, there was the statement made by this Court in connection with the appraisal of this particular Company's property in *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 408, 409, that: "It must be determined whether the rates complained of are yielding and will yield . . . a reasonable rate of return *on the value of the property at the time of the investigation and for a reasonable time in the immediate future.*" [Italics added.] Surely it is not a ground for reversing the cause now that the District Court has followed these instructions. Is the majority overruling these cases? Must the District Court, when the case is tried "anew," obey the former mandates "to prophesy" or does the opinion of the majority mean it should not prophesy? If the trial court does prophesy, and human fallibility brings error into the prophecy, will this Court again six years hence, reverse and remand for another trial "anew"? I believe this affirmance adds additional uncertainty to the existing chaos of rules and formulas created by judicial pronouncement in the field of rate

litigation. I further believe it to be wrong to send this case back for another trial, because I believe the record affirmatively shows that the consumers of water in Indianapolis are already compelled to pay an unjustifiable price for their water on account of previous judicial overvaluation of this property.

I believe the State of Indiana has the right to regulate the price of water in Indianapolis free from interference by federal courts. The courts did not deny this right to the states for the first hundred years after the adoption of the Constitution.[22] But even under the comparatively recent doctrine purporting to give federal courts jurisdiction to invalidate rates fixed by a state, I am of the opinion that the federal courts have no jurisdiction to proceed in this cause. I base this belief on the record which does not show clearly that the stockholders of the Indianapolis Water Company have ever made any substantial investment which could be confiscated. I further believe that the evidence does not clearly establish that the rates fixed by the commission will fail to provide an income amply adequate to pay all interest on the Company's funded debt and provide far more than a 6% profit on any actual value in excess of the borrowed capital remaining unpaid. I, therefore, believe that this Court should order this cause dismissed for want of jurisdiction or that the judgment of the Circuit Court of Appeals should be reversed and the opinion of the District Court dismissing the Company's bill should be affirmed.

---

[22] *Munn* v. *Illinois, supra.*

STANDARD ACCIDENT INSURANCE CO. *v.* U. S. FOR THE USE AND BENEFIT OF POWELL ET AL., RECEIVERS, ETC.

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

No. 41. Argued December 8, 1937.—Decided January 3, 1938.

1. A claim of a common carrier by railroad for unpaid freight charges, due for transportation of materials used in the construction of a federal building, is one for "labor and materials" within the meaning of the Act of August 13, 1894, as amended, and is covered by a contractor's bond given pursuant to that Act. Pp. 443–444.
2. The Act is to be liberally construed for the protection of those who furnish labor or materials for public works. P. 444.
3. That the carrier might have enforced payment of its charges by withholding delivery is not reason for excluding it from the benefit of the Act. P. 444.

89 F. (2d) 658, affirmed.

CERTIORARI, *post*, p. 664, to review a judgment affirming a judgment against the insurance company as surety on a public contractor's bond.

Mr. Stuart B. Warren, with whom *Mr. George W. Wylie* was on the brief, for petitioner.

Mr. John Bell, with whom *Messrs. Peter O. Knight* and *C. Fred Thompson* were on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The petitioner is surety on a post office construction bond given pursuant to the Act of Congress approved August 13, 1894, c. 280, 28 Stat. 278, as amended, 40 U. S. C. § 270, which provides—

"Any person or persons entering into a formal contract with the United States for the construction of any

public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. . . ."

Respondent, common carrier by railroad, having transported material for the structure, sued on the bond to recover freight charges and prevailed in both courts below. They held it was "a corporation who has furnished labor or materials used in the construction" of a public building. The correctness of this conclusion is the only question before us.

The cause is here because of conflicting opinions in Circuit Courts of Appeals. *U. S. to use of Sabine & E. T. Ry. Co.* v. *Hyatt,* 92 Fed. 442; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works,* 163 Fed. 168; *Mandel* v. *U. S. to use of Warton & N. R. Co.,* 4 F. (2d) 629; *Maryland Casualty Co.* v. *Ohio River Gravel Co.,* 20 F. (2d) 514; *Stuart for use of Florida East Coast Ry. Co.* v. *American Surety Co.,* 38 F. (2d) 193; *Standard Accident Ins. Co.* v. *U. S. for use of Powell,* 89 F. (2d) 658.

Petitioner maintains that freight cannot be considered as "labor or material" without doing violence to the words

of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.

Stuart for use of Florida East Coast Ry. Co. v. *American Surety Co.,* Circuit Court of Appeals Fifth Circuit (1930), *supra,* carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in the present cause.

The statute often has been before us. *Guaranty Co.* v. *Pressed Brick Co.,* 191 U. S. 416; *U. S. for use of Hill* v. *American Surety Co.,* 200 U. S. 197, 201; *Title Guaranty & T. Co.* v. *Crane Co.,* 219 U. S. 24; *U. S. Fidelity & Guaranty Co.* v. *U. S. for benefit of Bartlett,* 231 U. S. 237; *Equitable Surety Co.* v. *U. S. for use of McMillan,* 234 U. S. 448, 456; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 383; *Brogan* v. *National Surety Co.,* 246 U. S. 257, 262. And we are committed to the doctrine that it should be liberally construed in aid of the evident public object—security to those who contribute labor or material for public works.

Certainly labor is required for loading freight on railroad cars, moving these over the road, and unloading at destination. A carrier who has procured the doing of all this in respect of material has "furnished labor." If a contractor had employed men to move the same kind of material in wheelbarrows, there could be no doubt that he furnished labor. In principle the mere use of cars and track and a longer haul creates no materially different situation.

Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. Refusal by the carrier to deliver material until all charges

were paid might seriously impede the progress of public works, possibly frustrate an important undertaking.

State for use of Pennsylvania R. Co. v. *Aetna Casualty & Surety Co.*, (1929) 34 Del. 158; 145 Atl. 172, gave much consideration to a similar statute. The conclusion there reached accords with our view.

The judgment of the court below must be

Affirmed.

UNITED STATES EX REL. WILLOUGHBY, TRUSTEE, ET AL. *v.* HOWARD ET AL.

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

No. 30. Argued November 10, 1937.—Decided January 3, 1938.

1. By the common law it is the duty of a trustee or receiver, unless relieved by agreement, statute, or order of court, to exercise reasonable care in the custody of the fiduciary estate. P. 450.
2. In respect of the care of the funds of the bankrupt estates here involved, the duty of the trustee or receiver was not limited, by any agreement, statute, or order of court, to depositing them in one of the depositories designated by the court under U. S. C., Title 11, § 101. Pp. 450–452.
3. Although designation by the court of depositories for funds of bankrupt estates limits the discretion of the depositing officer and may render him absolutely liable for the loss of funds placed elsewhere, it does not relieve him of the duty of exercising care and prudence within the field left to his discretion. Pp. 451–452.
4. The mere imposition of statutory duties does not remove liability for breach of existing common law duties. P. 452.
5. The contention that the Bankruptcy Act established a depository system—analogous to the depository system established by Congress for the deposit of Treasury funds—which relieved trustees and receivers wholly of the duty of exercising care as to the condition or stability of a depository, cannot be sustained. P. 453.
6. As trustee or receiver of 123 separate bankrupt estates, H gave bond in each case conditioned, *inter alia*, on the faithful performance of his official duties. In a bank which made personal unsecured

loans to him, and which was one of twenty available designated depositories, he deposited funds of the estates totaling more than eight times the penalty of the bank's depository bond. He continued to maintain the funds there, although he knew of several heavy runs on the bank and that its deposits and resources were dwindling. The bank closed its doors, and subsequently actions were brought on the bonds given by H. *Held:*

(1) The exercise of ordinary care in making and maintaining deposits, even though made in a designated depository, was part of H's official duties, and he and his surety are liable on the bonds if he failed in this respect. P. 454.

(2) The evidence on the issue as to whether H had failed in the faithful performance of his official duties was ample—particularly in view of the personal loans to him—to justify submitting the question to the jury. P. 454.

87 F. (2d) 243, reversed.

CERTIORARI, 301 U. S. 677, to review a judgment reversing a judgment for the plaintiffs in three suits, consolidated for trial, against the principal and surety on a number of fidelity bonds given by the principal as trustee or receiver of bankrupt estates.

Mr. Walter E. Beebe, with whom *Messrs. Thurlow G. Essington, George B. McKibbin* and *Hamilton K. Beebe* were on the brief, for petitioners.

Mr. Lloyd Heth, with whom *Messrs. Julius Moses, William P. Smith, Walter Bachrach, Stanley J. Morris* and *R. Weyand* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether a trustee (or receiver) in bankruptcy and the surety on his official bond can be held liable for the loss resulting from the insolvency of the bank in which the estate's funds were deposited, if it was one of the depositories designated by the court under U. S. C. Title 11, § 101.

Sam Howard was trustee in bankruptcy of 114 separate bankrupt estates, and was receiver of 9, in the federal court for northern Illinois, Eastern Division. Between August 20, 1930, and June 21, 1932, he had deposited the funds of each of the 123 estates in the Phillip State Bank and Trust Company of Chicago, as ordinary commercial accounts. On the latter date the bank, being insolvent, closed its doors. The aggregate of his bankruptcy deposits in the 123 accounts was, at the time of its closing, over eight times the penalty of the bank's depository bond of $50,000. The only dividend received by the bankruptcy estates was about 11 percent—which was paid from the amount collected on the depository bond.

As required by U. S. C. Title 11, § 78, Howard had given an official bond to the United States for each estate, and Continental Casualty Company was the surety. The form of the trustee's bond was that prescribed by Form 25 of the General Orders and Forms in Bankruptcy, pursuant to U. S. C. Title 11, § 53.

The obligors bound themselves to pay any loss resulting to the estate from failure by Howard, (a) to obey any order of the court, (b) truly and faithfully to account for all moneys, (c) faithfully to perform his official duties as trustee.[1] It is agreed that the condition of the bonds given as receiver was in effect the same.

Howard resigned as trustee or receiver of each estate. Chester A. Willoughby, who succeeded him, brought in that court, pursuant to leave, three actions in the name of the United States against Howard and the Casualty

[1] The condition of each bond given as trustee was: "Now, therefore, if the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue."

Company. In these actions, which were consolidated, recovery was sought on each bond on the ground that its condition had been broken by Howard's failing to perform his official duties as trustee or receiver. The failure assigned was that he negligently deposited the funds, or permitted them to remain, in the Phillip Bank, whereas ordinary care and prudence would have required him to desist from such practice and take care that the aggregate of the deposits of estate funds in that bank should not exceed the penalty of the depository bond. The defendants moved to dismiss the complaints on the ground that they failed to disclose any breach of the condition of the bonds. Upon the denial of the motions, the consolidated cases were heard before a jury on the issue whether Howard had been negligent in the performance of his official duties in so depositing the funds, or in leaving them, in the Phillip Bank.

The following, among other facts, appeared: About twenty Chicago banks had been designated by the court as depositories of bankruptcy funds in that district. Howard, who had for years served as trustee and receiver of bankrupt estates, had, prior to August, 1930, deposited the funds of the estates either in the Central Trust Company of Illinois or the Foreman State National Bank of Chicago. In July he was solicited to transfer his bankruptcy deposits to the Phillip Bank, a small institution. He agreed to do so if the Phillip Bank should become a depository, would make him unsecured personal loans sufficient to discharge his existing personal indebtedness to the Central Trust Company and the Foreman State National Bank—and would give him thereafter like accommodation. The Phillip Bank loaned him $11,000; Howard paid his indebtedness to the other banks; and on August 20, the Phillip Bank qualified as a depository, giving a bond in the sum of $50,000. Within the next

few days, Howard opened in the Phillip Bank accounts for bankruptcy estates with deposits aggregating $249,-968.15. The number of his accounts, the aggregate amount on deposit, and the amount of his personal loans from that bank increased from time to time. When the bank closed, the accounts numbered 123, the deposits aggregated $416,833.90, and the loans to Howard $17,500. The Phillip Bank's depository bond remained at $50,000. He knew that during this period of deposit there were several heavy runs on the Phillip Bank, its deposits were steadily declining and its resources were being drained.

Defendants' motions for a directed verdict were denied; the jury found for the plaintiff verdicts aggregating $225,-740.45; a new trial was refused; and an appeal was taken to the Circuit Court of Appeals, where the case was heard first by two judges, then reargued before the full court. A condensed report of the evidence and other proceedings at the trial occupies 250 pages of the printed record. Much evidence offered by defendants had been excluded; many rulings sought had been refused; and timely exception had been taken to instructions given to the jury and to those refused. Eighty-four assignments of error had been filed with the petition for appeal. But the appellate court examined only a few of the assigned errors. For it held that the trial court should have directed a verdict for the defendants, on the ground that, since Howard had deposited and maintained the funds in one of the banks designated by the court as depositories, he fully performed his official duty in respect to the care of the funds. It reversed the judgment with direction to grant a new trial and to proceed in accordance with the opinion. 87 F. (2d) 243. One judge dissented. We granted certiorari because of the importance of the question presented.

First. That the obligors in the bonds are liable only for breach by Howard of an official duty may be assumed.

By the common law[2] every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court. Obviously, Howard was not relieved of the duty by any agreement. The question for decision is whether under the Bankruptcy Act,[3] or any order of the court, this duty in respect to the care of funds was limited to depositing them in one of the depositories designated by the court under U. S. C. Title 11, § 101, so that Howard was relieved of all duty to exercise care in selecting the depository and maintaining funds therein.

Second. No statute relieved Howard of the common law duty to exercise care in the custody of the funds.

---

[2] Receiver in Bankruptcy: *In re Curtis,* 76 F. (2d) 751, 753 (C. C. A. 2); *In re C. M. Piece Dyeing Co.,* 89 F. (2d) 37, 40 (C. C. A. 2); *Hartford Accident & I. Co.* v. *Crow,* 83 F. (2d) 386, 388 (C. C. A. 6). Trustee in Bankruptcy: *In re Reinboth,* 157 Fed. 672, 674 (C. C. A. 2); *Carson, Pirie, Scott & Co.* v. *Turner,* 61 F. (2d) 693, 694 (C. C. A. 6); *In re Kuhn Bros.,* 234 Fed. 277, 281 (C. C. A. 7); *In re Newcomb,* 32 Fed. 826 (N. D. N. Y.); *In re B. A. Montgomery & Son,* 17 F. (2d) 404, 406 (N. D. Ohio); compare *Delaware* v. *Irving Trust Co.,* 92 F. (2d) 17, 19 (C. C. A. 2); *In re Kane,* 161 Fed. 633, 639 (N. D. N. Y.). Equity Receiver: *Gutterson & Gould* v. *Lebanon Iron & Steel Co.,* 151 Fed. 72 (C. C. M. D. Pa.); *Hitner* v. *Diamond State Steel Co.,* 207 Fed. 616, 622 (D. Del.). Trustee: *Barney* v. *Saunders,* 16 How. 535, 545–46; *U. S. National Bank & T. Co.* v. *Sullivan,* 69 F. (2d) 412, 415–16 (C. C. A. 7); *Fidelity & Deposit Co.* v. *Redfield,* 7 F. (2d) 800, 802 (C. C. A. 9); *Johns* v. *Herbert,* 2 App. D. C. 485, 497; *Caldwell* v. *Hicks,* 15 F. Supp. 46, 52 (S. D. Ga.); compare *Strauss* v. *U. S. Fidelity & G. Co.,* 63 F. (2d) 174, 176–77 (C. C. A. 4); *American Bonding Co.* v. *Richardson,* 214 Fed. 897, 901 (C. C. A. 6); *Thompson* v. *Hays,* 11 F. (2d) 244, 247 (C. C. A. 8). Executor: see *Taylor* v. *Benham,* 5 How. 233, 275; *Glasgow* v. *Lipse,* 117 U. S. 327, 333–334; *Moore* v. *Moore,* 47 App. D. C. 18, 27. Guardian: *Lamar* v. *Micou,* 112 U. S. 452, 465; *Corcoran* v. *Kostrometinoff,* 164 Fed. 685, 687–688 (C. C. A. 9).

[3] July 1, 1898, c. 541, 30 Stat. 544, as amended; U. S. C. Title 11.

The only relevant provisions of the Bankruptcy Act prescribing duties of the trustee are:

"Sec. 61 (U. S. C. Title 11, § 101). *Depositories for Money.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

"Sec. 47 (U. S. C. Title 11, § 75). *Duties of Trustees.* (a) Trustees shall respectively . . .

"(3) deposit all money received . . . in one of the designated depositories;

"(4) disburse money only by check or draft on the depositories in which it has been deposited;

"(5) furnish such information concerning the estates . . . and their administration as may be requested by parties in interest; . . .

"(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

"(8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; . . .

"(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; . . ."

Obviously the Act does not in terms relieve the trustee of the common law duty to exercise care in the custody of funds. The designation of banks of deposit proper for bankruptcy funds, like the listing of legal investments

for trustees and guardians, limits the discretion which can be exercised by the depositing officer and may render him absolutely liable for the loss of funds placed in a non-designated depository. But the fact that the freedom of choice of the fiduciary is limited by statute does not relieve him of the duty of exercising care and prudence within the field left to his discretion. As he may not shut his eyes to the fact that a so-called legal investment is no longer sound, he may not disregard the fact that a depository proper when designated is no longer safe.[4] The mere imposition of statutory duties does not remove liability for breach of existing common law duties. Compare *Bowerman* v. *Hamner,* 250 U. S. 504, 510–11; *Yates* v. *Jones National Bank,* 206 U. S. 158, 178; *Mechanics Universal Joint Co.* v. *Culhane,* 299 U. S. 51, 57.

Third. No order of the court limited the common law duty of Howard to exercise care in the custody of estate funds. The Phillip Bank was designated as a depository on its own application. No order directed Howard to deposit funds in the Phillip Bank; and no order specifically authorized him to do so. Being free to select any one or more of the designated depositories, Howard was in respect thereto under the common law obligation to exercise care in the performance of his functions as a fiduciary. While he was making deposits in the Phillip Bank there were about twenty others in the Chicago area which were designated depositories, so he had a wide range from which to choose. By designating the Phillip Bank as a depository the court may have justified Howard in assuming that on August 20, 1930, it was a trustworthy

[4] See *Delafield* v. *Barret,* 270 N. Y. 43, 48–49; 200 N. E. 67; *Matter of Flint,* 240 App. Div. 217, 225; 269 N. Y. S. 470; *Matter of Blake,* 146 Misc. 780; 263 N. Y. S. 310; *Matter of Frazer,* 150 Misc. 43; 268 N. Y. S. 477; *Matter of Jacobs,* 152 Misc. 139, 141–42; 273 N. Y. S. 279; *Estate of Allis,* 191 Wis. 23, 31–32; 209 N. W. 945; 210 N. W. 418.

place of deposit for bankruptcy funds to the extent of $50,000. But throughout the period of deposit the legal duty to exercise care remained. If at any time he discovered facts tending to show that the place of deposit was no longer safe, it was his duty to bring the facts to the attention of the court.[5] And at no time was Howard justified in maintaining a deposit not entirely secured by the depository bond if he had reasonable cause to doubt the stability of the bank.

Fourth. The contention that the Bankruptcy Act established a depository system which relieved trustees and receivers wholly of the duty of exercising care as to the condition or stability of a depository rests upon false analogy. For federal public funds Congress has provided a depository system by which the moneys, as soon as deposited are in effect in the Treasury of the United States. 31 U. S. C. §§ 476–478, 495; 12 U. S. C. §§ 391, 392. Under that system an officer who has duly made the deposits is relieved of all responsibility for the stability of the depository. Similar provision has been made in many States for the deposit of public funds of the state or municipality.[6] But the funds of bankruptcy estates are private funds, see *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 257, note 11; and the provisions in the

[5] Compare *Jordon* v. *Baker*, 252 Ky. 40, 49; 66 S. W. (2d) 84; *Zimmerman* v. *Coblentz*, 170 Md. 468, 476; 185 Atl. 342.

[6] In a number of States statutes specifically relieve public officers of liability if the funds entrusted to them are deposited in the manner provided by law. Some courts hold that in the absence of such a provision the mere fact that the funds are placed in a duly designated depository is not a complete defense; and that if the officer acquires knowledge of facts which show the bank to be unsafe, he may be held responsible if he fails to have the funds removed. *Independent School Dist.* v. *Flittie*, 54 S. D. 526; 223 N. W. 728; *Lane Independent School Dist.* v. *Endahl*, 55 S. D. 73; 224 N. W. 951; *Cozad* v. *Thompson*, 126 Neb. 79; 252 N. W. 606; see *Jordon* v. *Baker*, 252 Ky. 40, 49; 66 S. W. (2d) 84.

Bankruptcy Act concerning the appointment of depositories and the deposits to be made by trustees are of a very different character.

As the exercise of ordinary care in making and maintaining deposits, even if made in a designated depository, was part of Howard's official duties, he and his surety are liable on the bonds if he failed in this respect. On that issue the evidence—particularly in view of the personal loans to him—was ample to justify submitting the question to the jury. The judgment of the Circuit Court of Appeals is, therefore, reversed; and the cause is remanded to it for consideration of the other errors which the defendants assigned concerning the conduct of the trial. *Reversed.*

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

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

No. 33. Argued October 21, 1937. Reargued December 15, 1937.—Decided January 3, 1938.

The A corporation brought about a consolidation of three of its competitors into a new corporation, of which it became the owner of all the preferred shares and 57% of the common shares. Stockholders of the consolidated companies received in exchange for their shares: shares of the new corporation, shares of the A corporation, and cash which the A corporation supplied. *Held,* the A corporation was not a "party to a reorganization" under § 112 (b) (3) of the Revenue Act of 1928; its shares received by stockholders of the consolidated companies were "other property" under § 112 (c) (1), and gain thereon was taxable. Following *Groman* v. *Commissioner, ante,* p. 82. P. 458.

87 F. (2d) 827, reversed.

CERTIORARI, 301 U. S. 678, to review a judgment affirming a decision of the Board of Tax Appeals, 33 B. T. A. 10,

which reversed an order of the Commissioner assessing a deficiency in income tax.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for petitioner.

Mr. Walter G. Moyle, with whom *Messrs. Charles C. Gammons* and *Ernest L. Wilkinson* were on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

Whether Bashford is liable for a deficiency in the income taxes assessed for the year 1930 depends upon whether Atlas Powder Company was, as defined by § 112 (i) (2) of the Revenue Act of 1928, 45 Stat. 818, "a party to the reorganization" of the Peerless Explosives Company.

Atlas Powder Company desired to eliminate the competition of three concerns—Peerless Explosives Company, Union Explosives Company and Black Diamond Powder Company. Deeming it unwise to do so by buying either their stock or their assets, Atlas conceived and consummated a plan for consolidating the three competitors into a new corporation, with Atlas to get a majority of its stock. To this end holders of the stock of the three companies were duly approached by individuals who represented Atlas; their agreements to carry out the plan were obtained; the new corporation was formed and became the owner practically of all the stock, and all the assets, of the three competitors; Atlas became the owner of all the preferred stock and 57% of the common stock of the new corporation; and in exchange for the stock in the three companies each of the former stockholders re-

ceived some common stock in the new company, some Atlas stock, and some cash which Atlas supplied.

Bashford, one of the stockholders in Peerless, received in exchange for his stock 2,720.08 shares of the common stock of the new corporation, $25,306.67 in cash, 625 shares of Atlas preferred, and 1344 shares of Atlas common. In his income tax return for the year 1930 he included all the cash, but did not include the gain on stock of either the new corporation or Atlas. The Commissioner concedes that gain on the stock in the new corporation was properly omitted, since the new company was a "reorganization" of Peerless. He insists that the Atlas stock should have been included, as it was "other property" on which gain was taxable under § 112 (c) (1) of the Revenue Act of 1928, since Atlas was not "a party to the reorganization." The Board of Tax Appeals, 33 B. T. A. 10, held that Atlas was "a party to the reorganization," and hence that gain on its stock was properly omitted by Bashford. The Circuit Court of Appeals for the Third Circuit affirmed that judgment. 87 F. (2d) 827. Because of alleged conflict of the decision with *Commissioner* v. *Groman,* 86 F. (2d) 670, we granted certiorari in both cases.

In *Groman* v. *Commissioner, ante,* p. 82, we gave the following construction to the reorganization sections here involved:

". . . where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss." P. 89.

Applying the rule, we held there that the Glidden stock received by Groman was "other property" and he, therefore, liable on the deficiency assessment; because the Glidden Company was not "a party to the reorganiza-

tion," although it had, pursuant to agreement with the stockholders of the Indiana corporation, caused it to be reorganized as an Ohio corporation; had taken for itself all the common stock of Ohio; and had distributed among the former stockholders of Indiana the Ohio preferred stock and some Glidden stock, as well as cash, which it supplied. Applying the rule here, we hold likewise that the Atlas stock was "other property" and Bashford, therefore, liable on the deficiency assessment; because the Atlas Powder Company was not "a party to the reorganization."

Bashford contends that there is a clear distinction in the facts between the case at bar and the *Groman* case which should lead to a different conclusion here. The differences mainly relied upon are these:

1. In the *Groman* case, the court found that Glidden did not acquire a majority of the shares of the voting stock and a majority of the shares of all other classes of stock involved, whereas here the facts were as follows: Atlas acquired "not only a majority of the voting stock and a majority of the stock of all other classes of another corporation (the new company) *in the reorganization,* but of all the other corporations (Peerless and Union) *in the reorganization.*"

2. "Atlas actually acquired, as part of the plan . . . substantially all of the shares of Peerless and Union in direct exchanges with the taxpayer and the other stockholders of those companies in part consideration for which it delivered to the shareholders 6,318 shares of Atlas preferred stock and 8712½ shares of common."

3. "Atlas, unlike Glidden was a party to all the exchanges, while the new company was a party only to exchanges with Atlas."

4. "The stockholders of Peerless and Union did not participate in the contract or exchange between Atlas and the new company."

Any direct ownership by Atlas of Peerless, Black Diamond, and Union was transitory and without real substance; it was part of a plan which contemplated the immediate transfer of the stock or the assets or both of the three reorganized companies to the new Atlas subsidiary. Hence, under the rule stated, the above distinctions are not of legal significance. The difference in the degree of stock control by the parent company of its subsidiary and the difference in the method or means by which that control was secured are not material. The participation of Atlas in the reorganization of its competitors into a new company which became a subsidiary did not make Atlas "a party to the reorganization." The continuity of interest required by the rule is lacking.

Reversed.

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

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER are of opinion that the Board of Tax Appeals and the Circuit Court of Appeals reached the right conclusion, and that the judgment below should be affirmed.

LEITCH MANUFACTURING CO. *v.* BARBER COMPANY.

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

No. 208. Argued December 14, 1937.—Decided January 3, 1938.

1. The owner of a patent for a process for curing concrete by the use of a spray of bituminous emulsion, an unpatented article of commerce, can not enjoin as a contributory infringer a competing manufacturer who sold bituminous emulsion to a road contractor who used it in practicing the patented method. Pp. 460, 463.

2. A patent may not be used as a means of obtaining a limited monopoly of unpatented material. *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27. P. 463.
3. The rule of the *Carbice* case, *supra,* is applicable whether the patent be for a machine, a product, or a process; and whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly. P. 463.

89 F. (2d) 960, reversed.

CERTIORARI, *post,* p. 673, to review a decree which, upon appeal from a decree dismissing the bill in a suit for contributory infringement of a patent, 14 F. Supp. 212, directed the District Court to enter a decree adjudging the claims in issue valid and infringed and awarding an accounting.

Mr. Samuel Ostrolenk for petitioner.

Mr. George J. Harding, with whom *Mr. Frank S. Busser* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the owner of a process patent may by suit for contributory infringement suppress competition in the sale of unpatented material to be used in practicing the process.

The Barber Company brought, in the federal court for New Jersey, against the Leitch Manufacturing Company,[1] this suit to enjoin the alleged contributory in-

[1] The suit was begun by The Barber Asphalt Company, the then owner of the patent. During the pendency of the suit that corporation transferred the patent, together with all claims for damages and profits for past infringement and the right to sue therefor, to The Barber Company, Inc. Upon supplemental bill of complaint, it was substituted as plaintiff. The Stulz-Sickles Company, the jobber through whom the sale was made, was a co-defendant throughout the proceedings below; but declined to join in the petition for certiorari.

fringement of patent No. 1,684,671, dated September 18, 1928, by selling and delivering bituminous emulsion to a road builder, knowing that it was to be used in Newark in accordance with the method defined in the claims of the patent. Besides denying the validity of the patent, this further defense was interposed. It was insisted that the suit could not be maintained, even if the patent were valid, because to do so would give a limited monopoly of an unpatented staple article of commerce. The following facts were proved or admitted.

The Barber Company and Leitch Manufacturing Company are competing manufacturers of bituminous emulsion—an unpatented staple article of commerce produced in the United States by many concerns and in common use by their customers for many purposes. By builders of macadam roads the emulsion has long been used as a coating for crushed stone and otherwise. With builders of cement concrete roads it has recently come into use for a film on the surface of the roadway to retard evaporation during curing. For the method of so retarding evaporation The Barber Company acquired the process patent sued on, and seeks to use it to secure a limited monopoly in the business of producing and selling the bituminous material for practicing and carrying out the patented method. The company does not itself engage in road building, or compete with road contractors. It does not seek to make road builders pay a royalty for employing the patented method. It does not grant to road builders a written license to use the process.[2] But it adopts a method of doing the business which is the prac-

[2] No written license had, so far as appears, been granted by The Barber Company to any one. Its predecessor, The Barber Asphalt Company (see note 1), had granted a written license to Johnson-March Corporation, which paid no royalty but bought from The Barber Asphalt Company "cutback material" for use in the East, and "Trinidad or Bermudez asphalt" for use in the West.

tical equivalent of granting a written license with a condition that the patented method may be practiced only with emulsion purchased from it. For any road builder can buy emulsion from it for that purpose, and whenever such a sale is made, the law implies authority to practice the invention. On the other hand The Barber Company sues as contributory infringer a competing manufacturer of this unpatented material who sells it to a road builder for such use. Thus, the sole purpose to which the patent is put is thereby to suppress competition in the production and sale of staple unpatented material for this use in road building.

The District Court discussed, but found it unnecessary to pass upon, this defense, as it dismissed the bill on the ground that the patent was void. 14 F. Supp. 212. The Court of Appeals sustained the validity of the patent; concluded that there was contributory infringement; held that maintenance of the suit was not forbidden by the rule declared in *Carbice Corporation* v. *American Patents Development Corp.*, 283 U. S. 27; and directed that the District Court enter a decree adjudging the claims in issue valid and infringed, and awarding an accounting. 89 F. (2d) 960. One judge dissented on the ground that the decree dismissing the bill should have been affirmed under the rule declared in the *Carbice* case. A petition for certiorari limited to that question was applied for and granted.

That the patent did not confer upon The Barber Company the right to be free from competition in supplying unpatented material to be used in practicing the invention was settled by the rule declared in the *Carbice* case. That suit was likewise one to enjoin an alleged contributory infringer. The subject of the patent was a refrigerating transportation package in which the refrigerant to be used was solid carbon dioxide, or "dry ice." The sole business of the Dry Ice Corporation was

to make and sell dry ice—which is unpatented material. It did not make or sell transportation packages in which dry ice was used as a refrigerant. It did not issue to other concerns licenses to make such packages upon payment of a stipulated royalty. It did not formally license buyers of its dry ice to use the invention in suit. But each invoice for dry ice bore a notice in effect that the patented container could be used only with dry ice purchased from the Corporation. In declaring that relief must be denied the Court said:

"The Dry Ice Corporation has no right to be free from competition in the sale of solid carbon dioxide. Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used. Relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention." (pp. 33–34.)

"In the case at bar the plaintiffs neither sell nor license others to sell complete transportation packages. They supply merely one of several materials entering into the combination; and on that commodity they have not been granted a monopoly. Their attempt to secure one cannot be sanctioned." (pp. 34–35.)

The Barber Company contends that the rule of the *Carbice* case is not applicable because it has not entered into any contract or agreement aimed at expansion of the patent monopoly. It argues that in the *Carbice* case, as in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, the attempt to secure the "partial monopoly of an unpatented material, outside of and apart from the patent monopoly" was made by contract or notice, whereas The Barber Company has made no attempt

"by contract, notice, or otherwise, to expand its patent monopoly by limitations, or to reserve or create any monopoly in emulsion outside of, or apart from, its patent monopoly"; that its "customers for emulsion have no more than the unconditioned license to use implied by law, and are under no restriction"; and that neither the defendant nor its customers has any "relation with the patent owner."

The distinction upon which The Barber Company thus rests is without legal significance. The Court held in the *Carbice* case that the limitation upon the scope or use of the patent which it applied was "inherent in the patent grant." It denied relief, not because there was a contract or notice held to be inoperative, but on the broad ground that the owner of the patent monopoly, ignoring the limitation "inherent in the patent grant," sought by its method of doing business to extend the monopoly to unpatented material used in practicing the invention. By the rule there declared every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited. It applies whether the patent be for a machine, a product, or a process. It applies whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly. Nothing in *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325, limits it.

Reversed.

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

ALABAMA POWER CO. *v.* ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

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

Nos. 84 and 85. Argued December 6, 7, 1937.—Decided January 3, 1938.

1. An electric power company, operating in Alabama under a non-exclusive franchise, sued to enjoin the performance of agreements whereby a federal official purporting to act under Title II of the National Industrial Recovery Act, as amended, undertook on behalf of the United States to make loans and grants of money to several Alabama municipalities to assist each of them, respectively, in constructing an electrical distribution system within its municipal limits. *Held* that the company had no standing to question the validity of the loans and grants under the federal statute, or the validity of the statute in that regard under the Federal Constitution, since the only damage threatening the company was the damage of lawful competition—*damnum absque injuria*. Pp. 478, 479.

   According to the findings in the cases each of the municipalities had authority to construct and operate its proposed plant and distribution system in competition with the company, and to borrow money for that purpose, and had determined to do so of its own free will; no conspiracy was involved, nor any desire to cause injury or financial loss to the company, nor purpose to regulate rates or foster municipal ownership of utilities. Neither the United States nor any of the respondent-officers had reserved any right to require an elimination of competition or designate any agency from which the municipality must purchase its power. Each municipality was left entirely free from federal control or direction in respect of the management and control of its plant and business.
2. Findings of the District Court, made after hearing, supported by substantial evidence, and not questioned by the intermediate appellate court, *held* unassailable in this Court. P. 477.
3. The interest of a taxpayer in the moneys of the federal treasury affords him no status to enjoin expenditures upon the ground that they are for an unconstitutional purpose. P. 478.

4. Courts have no power to enjoin the execution of an Act of Congress upon the ground of unconstitutionality, where no wrong directly resulting in the violation of a legal right is presented in a justiciable issue. P. 479.

67 App. D. C. 230; 91 F. (2d) 303, affirmed.

CERTIORARI, 301 U. S. 681, to review decrees affirming the dismissal of bills brought against the Emergency Public Works Administrator and other Government officials to restrain the making of loans and grants of money to certain municipalities in Alabama, in aid of the construction of municipal light and power plants. These cases were consolidated and tried with others which later became moot. No. 84 also became moot in so far as it related to three of the municipalities originally named in the bill. The opinion of the District Court is in LXIV Wash. L. Rep. 563.

Mr. William H. Thompson, with whom *Messrs. Perry W. Turner, Newton D. Baker, R. T. Jackson, Dean Acheson, Thomas V. Koykka, Wayne G. Cook* and *J. Harry Covington* were on the brief, for petitioner.

I. The petitioner has shown facts which entitle it to question the legality of the respondents' acts.

The respondents have argued in the lower courts that the test of whether they owe a duty to the petitioner to refrain from the acts threatened—admitting for the purpose of this argument that they are unauthorized—is whether private individuals would incur liability from committing them. They argue that the respondents, stripped of legal authority, are merely private individuals and that the rights and duties of the parties must be determined by principles applicable in suits between one private individual and another.

The argument is as unsound in principle as it is opposed to authority. In many cases the act of the officer, if unauthorized, would fit into such common forms of

action as trespass, but in a great and growing field of activity an officer acting under color of authority is not acting as a private person, the consequences of his acts are not the same as those of a private person, and no private person could conceivably propose to act in the same way. In short, the argument is wholly verbal and unrealistic.

But the error in principle goes deeper. The argument assumes that the legal principles determinative of the standing of the plaintiff to question the legality of acts of a public officer should be those which have been evolved to determine rights to *recover* against a *private* person. Nothing could be more fallacious. The principles determining the right to recover against private persons are the result of long and careful evaluation of the conflicting interests of private persons. A rule of law which makes the difference between victory for the plaintiff and victory for the defendant represents the accumulated wisdom of courts and legislatures as to how private persons should live together and how loss, as between them, should be borne. These issues involve basic considerations of policy; but to make that same policy determinative of the right to question the statutory authority of a public officer disregards vital differences.

The considerations which should be, and have been, determinative with courts in formulating the principles affecting the right of private persons to question the authority of public officers are the necessity of affording protection against injury resulting from abuse of authority, while avoiding officious and burdensome litigation, and the assertion of fanciful wrongs and insubstantial injuries. Recognizing, as they should and must, this vital difference in the function and purpose of the rules involved in determining when a plaintiff may question the authority of a public officer and when he may recover from another pri-

vate individual, courts have not, as respondents argue, blindly confused the two, but in determining the former have referred to the latter merely as a guide, by analogy, to types of injuries to plaintiffs of which the law will take note. See *Ex parte Young,* 209 U. S. 123.

In *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 621, the Secretary of War, if he had been a private citizen, would have incurred no liability by threatening suits to enforce a harbor line which he had drawn. Similarly private persons would have owed no duty to the plaintiff which would have been violated by the acts threatened by the public officers in *Pierce* v. *Society of Sisters,* 268 U. S. 510 or *Terrace* v. *Thompson,* 263 U. S. 197, or *Hammer* v. *Dagenhart,* 247 U. S. 251, or *Truax* v. *Raich,* 239 U. S. 33.

In *Santa Fe Pacific R. Co.* v. *Lane,* 244 U. S. 492, if the Secretary of the Interior had been a private individual, and asserted a claim unauthorized in amount for surveying public land before issuing a patent—if the situation can be imagined—no legal duty to plaintiff would have been violated. Similarly in *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146, the plaintiff sued to enjoin a state official from declaring that it was without authority to do business in the State—an act which no private individual could perform, and which if threatened would not involve liability.

In all these cases the principle entitling the plaintiffs to question the officials' authority is the same—the plaintiffs had a right to hold their property, or conduct their business, free from injury by public officials through acts done without lawful power and in abuse of authority. Public officials owe a duty to refrain from interfering with the property or business of the plaintiffs and from injuring them therein without authority or in abuse of it. When an act, in violation of this duty, will be the proximate cause of consequences to the plaintiff so substantial and onerous as to be comparable to injuries which the law is

accustomed to note as legal damage, a cause of action arises, with the right to an injunction.

The rule is no different when the injury flows from an unauthorized use of the spending power. There the plaintiff also establishes his right to question the authority of the officer if he is—"able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon,* 262 U. S. 447, 488.

This petitioner has shown just such immediate threat of direct and special injury. In the present cases the Administrator has authorized, for purposes which he claims are authorized by law, the construction, as federal public works projects, under his supervision and with funds provided by him, of facilities which are intended to supplant the petitioner's, and which must do so if the loans contemplated are to be repaid. It is this action of his, in causing the construction for alleged federal purposes and with federal funds, which threatens the petitioner's business with destruction. The elimination of the petitioner from the towns is essential to the financing of the projects. The towns have already provided for this elimination. In the words of their own officials, they intend to supplant the petitioner's distribution systems.

It is equally plain that construction of each supplanting system is to be undertaken as a federal public-works project, subsidized by the Administrator. The purpose of the public-works program was to cause construction which would not otherwise take place. We refer to the official declaration of PWA that the public grants "are given to induce public bodies to undertake construction of useful works."

The fact that the impact of the injury upon the petitioner will be produced by action of the towns does not

render the Administrator immune from petitioner's suit. The fact remains that he is the proximate and moving cause of the injury which it will suffer solely because of his unlawful acts in authorizing and financing these particular federal public-works projects with gifts and revenue loans, the repayment of which contemplates and requires the destruction of petitioner's business in the towns. It is well settled that where one without warrant or justification in law, induces and enables another to inflict injury on a third party the wrongdoer is liable even though the intervening party may act within his legal rights. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251–252; *Walker* v. *Cronin,* 107 Mass. 555; *Thacker Coal Co.* v. *Burke,* 59 W. Va. 253; *Deon* v. *Kirby Lumber Co.,* 162 La. 671; *U. S. Fidelity & Guaranty Co.* v. *Millonas,* 206 Ala. 147; *Gibson* v. *Fidelity and Casualty Co.,* 232 Ill. 49; *Rice* v. *Manley,* 66 N. Y. 82; *Benton* v. *Pratt,* 2 Wend. 386; compare *Angle* v. *Chicago, St. Paul, M. & O. Ry. Co.,* 151 U. S. 1, 12–13, 22, 23. As the trial court concluded, ". . . the furnishing of the funds by the Government and the resulting competition are so closely connected that, if the statute under which the funds are supplied is unconstitutional, or if the officer furnishing the funds is not authorized to do so, then the plaintiffs may test those questions on the merits." Cf. *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986, 1001, 1002; *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. No. 6,546, at p. 255.

The respondents' acts are the proximate cause of the petitioner's injury since that injury is the inevitable and contemplated result of the authorization of the projects; indeed, is essential to their accomplishment as planned. The petitioner's business must be taken from it in order to repay the Administrator.

The respondents do not and cannot argue that because the intervening acts of third persons are lawful,

resulting consequences to a plaintiff cannot be legal injury. The cases cited *supra* negative any such argument. Nor can they argue that the consequences to the petitioner do not constitute legal injury because they reach the petitioner through the competition of a rival. That the injury from competition is injury recognized by the law was expressly held by this Court in *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, 11. Similarly in *Frost* v. *Corporation Commission*, 278 U. S. 515.

The respondents' argument seems to be that because the intervening act, which finally produces the injury, is legal competition, the consequences are not legal injury. Here, again, as might be expected, both authority and reason are against such an argument. See *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 961; *Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; cf. *Oklahoma Utilities Co.* v. *Hominy*, 2 F. Supp. 849; see also *Iowa Southern Utilities Co.* v. *Cassill*, 69 F. (2d) 703; *Gallardo* v. *Porto Rico Ry. L. & P. Co.*, 18 F. (2d) 918, and *Citizens Electric Illuminating Co.* v. *Lackawanna & W. V. Power Co.*, 255 Pa. 145.

Thus the argument that the petitioner has no standing to complain if subsequent operation of the plants by the towns is lawful falls to the ground. The petitioner can complain, regardless of the lawfulness of the operation, if the acts which cause it are in violation of law. The Administrator owes the petitioner a duty not to cause petitioner injury by acts done beyond and without authority in law. If he breaches that duty, it avails him nothing that the impact of the injury comes from operation of the plants by third parties which may be lawful. It is the unlawfulness of his acts and not of the towns' acts of which petitioner complains. This is not a suit to enjoin competition by the towns. They will be as free after as before any decree entered herein to engage in it.

This is a suit to enjoin the unlawful acts of the Administrator which cause the injury to petitioner and which breach the duty which he owes them.

II. Title II of the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935, are unconstitutional delegations of legislative power.

III. The loans and grants are unauthorized because the Administrator in approving them has applied a standard or criterion which Congress has not provided and could not.

IV. If the statutes be construed to authorize what has been done here, they exceed any power delegated to the Federal Government and violate the Tenth Amendment.

Messrs. Jerome N. Frank and *Solicitor General Reed,* with whom *Attorney General Cummings, Assistant Attorney General Morris,* and *Messrs. Enoch E. Ellison* and *Robert E. Sher* were on the brief, for the respondent Administrator.

Petitioner has no standing to challenge the constitutional and statutory validity of the proposed loans and grants. That conclusion, reached by the court below, accords with the decisions of every other appellate court which has passed upon the question. *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665; *Arkansas-Missouri Power Company* v. *Kennett,* 78 F. (2d) 911 (C. C. A. 8th); *Allegan* v. *Consumers Power Co.,* 71 F. (2d) 477 (C. C. A. 6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *Burlington,* 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. A contrary result would establish either a new doctrine of private law, enlarging the rights of franchise holders against lawful competition, or a new doctrine of public law with respect to the action of Government officers.

The loss with which petitioners are threatened is attributable to the competition of the cities, and that

competition is voluntary and is admittedly lawful under the law of Alabama and under the Fourteenth Amendment. The standing of petitioner, as the holder of non-exclusive franchises, is limited to complaints against unauthorized or illegal competition, as in *Frost* v. *Corporation Commission,* 278 U. S. 515. Cases in which a city is acting in violation of its own charter powers, such as *Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560 (C. C. A. 8th), have no application, as was recognized by the same court in the later *Arkansas-Missouri Power Co.* case, *supra.*

The fact that the competition will be made possible by advances of funds alleged to be beyond the lawful authority of the lender cannot serve to confer additional protection upon the petitioner. Cf. *Railroad Co.* v. *Ellerman,* 105 U. S. 166; *Sprunt & Son* v. *United States,* 281 U. S. 249; *Chicago Junction Case,* 264 U. S. 258. And the fact that the lender is the United States is likewise not material. Since no legally protected interest of petitioner will be infringed, there is no occasion for the defendant to justify the proposed loans and grants by showing the authority of a valid statute. That the suit is brought against Government officers, so far from enlarging the standing of the petitioner, discloses the deficiency in its claim; for in such suits the officer is required to show valid authority only if his acts, viewed as those of a private individual, would constitute an invasion of an interest which the law would otherwise protect or which has been especially conferred by statute. *In re Ayers,* 123 U. S. 443; *Ex parte Young,* 209 U. S. 123; *Ex parte La Prade,* 289 U. S. 444. Cases holding that a defendant is answerable where he has induced another, by fraud or intimidation or with a solely malicious motive, to cause damage to a plaintiff, have no application to the cases at bar.

The proposed loans and grants are authorized by the statutes.

The statutes do not unlawfully delegate legislative power to the Administrator.

The statutory provisions are a legitimate exercise of the power to appropriate money to promote the general welfare.

There is no invasion of the reserved powers of the States.

The alleged improper purpose, motive or standard of the Administrator is irrelevant.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases involve certain "loan-and-grant agreements" made by the Federal Emergency Administrator of Public Works with four municipal corporations located in the State of Alabama. The bills of complaint sought to enjoin the execution of these agreements. Each agreement contemplates the construction of an electricity-distribution system by the designated municipality, and, to that end, the purchase, by the administrator, of bonds to be issued by the municipality and secured by a first pledge of the revenues derived from the operation of the system. In No. 84 thirty and in No. 85 forty-five per cent. of the cost of the labor and materials used in the construction are to be donated outright. The authority relied upon for the loans and grants is that contained in Title II of the National Industrial Recovery Act [1] as modified and continued by the Emergency Relief Appropriation Act of 1935.[2] Title I of the former act has been declared unconstitutional by this court. *Schechter Corp.* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. But we are here concerned not with Title I

[1] C. 90, 48 Stat. 195, 200.

[2] C. 48, 49 Stat. 115, 119.

but with Title II of the act. So far as material, that title provides:

"Sec. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, . . . ; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, . . .

"Sec. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 [by later act 45] per centum of the cost of the labor and materials employed upon such project; . . ."

The bills of complaint challenge the validity of the loans and grants on the grounds, among others, that these statutory provisions purporting to authorize such loans and grants are unconstitutional; and that, in any event, the loans and grants do not come within the statutory provisions.

The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants; a result, it is further contended, which will be directly caused by the unlawful act of the administrator in making and consummating the loan-and-grant agreements.

The suits were brought in the United States District Court for the District of Columbia. There, the respondents, in addition to defending the validity of the action of the administrator, contended that petitioner was without legal standing to maintain the suits. After a full hearing, the district court held that petitioner had standing to challenge the administrator's action, but denied the injunctions and dismissed the bills of complaint upon the view that the statutory provisions were constitutional and that they conferred upon the administrator the power which he had exercised.

On appeal to the United States Court of Appeals for the District of Columbia, that court found it unnecessary to consider the validity of the loans and grants, and affirmed the decrees of the district court dismissing the bills on the ground that no legal or equitable right of the power company had been invaded, and the company, therefore, was without standing to challenge the validity of the administrator's acts. 91 F. (2d) 303. With that view we agree, and confine our consideration of the cases accordingly.

The trial court made elaborate findings, but for present purposes the following is all that need be stated. Peti-

tioner is a corporation organized under the laws of Alabama, having its principal office and corporate domicile in that state. Respondent Ickes is the Administrator of the Federal Emergency Administration of Public Works, duly appointed by the President of the United States in pursuance of law. The other respondents are subordinate officers and agents of the same Emergency Administration, or officers connected with its operations.

Petitioner, under its charter, has the right to manufacture, supply and sell electrical energy throughout the State of Alabama. Among other communities served by its system are the four municipalities here involved, from each of which it has a non-exclusive franchise giving it the right to construct, maintain and operate within the municipality an electricity-distribution system. Petitioner is a taxpayer of each of the municipalities, of the counties in which they are located, and of the state, with respect to petitioner's properties and operations; and it also is a taxpayer of the United States with respect thereto.

Each of the municipalities is authorized under state law to construct and operate municipal electric plants and distribution systems, and to engage in competition with petitioner. Each is authorized to issue bonds for the purpose of financing the construction of such plants and to receive grants for that purpose; to mortgage its plant or any part of it and to pledge all or any part of the revenues derived from the operation of the plant as security for the loan.[3] In each municipality an election was held prior to the making of the loan agreements, at which it was determined by a majority of the qualified voters that the municipality should engage in the electric business. The district court further found—

"Each of the municipalities involved in this suit determined to enter into the electric distribution business of

[3] See *Oppenheim* v. *City of Florence*, 229 Ala. 50; 155 So. 859.

its own free will. There was no solicitation or coercion on the part of any of the defendants [respondents], their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or electric rates generally, or to foster municipal ownership of utilities.

"The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.

"The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. . . .

"Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. . . .

"Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed. . . .

"Each of the projects herein involved is a part of a program of national scope, is designed to relieve unemployment, and promotes the general welfare of the United States."

These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis* v. *Schwartz,* 155 U. S. 631, 636–637; *Adamson* v. *Gilliland,* 242 U. S. 350, 353.

It, therefore, appears that each of the municipalities in question has authority to construct and operate its proposed plant and distribution system in competition with petitioner, and to borrow money, issue bonds and receive grants for that purpose; that it determined to do so of its own free will, without solicitation or coercion; that there was no conspiracy between any of the respondents and any other person, or any effort or action motivated by a desire to cause injury or financial loss to petitioner, or any purpose to regulate rates or foster municipal ownership of utilities. It further appears that neither the United States nor any of the respondents has reserved any right or power to require an elimination of competition or designate any agency from which the municipality must purchase its power. Each municipality is left entirely free from federal control or direction in respect of the management and control of its plant and business. In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner.

First. Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits. Petitioner alleges that it is a taxpayer; but the interest of a taxpayer in the moneys of the federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity. *Massachusetts* v. *Mellon,* 262 U. S. 447, 486 *et seq.* The principle estab-

lished by the case just cited is that the courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." The term "direct injury" is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. . . . Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action." *Parker* v. *Griswold,* 17 Conn. 288, 302–303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Second. The only pertinent inquiry, then, is what enforceable legal right of petitioner do the alleged wrongful agreements invade or threaten? If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* consummation of the loans and grants will not constitute an actionable wrong. Nor will the subsequent application by the municipalities of the moneys derived therefrom give rise to an actionable wrong, since such application, being lawful, will invade no legal right of petitioner. The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria.* Stated in

other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

What petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition. No other claim of right is involved. It is, in principle, as though an unauthorized loan were about to be made to enable the borrower to purchase a piece of property in respect of which he had a right, equally with a prospective complainant, to become the buyer. While the loan might frustrate complainant's hopes of a profitable investment, it would not violate any legal right; and he would have no standing to ask the aid of a court to stop the loan. What difference, in real substance, is there between the case supposed and the one in hand?

The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. And that question suggests another: Should the loan be consummated, may such a one sue for damages? If so, upon what ground may he sue either the person making the loan or the person receiving it? Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose. If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants,

are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed.

John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted.

If there are conditions under which two distinct transactions, neither of which, apart, constitutes a judicially remediable wrong, may be so related to one another as to afford a basis for judicial relief, such conditions are not to be found in the circumstances of the present case.

What we have now said finds ample support in the decided cases. Among the decisions of this court, and directly in point, is *Railroad Co.* v. *Ellerman*, 105 U. S. 166. In that case, the railroad company was authorized by its charter, among other things, to obtain and afterwards manage, use and enjoy, wharves and the appurtenances thereto "in connection with its railroads." A Louisiana statute conferred upon the railroad the power to obtain and thereafter to own, maintain and use, suitable wharves,

etc., "connected with and incidental to said railroad." Pursuant to this authority, the railroad company acquired property which it used as a wharf and which, although limited by the statute and its charter to use for railroad purposes, it leased to certain persons for the mooring of vessels and the loading and unloading of cargoes upon and from all vessels of a kind designated. Ellerman operated certain public wharves under a contract with the city of New Orleans giving him the right to collect revenues derived therefrom. He brought suit to enjoin the execution of the lease of the railroad wharf. This court held that he was without legal standing to maintain the suit—his only interest being to prevent competition with himself as a wharfinger, which the more extensive and challenged use by the lessees of the railroad wharf would create, and his claim for relief resting only upon the allegation that the use proposed by the lease was beyond the corporate power of the railroad company to grant. "But if the competition in itself, however injurious," we said, pp. 173–174, "is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in prevent-

ing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." Supporting cases are cited. See, also, *U. S. ex rel. New York Warehouse, W. & T. Assn.* v. *Dern,* 68 F. (2d) 773. Compare *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Alexander Sprunt & Son* v. *United States,* 281 U. S. 249, 256–257; *Milwaukee Horse & Cow Comm'n Co.* v. *Hill,* 207 Wis. 420, 423, 430–432; 241 N. W. 364.

The *Chicago Junction Case,* 264 U. S. 258, is not to the contrary. There, suit was brought by certain railroad companies to set aside an order of the Interstate Commerce Commission authorizing a competing company to acquire a terminal road. Answering the contention that complainants were without the legal interest necessary to entitle them to challenge the order, this court held that the right to sue arose in virtue of a special interest recognized by certain provisions contained in Transportation Act, 1920, and under § 212 of the Judicial Code which gave any party to a proceeding before the commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved. In this view, the *Ellerman* case was thought to be inapplicable. A reading of the case in connection with the

dissenting opinion shows very clearly that, but for express statutory provision creating a different rule, the decision in the *Ellerman* case would have been controlling.

The precise question here involved was decided, in accordance with the view we have expressed, in *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, 676; same case, 81 F. (2d) 986, 997. Compare *Arkansas-Missouri Power Co.* v. *Kennett,* 78 F. (2d) 911. See, also, *Allegan* v. *Consumers' Power Co.,* 71 F. (2d) 477. The *Greenwood County* case, *supra,* is now pending in this court upon certiorari, and will be determined upon the authority of our present decision.

Frost v. *Corporation Commission,* 278 U. S. 515, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant company. See *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435. The difference between the *Frost* case and

this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful.

We deem it unnecessary to review the many other cases cited by petitioner where suits against officials have been sustained. An examination of them will disclose the presence of fraud, coercion, malice, conspiracy, or some other element or condition of controlling force—none of which, as shown by the findings which we have accepted as unassailable, exists in the present case.

Decrees affirmed.

MR. JUSTICE BLACK concurs in the result.

DUKE POWER CO. ET AL. *v.* GREENWOOD COUNTY ET AL.

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

No. 397. Argued December 7, 8, 1937.—Decided January 3, 1938.

Decided upon the authority of *Alabama Power Co.* v. *Ickes, ante,* p. 464.

91 F. (2d) 665, affirmed.

CERTIORARI, *post,* p. 675, to review a decree affirming the dismissal, 19 F. Supp. 932, of a bill to enjoin performance of a contract like those involved in the two cases last preceding. For an earlier phase of this litigation, see 299 U. S. 259.

Mr. W. S. O'B. Robinson, Jr., with whom *Messrs. Newton D. Baker, R. T. Jackson, W. R. Perkins, H. J. Haynsworth, J. H. Marion* and *W. B. McGuire, Jr.* were on the brief, for petitioners.

The evidence shows that the project was included in the comprehensive program of public works and that

federal funds were allotted for its construction pursuant to the PWA power plan to reduce power rates.

Title II of the National Industrial Recovery Act, rightly construed, does not authorize the action of the Public Works Administrator in this case. If construed otherwise it is unconstitutional in that (a) it invades the reserved powers of the States; (b) it is not within any power delegated to Congress by the General Welfare Clause or by any other provision of the Constitution; (c) it is an unauthorized delegation of the power of the Congress to spend for the general welfare, and (d) as applied in this case, it deprives the petitioner of its property without due process of law.

The action of the Administrator will be the proximate cause of the injury which petitioner will sustain.

This was found as a fact by the District Court both on the original hearing and on the retrial.

The injury to petitioner will be the inevitable result of the act of the Administrator in authorizing the project,—a result necessarily contemplated at the time of the authorization. Rates were fixed below those of petitioner in order to attract petitioner's customers, and contracts subject to the Administrator's approval were made with petitioner's customers. The very conditions under which the loan is being made contemplate the taking of petitioners business, and the repayment of the loan even in part necessitates the continuation of rates which will attract petitioner's business.

A defendant is responsible for the consequences of his wrongful act which might reasonably have been foreseen. *Milwaukee & St. Paul R. Co.* v. *Kellogg,* 94 U. S. 469.

The effect upon petitioner's rates and business was not only reasonably foreseeable but was in fact foreseen. The Administrator knew that his act in authorizing the project and in allotting the funds for its construction, was calculated to damage petitioner and would do so.

Petitioner is not complaining of competition by the County and a decree in favor of petitioner would leave the County free to compete with petitioner in any lawful way. But, should the plant be constructed, its operation by the County in competition with petitioner would arise out of and be an immediate consequence of this action of the Administrator.

The rule that the construction of a competing municipal plant may be enjoined, if the construction would be illegally financed, as, for instance, by the issuance of bonds in violation of a constitutional or statutory debt limitation, is well established. And it is no defense to a suit by a utility which would be injured by such competition that the utility has no exclusive franchise, and that the municipality has the lawful right to compete with it. If the respondents' position were sound, such a suit would fail on the ground that, the municipality having the lawful right to compete, no right of the plaintiff would be infringed and the resulting damage would be *absque injuria.* Contrary to the contention of the respondents, however, the right of the utility to maintain such a suit is uniformly recognized. [Citing: *Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560; *Oklahoma Utilities Co.* v. *Hominy,* 2 F. Supp. 849; *Iowa Southern Utilities Co.* v. *Cassill,* 69 F. (2d) 703; *Gallardo* v. *Porto Rico Ry. L. & P. Co.,* 18 F. (2d) 918; *Colorado Central Power Co.* v. *Municipal Power Development Co.,* 1 F. Supp. 961; *Mississippi Power Co.* v. *Starkville,* 4 F. Supp. 833; *Frost* v. *Corporation Commission,* 278 U. S. 515; *Citizens Electric Illuminating Co.* v. *Lackawanna & W. V. Power Co.,* 255 Pa. 145; 18 Harv. L. Rev. 412; 8 Harv. Law Rev. 11; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Truax* v. *Raich,* 239 U. S. 33; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Pierce* v. *Society of Sisters,* 268 U. S. 510. Other citations to support the petitioner's right to raise the main questions are here

omitted because included in the summary of the like argument in the case last preceding.]

The petitioner's business is a private property interest which the law will protect against invasion through the unlawful acts of a public official. *Pierce* v. *Society of Sisters, supra; Philadelphia Co.* v. *Stimson,* 223 U. S. 605.

A public official may be enjoined from illegal acts involving the unauthorized expenditure of public funds at the suit of an individual who will be specially grieved thereby. *Frothingham* v. *Mellon,* 262 U. S. 447, 486; *Warner-Quinlan Asphalt Co.* v. *Carlisle,* 158 App. Div. (N. Y.) 638.

In restraining illegal action by a public official at the suit of a party specially grieved by such action, a court of equity is exercising a well established equitable jurisdiction.

On the same principle equity will enjoin a common or public nuisance at the suit of a private person who will suffer a special grievance therefrom. *Mayor* v. *Alexandria Canal Co.,* 12 Pet. 91, 98–100; *Corning* v. *Lowerre,* 6 Johns. Chan. 439; *Truax* v. *Raich, supra.* p. 37.

The objection to suits by taxpayers generally to restrain the enforcement of appropriation statutes on the score that to permit such suits would lead to a multiplicity of actions, with the attendant inconveniences resulting therefrom, has no application to a suit by a party specially aggrieved. The interest that will justify such a suit is of a sort that will give rise to no such danger or inconvenience. This is illustrated by the fact that the validity of even a criminal statute may be challenged by a party who will sustain a direct injury to his property rights by the enforcement of the statute.

The District Court should have limited the retrial of the cause to the question of whether or not there had been

any material change in the situation since the entry of the original decree of injunction.

Mr. W. H. Nicholson, with whom *Messrs. James F. Dreher* and *D. W. Robinson, Jr.* were on the brief, for Greenwood County and its Finance Board, respondents.

Mr. Jerome N. Frank, with whom *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Enoch E. Ellison* and *Robert E. Sher* were on the brief, for respondents Administrator et al.

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents the same question as that just decided in Nos. 84 and 85, *ante,* p. 464. The respondents are essentially the same, with the addition of Greenwood County, in the State of South Carolina, and the members of the finance board of the county. The suit was brought to enjoin the construction and operation of a local electric power plant in the county, and the making of a loan and grant by the federal administrator to the county, for that purpose, under the provisions of Title II of the National Industrial Recovery Act, set forth, so far as material, in Nos. 84–85, *supra.*

The case was here on a previous writ, upon consideration of which this court, because of substantial irregularities in practice, reversed the judgment of the court below with directions to vacate the decrees entered by the district court, and remand the cause to that court with directions to permit the parties to amend their pleadings in the light of existing facts, and retry the cause upon the issues then presented. We expressed no opinion upon the merits or the relevancy or effect of the evidence. 299 U. S. 259. Accordingly, the case was remanded to

the district court, and reheard. The district court, after making findings of fact and conclusions of law, dismissed the bill. The court below, upon appeal, considered the case fully, and delivered an exhaustive opinion. It held (1) that the statute, under which the administrator proposed to act, was constitutional; (2) that he acted within the power granted him by the statute; and (3) that in any event no legal right of plaintiffs was violated by what had been done. 91 F. (2d) 665; see also preceding decision, 81 F. (2d) 986.

Upon the question of petitioners' standing to maintain the suit, the lower court held, in substance, that the competition proposed by the county was lawful and that even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded. The opinion upon this branch of the case is in harmony with the views we have just expressed in Nos. 84 and 85; and it follows that the decree must be, and it is,

Affirmed.

MR. JUSTICE BLACK concurs in the result.

TEXTILE MACHINE WORKS *v.* LOUIS HIRSCH TEXTILE MACHINES, INC.

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

No. 62. Argued November 19, 1937.—Decided January 3, 1938.

1. Claims 1, 3, 14 and 15 of Patent No. 1,713,628, to Schletter, May 21, 1929, for an attachment for "flat" or "straight" knitting machines, including machines of the "full-fashioned" type, *held* invalid for want of novelty. Pp. 494, 497.

Claim 14, taken as typical, defines the invention as the combination in a straight knitting machine of (a) a set of yarn guide carrier bars for operating yarn guides traveling less than the

full width of the fabric being knitted, (b) a spindle having reversed screw threads, (c) stops operated by said spindle, (d) means for turning the spindle in either direction, (e) pattern-controlled means for determining the time of operation of the spindle, and (f) pattern-controlled means for determining the direction of rotation of the spindle.

2. The addition of a new and useful element to an old combination may be patentable; but the addition must be the result of invention rather than the mere exercise of the skill of the calling, and not one plainly indicated by the prior art. P. 497.

3. Commercial success may be decisive where invention is in doubt. P. 498.

But in this case it does not appear whether the commercial success is attributable to novelty of the bare conception of the use of the attachment with full-fashioned knitting machines rather than to the skill with which the patentee devised mechanisms for making the attachment effective, but for which he made no claim, or to the strength of the hands into which the patent came. P. 499.

87 F. (2d) 702, affirmed.

CERTIORARI, 301 U. S. 680, to review the reversal of a decree, 13 F. Supp. 476, sustaining four claims of the petitioner's patent, enjoining further infringement, and ordering an accounting.

Mr. Charles H. Howson, with whom *Messrs. Hubert Howson, Dexter N. Shaw* and *William A. Smith, Jr.,* were on the brief, for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Mr. Walter A. Darby* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to review a decree, in a patent infringement suit, of the Court of Appeals for the Second Circuit, which reversed the district court and held invalid Claims 1, 3, 14 and 15 of the Schletter Patent No. 1,713,628 of 1929, for an attachment for flat knitting machines. 87 F. (2d) 702. The Court of Appeals for the Third Circuit had previously held these

claims valid and infringed in *Alfred Hofmann, Inc.* v. *Textile Machine Works,* 71 F. (2d) 973. The patent is for an attachment for "flat" or "straight" knitting machines, including machines of the "full-fashioned" type. By use of the attachment, as the specifications state, "yarn-guides can be accurately controlled to lay a yarn over a distance less than the full length of a course being knitted, as for reinforcing or for so-called split-seam work wherein sections of fabric are connected by suture seams." The attachment, it is stated, may be used for "fashioning designs, as clocks, upon hosiery."

Flat knitting machines are adaptable to use in the manufacture of full fashioned garments such as stockings, underwear or sweaters. A characteristic feature of the manufacture is that the garment or a portion of it, is knitted in a flat web which, in the course of knitting, is shaped by variation of its width, in such a way that it conforms to the contour of the body to be fitted, when its shaped edges are united in a seam. The desired variations in width are secured through control of the traverse or "throw" of the yarn guide which brings the yarn to the needles of the machine as they knit the web. They may be and usually are set up as multiple units in a single machine capable of knitting simultaneously a number of garments of the same type.

The object of the patented attachment in providing accurate controls for yarn guides laying a yarn over a distance less than the full width of a fabric being knitted, is either to knit an additional yarn over a particular area of the main body of the fabric so as to strengthen it or form upon it an ornamental design, or to insert in it "split-seam work," which is a portion of the main fabric knitted with a separate yarn and forming a distinctive design. The attachment makes it possible to lengthen and shorten the throw of the yarn guide, and thus to form designs with reëntrant angles in both reinforcement and split-seam work.

The patented device embraces a rotatable spindle having threads cut upon it, in reverse, on opposite sides of its central portion, with a nut mounted upon each of its two threaded parts and moved by its revolutions so that when the spindle is turned in the one direction or the other the nuts are moved by the reversely threaded screws toward or away from each other. Carried on the nuts so as to move with them are yarn carrier stops which are so adapted and located as to serve as controls to limit the travel of carrier rods which have mounted on them the yarn guides. The function of the mechanism is to control the movement of the stops which in turn control the distance of travel of the yarn guides. This is accomplished by the movement of the stop nuts toward or away from each other by the rotation of the threaded spindle in the appropriate direction.

Movement in conformity to a desired pattern is effected by the transmission of power from the main camshaft of the knitting machine to two ratchet wheels mounted on the end of the threaded spindle, each with an actuating pawl. The two pawls are in such relationship that when one operates its complementary ratchet wheel the spindle will rotate in one direction, and when the other operates its complementary ratchet wheel the spindle will turn in the opposite direction. The operation of the ratchet wheels is controlled by means of buttons, arranged on two endless belts propelled by the main camshaft. The buttons attached to one of the belts serve to actuate a mechanism which pushes both pawls. The buttons affixed to the other belt govern a mechanism that selectively engages one or the other of the two pawls, and thus determines the direction in which the spindle and hence the stops are to move. By suitable spacing of the buttons on the belts, the motion, which is to be imparted to the stops through the intermediate apparatus, is controlled in such fashion as to fix in advance the length of throw

and hence the outline of the design which is to be incorporated in the main fabric by reinforcement or split-seam work.

Claim 14, which may be taken as typical, defines the invention as the combination "In a straight knitting machine [a] a set of yarn guide carrier bars for operating yarn guides traveling less than the full width of the fabric being knitted, [b] a spindle having reversed screw threads, [c] stops operated by said spindle, [d] means for turning the spindle in either direction, [e] pattern-controlled means for determining the time of operation of the spindle, and [f] pattern-controlled means for determining the direction of rotation of the spindle."

As early as 1912, ten years before Schletter's original application of June, 1922, from which his patent dates, the art had devised an attachment for full-fashioned knitting machines, commercially used for reinforcing the heel portion of the stocking. One form, known as the Gotham, comprised a reversely threaded spindle, on the threads of which were mounted stops moving toward each other when the spindle rotated in one direction, and away from each other when the spindle turned in the opposite direction. The traveling stops controlled the throw of carrier bars with yarn guides which laid a reinforcing yarn at the heel of the stocking. As the reinforcement was triangular with the point above the heel gradually widening below without reëntrant angles, it was needful to rotate the spindle automatically in but one direction in order to complete the pattern. When the reinforcement had been knitted the spindle was rotated by hand in the reverse direction, or "racked out," until the stops were restored to their initial position, ready to knit the next stocking. A means for automatically rotating the spindle in the desired single direction was provided by a ratchet wheel mounted on the spindle, which was worked by a pawl pushed by a cam on the main shaft;

the operation of the pawl was controlled by a mechanism actuated by a "button" type of pattern belt or chain. The reinforcement could not be knitted from a single yarn carrier operating over a single area of the fabric, because the reinforced area was divided, in the completed stocking, by the seam which united the selvages of the stocking web. It was thus necessary to knit the reinforcement in two areas, using two yarn carriers, each with a throw of the desired variation in length, reaching from the selvage on either side of the stocking web inward upon the main fabric. For this purpose the lugs on the carrier rods which, in coöperation with the stops, controlled the throw, were located between the end stops of the full-fashioned machine and the stops moved by the threaded nuts on the attachment.

It will be observed that this device, while not completely anticipating that of the patent, nevertheless exhibited every element of the claim except the "pattern-controlled means for determining the direction of rotation of the spindle." This lack was supplied by Nusbaum, whose machine was in common use as early as 1917. As already indicated, the use of such a device in full-fashioned knitting machines to secure selvage variations was known long before the Schletter application. In order to effect this type of fashioning, the yarn carrier stops were moved and their movements controlled by stop nuts mounted on spindles with threads in reverse located at either end of the knitting machine. Two-way movement of the nuts was effected by mechanisms, under pattern belt control, suitable to rotate the spindle in either direction.

The Nusbaum machine was a modification of the existing flat knitting machine and was designed for knitting reinforcements of variable width on sweaters which were themselves not full fashioned, that is, not narrowed in the knitting. The modification was devised for varying the

throw of a secondary yarn carrier supplying yarn to needles knitting upon the main fabric a reinforcement or plaiting. To accomplish this, Nusbaum rebuilt an old full-fashioned machine by using the existing end nuts as a means of controlling the movements of the stops which determine the length of throw of a secondary yarn carrier, and supplying a new carrier bar for the primary yarn. Since the garment was not full-fashioned he placed fixed stops at the ends of the machine so that the throw of the primary thread carrier was constant. He used the old automatically reversible spindle of the full-fashioned machine as a means, wanting in the Gotham mechanism, for increasing or diminishing at will the throw of the secondary yarn carrier. Instead of the single reversibly threaded spindle of the Gotham machine, Nusbaum retained the two threaded shafts located at the ends of the principal machine, each bearing twin ratchet wheels, each of which was operated by a pawl controlled through an intermediate apparatus by buttons appropriately spaced on a pattern belt. Only a single belt was used bearing four rows of buttons, which by reversing the motion of the spindle as desired operated to vary the throw of the yarn carrier in conformity to the desired pattern.

It is true, as petitioner urges, that the threaded spindles were located at the ends of the Nusbaum machine, and that they were separate shafts although capable of being operated in unison as if united in a single spindle such as that shown by the Gotham attachment. Even with the double spindle synchronously operated instead of the single spindle of the Gotham it was substantially the device claimed by Schletter. In converting a full-fashioned knitting machine into a different type of straight knitting machine which did not fashion the main fabric, Nusbaum embodied in it a device for accurately controlling yarn guides for laying a secondary yarn less than the length of the course being knitted, which was capa-

ble of producing designs having reëntrant angles. This, according to the specifications, is one of the objects to be achieved by the patented device. The other is the making of multiple designs and split-seam work.

As the pattern of the reinforcement or plait was to be wholly within a single area on the main fabric and did not extend to the selvage, Nusbaum used a single yarn guide instead of the two which were required in the Gotham attachment because the reinforcements were upon detached areas of the fabric. Hence his machine as set up could not do split-seam work or make double designs, which could only be knitted by employing a plurality of yarn guides with corresponding controls. But the use of the device for these different methods of knitting the secondary yarn involves but an obvious adaptation of the claimed combination to the particular work to be done. That may be accomplished by using the device exhibited by Nusbaum as well as that claimed by the patent, with the requisite number of controlled yarn guides in the case of multiple designs and with stops, both sides of which are used as carrier rod controls in the case of split-seam work. This addition of yarn guides and the varied use of the stops, even if invention, are not embraced in the claims before us.

The addition of the reversing mechanism, used by Nusbaum and previously used in the full-fashioned machine, to the elements exhibited by the Gotham, for the purpose of effecting variations in the throw of the secondary yarn carrier in precisely the manner in which the throw of the primary yarn carrier had been controlled in full-fashioned machines, was plainly not invention. The addition of a new and useful element to an old combination may be patentable; but the addition must be the result of invention rather than the mere exercise of the skill of the calling, and not one plainly indicated by the prior art. *Electric Cable Joint Co.* v. *Brooklyn Edison*

Co., 292 U. S. 69, 79, 80; *Altoona Publix Theatres* v. *American Tri-Ergon Corp.*, 294 U. S. 477, 486. The art of machine design in the knitting machine field is a highly developed one. The addition to the combination of the Gotham attachment of a means for automatically reversing the rotary threaded spindle to perform the very function it had performed in the full-fashioned knitting machine was not beyond the skill of the art and was plainly foreshadowed, if not completely anticipated, by Nusbaum.

The claims in suit do not embrace a train of mechanism of any particular type for the transmission of control from the power shaft to the pawls and so cannot rest on any differences between the train employed by Schletter and that of earlier devices. As the court below pointed out, if the patent is valid it is either because of the novelty of the conception of employing the Nusbaum device in an attachment for a full-fashioned machine, which Nusbaum had not done, or because of technical difficulties in executing that conception. If there were such difficulties, which could be overcome only by invention, Schletter did not show what they were or define such an invention by the claims before us. He did show in his specifications how to provide, by familiar mechanical means, for one necessary relationship of the attachment to the principal machine—the necessity that the threaded spindle remain stationary while the fashioning stops are moving. For this no invention is claimed, nor well could be in view of the state of the art.

Petitioner relies on the novelty of conception reinforced by an alleged commercial success. Commercial success may be decisive where invention is in doubt, but an insuperable obstacle to the invocation of that doctrine here is our inability, like that of the court below, to say "that an art which knew how to reinforce 'full-fashioned' webs without re-entrant angles, and straight edged webs

with such angles, required some uncommon talent merely to conceive of combining the two, for, as we have said, the patent can only stand on the bare conception." 87 F. (2d) 705.

It is significant that the courts which, in *Textile Machine Works* v. *Alfred Hofmann, Inc., supra,* found invention, supported by commercial success, pointed to the novelty not of this conception but of adding to the elements of the Gotham machine the automatic pattern controlled means for reversing the screw spindle. But neither court made mention of the Nusbaum machine which supplied that element. Upon the record before us we cannot say that the commercial success is attributable to novelty of the bare conception of the use of the attachment with full-fashioned knitting machines rather than to the skill with which the patentee devised mechanisms for making the attachment effective, but for which he made no claim, or to the strength of the hands into which the patent came. Compare *Paramount Publix Corp.* v. *American Tri-Ergon Corp.,* 294 U. S. 464, 474, with *Altoona Publix Theatres* v. *American Tri-Ergon Corp., supra,* 487.

Affirmed.

CHRISTOPHER ET AL. *v.* BRUSSELBACK ET AL.

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

No. 108. Argued December 16, 1937.—Decided January 3, 1938.

1. Sec. 16 of the Federal Farm Loan Act of July 17, 1916, declares that shareholders of every joint stock land bank organized under the Act shall be held individually responsible, equally and ratably, and not one for another, for the debts of the bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. *Held:*

   (1) That the only means of enforcing the liability for creditors is an adversary suit in equity against the stockholders wherever they may be found. P. 502.

   (2) The liability of each stockholder is personal, enforceable only in a court having jurisdiction to render a judgment against him *in personam*, and a judicial determination of the inability of the bank to pay its debts and of the amount to be assessed against the stockholders to meet the deficiency are prerequisites to the enforcement of liability, and are essential parts of the only cause of action which the statute gives to the creditors. *Id.*

   (3) A bill against stockholders which sought to collect an assessment decreed in another suit but which showed on its face that, though named as defendants, they were not served with process in that suit, and which omitted to allege the existence and extent of insolvency of the bank, failed to state a cause of action. P. 502.
2. The purpose of Equity Rule 38, providing that in a class suit "one or more may sue or defend for the whole," was procedural, not to enlarge jurisdiction of federal courts. P. 505.
3. This rule preserves the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court. P. 505.

87 F. (2d) 761, reversed.

CERTIORARI, *post*, p. 672, to review the reversal of a judgment for stockholders of a Federal Joint Stock Land Bank, the present petitioners, in a suit against them by the

creditors of the bank, the respondents here, to collect a stockholders' liability assessment.

Mr. Wellmore B. Turner, with whom *Messrs. Roy G. Fitzgerald, Robert E. Cowden, Howard P. Williamson, Joseph W. Sharts, Eugene G. Kennedy, Irvin G. Bieser, F. N. R. Redfern* and *James E. Thomas* were on the brief, for petitioners.

Mr. J. Arthur Miller for respondents.

Mr. Justice Stone delivered the opinion of the Court.

Respondents, creditors of a Federal Joint Stock Land Bank located in Illinois, brought the present suit in the district court for southern Ohio to collect a 100% assessment of the statutory double liability of its shareholders, which had previously been decreed in a suit brought by respondents in the district court for northern Illinois. In the Illinois suit the bank and all its stockholders were named as parties defendant, but the present defendants, petitioners here, who are stockholders residing in Ohio, were not served with process. A motion in the district court to dismiss the present suit raised the question whether the bill of complaint, which sets up the decree of the court in the Illinois suit in which it states petitioners were not served with process, but does not allege that the bank is insolvent or show any necessity for the assessment, states a cause of action. The district court gave judgment for petitioners which the Court of Appeals for the Sixth Circuit reversed. *Brusselback* v. *Arnovitz,* 87 F. (2d) 761. We granted certiorari, to resolve a conflict between the decision of the court below and that of the Court of Appeals for the Second Circuit in *Holmberg* v. *Carr,* 86 F. (2d) 727. Compare *Brusselback* v. *Cago Corporation,* 85 F. (2d) 20.

The question decisive of the case is whether petitioners are bound by the Illinois adjudication, in their absence,

of the bank's insolvency, and the amount of the assessment. Section 16, Federal Farm Loan Act, July 17, 1916, c. 245, 39 Stat. 360, 374, 12 U. S. C. § 812, provides, "Shareholders of every joint stock land bank organized under this Act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

Before respondents had brought the Illinois suit this Court in *Wheeler* v. *Greene,* 280 U. S. 49, had before it the provisions of the Federal Farm Loan Act which authorize the Farm Loan Board to declare a Joint Stock Land Bank insolvent, and to place it in the hands of a receiver. § 29, Federal Farm Loan Act, July 17, 1916; c. 245, 39 Stat. 381; 12 U. S. C. §§ 961, 963. We held that those provisions do not confer upon the Federal Farm Loan Board any power to levy an assessment on the stockholders, or give to the receiver authority to maintain suit for the enforcement of their statutory liability, or otherwise set up any machinery comparable to that of the National Banking Act for enforcing the stockholders' liability. Compare *Rankin* v. *Barton,* 199 U. S. 228, 232; *Casey* v. *Galli,* 94 U. S. 673, 681. The only means of enforcing the liability left to creditors of a Joint Stock Land Bank, as the Court pointed out in the *Wheeler* case, is an adversary suit in equity against the stockholders wherever they may be found.

The obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them *in personam.* As the liability of the stockholders is to pay the debts of the bank to creditors "equally and ratably," judicial determination of the inability of the bank to pay

its debts and the amount to be assessed against the stockholders to meet the deficiency are prerequisites to the enforcement of liability, and are essential parts of the only cause of action which the statute gives to the creditors. It is plain that in such a suit the existence and extent of insolvency are facts, the allegation and proof of which cannot be dispensed with as to any stockholder unless, as between the parties to the suit, they are matters already adjudicated.

A stockholder is so far an integral part of the corporation of which he is a member, that he may be bound and his rights foreclosed by authorized corporate action taken without his knowledge or participation. *Sanger* v. *Upton,* 91 U. S. 56, 58. The subscriber to corporate stock, whose subscription is payable on call of the directors, as required for corporate purposes, is bound by the action of the board in making the call as he is bound by a valid decree of a court against the corporation, although made in his absence, which directs performance of the corporate duty to make the call. *Hawkins* v. *Glenn,* 131 U. S. 319, 329; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 336; cf. *Kerrison* v. *Stewart,* 93 U. S. 155. Similarly, where a procedure is authorized by statute, under which a corporation may be brought into court for determination of its insolvency and the amount to be assessed against stockholders for the payment of its debts, and the judgment is declared by statute to be binding upon them, they are deemed by virtue of their membership in the corporation to have so far subjected themselves to the prescribed procedure and its consequences as to be bound by the determination although not nominal parties to the proceeding. *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Selig* v. *Hamilton,* 234 U. S. 652; *Marin* v. *Augedahl,* 247 U. S. 142; *Chandler* v. *Peketz,* 297 U. S. 609.

Whether it be said that by purchasing or retaining his stock in the face of such a procedure the stockholder has

consented that the corporation represent him for the purposes of the adjudication, *Bernheimer* v. *Converse, supra,* 529, 532, 533; *Marin* v. *Augedahl, supra,* 150, or more realistically that as stockholder he has voluntarily assumed a corporate relationship which is subject to the local regulatory power, in the exercise of which the procedure has been attached, as an incident, to his membership in the corporation, *Converse* v. *Hamilton, supra,* 260, in either case the procedure conforms to accepted principles, involves no want of due process, *Converse* v. *Hamilton, supra; Selig* v. *Hamilton, supra; Chandler* v. *Peketz, supra,* and at least when it ripens into a judgment is entitled to full faith and credit. *Marin* v. *Augedahl, supra.* It is enough that in every case the stockholder has assumed or retained his membership in the corporation after the warning of the statute, or of rules governing the corporation, of which he knew or had opportunity to know, that the benefits of membership carry with them the risk that the corporation may stand in judgment for him.

In the present case no such warning has been given, for no such procedure has been prescribed. The statutes have fixed only the conditions on which liability of the stockholders is to attach, leaving to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organization of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure for determining in their absence the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment. As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would other-

wise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought.

Equity Rule 38, providing that in a class suit "one or more may sue or defend for the whole," was adopted in the exercise of the authority conferred on this Court by R. S. § 913, and of its own inherent power to regulate by rules "the modes of proceeding in suits of equity." Their purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction. The omission from old Rule 48, amended and promulgated as Rule 38 in 1912, 226 U. S. 659, of the phrase " . . . the decree shall be without prejudice to the rights and claims of all the absent parties" preserved unimpaired the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court. *Smith* v. *Swormstedt,* 16 How. 288; cf. *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 672.

In the circumstances the decree in the Illinois suit was not *res adjudicata* as to petitioners in any respect. For that reason the bill of complaint failed to state a cause of action, and the decree is

Reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

SCHUYLKILL TRUST CO. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 447. Argued December 6, 1937.—Decided January 3, 1938.

1. A state law as construed by the State Supreme Court to sustain a tax was found unconstitutional by this Court, and mandate issued reversing the judgment and remanding the cause for further proceedings not inconsistent with the opinion. *Held* that the state court was not thereby precluded from reassessing the tax upon a revised construction of the statute eliminating the unconstitutional features. P. 512.
2. Whether state courts in construing a taxing act so as to avoid conflict with the Federal Constitution in effect exercised legislative power in violation of the state constitution,—*held* not a federal question. P. 512.
3. The tax in respect of trust companies laid by the Pennsylvania Act of June 13, 1907, as amended, is a tax upon the shares rather than upon the corporate assets. P. 512.
4. In taxing shares of a trust company on the basis of their value as reflected from its paid-in capital stock, surplus and undivided profits, a State is not obliged to exclude from the valuation obligations of the Federal Government or its instrumentalities belonging to the company. P. 513.

   But shares of national banks already taxed to the company, as owner pursuant to R. S. § 5219, can not be included in such valuation.
5. Under Pennsylvania Act of June 13, 1907, as amended, the shares of a local trust company are valued for taxation on the basis of the amount of the company's paid-in capital stock, surplus and undivided profits minus its investments in shares of Pennsylvania corporations which are liable to pay, or are exempted from, a capital stock tax, or which are relieved from a tax on shares. If the trust company fails to show that such investments represent capital, surplus and undivided profits rather than purchase with deposits, they are allowed a partial or "proportionate" exemption, computed by use of a formula. *Held:*

   (1) That where obligations of the United States or its instrumentalities, (other than national bank shares) were proportionately

exempted, in the same way as other investments of a trust company, there was no ground to claim discrimination against such obligations in assessing the share tax. P. 514.

(2) The fact that the shareholders of a trust company whose investments consist of national bank stock would pay no tax, because R. S. § 5219 permits but a single tax thereon which has been paid by the company as owner, whereas those holding shares in a trust company which owns only other federal securities would not be entitled to a similar total exemption but only to a proportionate deduction unless it could be shown that those securities were purchased from capital, surplus, and undivided profits, does not evidence any illegal discrimination against such securities. P. 514.

(3) The principle of equal protection does not demand that because one company owns wholly exempt securities, with consequent exemption of its shareholders from the tax on shares, the State shall abstain from taxing the shareholders of another company whose investments carry no such exemption. P. 514.

6. A state tax on the shares of a domestic corporation, assessed on the basis of the corporate assets and payable by or collected through the corporation, may consistently with the Fourteenth Amendment extend to shares owned by non-residents. *Corry* v. *Baltimore*, 196 U. S. 466. P. 514.

So *held* where the corporate charter antedated the creation of the tax liability but was subject to a power to alter, amend or repeal reserved by the state constitution.

7. Where a State has reserved the right to alter, amend and repeal the charter of a corporation, every stockholder acquires his shares with full knowledge that his interest in the corporation is subject to regulation and taxation by the State. P. 516.

327 Pa. 127; 193 Atl. 638, affirmed.

APPEAL from the affirmance of a judgment redetermining a tax assessment. Cf. s. c., 296 U. S. 113.

Mr. John Robert Jones for appellant.

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

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, we held an act of Pennsylvania [1] invalid as construed and applied in the calculation of the amount of the tax thereby imposed. The statute requires every trust company chartered under the general corporation law to report annually to the Department of Revenue the number of outstanding shares and their actual value at the close of the preceding calendar year. The department is to assess the shares for taxation at five mills upon the dollar. The taxable value of each share is to be ascertained by adding together so much of the amount of paid-in capital stock, surplus, and undivided profits as is not invested in shares of corporations liable to pay or exempted from payment of the Pennsylvania capital stock tax, or relieved from the payment of a tax on shares, and dividing this amount by the number of shares. The company must pay the tax from its general fund within sixty days after assessment, or collect it from the shareholders and pay it over. Provision is made for posting notice of the assessment in the company's office so that shareholders shall be advised of the amount of the assessment and for a hearing of any shareholder who objects to the valuation of the shares.[2]

Securities owned by a trust company may have been purchased out of deposits or from the capital, surplus, and undivided profits. Since securities the value of which is by the act deductible from the tax base may have been purchased out of either of the two funds, it is open to the company to prove that they or any of them were

[1] Act of June 13, 1907, P. L. 640, as amended by the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673.

[2] Act of April 9, 1929, § 807, P. L. 393.

purchased out of capital, surplus, or undivided profits. Upon such a showing these securities are fully exempt from tax. Where the company has not made this showing the practice in assessing the tax has been to grant a so-called proportionate deduction in respect of such exempt securities.[3] This is accomplished by the use of the following formula: A fraction, the numerator of which is the capital, surplus, and undivided profits at book value less the book value of those investments, if any, for which a full deduction has been made, and the denominator, the book value of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made, is applied to the book value of the securities which are to be apportioned, after adjustment for appreciation or depreciation of those securities, and the resulting sum is deducted from the capital, surplus, and undivided profits. In this manner a portion of the value of each exempted security reflected in the capital, surplus, and profits is deducted before the value per share is determined by dividing the capital surplus and profits so diminished by the number of shares outstanding.

Upon the former appeal it was shown that whereas a proportionate deduction was allowed for shares of Pennsylvania corporations previously taxed, or shares of such corporations exempt from tax, no deduction was accorded in respect of shares of a national bank and bonds of the federal government and its instrumentalities owned by the company. The appellant's position was that the act, though it purported to tax the shares, in fact taxed the net assets of the company which included shares of stock of a national bank and securities of the federal government and its instrumentalities owned by the

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

appellant. An alternative claim was that, if the levy was upon the shares as such, the application of the act worked a discrimination against national bank shares and other federal securities by excluding from the base a proportionate part of the value of shares of certain Pennsylvania corporations while leaving in the base national bank shares and federal securities; and that, if the tax was upon the shares it was bad, as the Commonwealth was without power to tax the shares of nonresident stockholders. The Commonwealth insisted the tax was upon the shares and not upon assets, that the application of the statute involved no discrimination against federal securities and that the State had jurisdiction to tax the shares of nonresident shareholders.

We found it unnecessary to determine whether the tax was upon shares or assets. Amongst the assets were shares of national bank stock which had been taxed to the company as owner, pursuant to R. S. 5219 as amended.[4] These we held must be excluded from the base upon which the tax was calculated. We held further that the exclusion from the base of a proportion of the value of tax exempt shares of Pennsylvania corporations, and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter. We reversed the judgment of the Supreme Court of Pennsylvania and remanded the cause for further proceedings not inconsistent with our opinion.

After our mandate went down the Commonwealth moved the trial court to redetermine the tax by disregarding the amendatory statute involved in our decision and reverting to the basic act of June 13, 1907,[5] which was claimed not to be affected by the infirmity of the amendatory act. The appellant insisted that as we had set aside

[4] U. S. C. Title 12, § 548.

[5] *Supra,* Note 1.

the judgment and held the amendatory act of April 25, 1929,[5] invalid as construed and applied, the only action open to the trial court was the entry of a judgment for the appellant. The court refused to follow either of the suggested courses, holding that the legislature, by the act of 1929, intended to exercise only such power as it lawfully possessed and did not attempt to impose a tax upon securities exempted by federal law. It found that the purpose of the statute could be accomplished by eliminating the national bank shares from the tax base and by treating the other federal securities in the same manner as tax exempt stock of state corporations. It accordingly recalculated the tax. The appellant took the case to the Supreme Court of the Commonwealth which affirmed the judgment.[7]

By appropriate exceptions and assignments of error the appellant challenges the new judgment upon these grounds: that the courts below have disregarded the mandate of this court and have exceeded their powers in reassessing the tax; that the tax is one upon assets and not upon shares, and federal securities are left in the tax base as to at least a portion of their value; that, if the tax is upon the shares rather than upon the assets, there is still a discrimination against federal securities because the stockholders of appellant and other similar corporations are wholly exempted from any tax calculated upon the value of the shares of national banks whereas at least a portion of the value of other federal securities still remains in the tax base; and that, in any event, the impost is bad so far as it is laid upon the shares of nonresident shareholders. The Commonwealth argues that the tax is upon the shares as such and not upon assets; that in assessing it no discrimination is practiced

[6] *Supra,* Note 1.

[7] 327 Pa. 127; 193 Atl. 638.

against federal securities and in favor of the exempted stock of Pennsylvania corporations and that, if the tax is otherwise valid, the fact that it is laid upon all shareholders, including nonresidents, does not void it as respects the latter.

First. When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not inconsistent with our opinion. It is clear that the state courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax.

Second. The contention that the state courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act.

Third. As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The state courts, and the local federal court, have held the imposition a tax upon the shares.[8] The history of legisla-

[8] *Commonwealth* v. *Schuylkill Trust Co.*, 315 Pa. 429; 173 Atl. 309; *Commonwealth* v. *Mortgage Trust Co.*, 227 Pa. 163, 174; 76 Atl. 5; *Commonwealth* v. *Union Trust Co.*, 237 Pa. 353, 355; 85 Atl. 461; *Northern Trust Co.* v. *McCoach*, 215 Fed. 991.

tion respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion.[9] We are of opinion that the tax is one upon the shares as such and not upon the assets of the company.

Fourth. The State need not have made any exemption or concession in taxing the property in the shares on account of value therein reflected from the company's ownership of obligations of the government or its instrumentalities

[9] As early as 1867 [Act of April 12, 1867, P. L. 74] Pennsylvania imposed a tax on the shares of national bank stock in the hands of the holders. See also Act of April 2, 1868, P. L. 55; Act of May 1, 1868, P. L. 108, § 10. It also taxed the shares of state banks. Act of December 22, 1869, P. L. [1870] 1373; Act of June 10, 1881, P. L. 99; Act of June 30, 1885, P. L. 193; Act of June 8, 1891, P. L. 229, (the last named act was sustained in *Commonwealth* v. *Merchants & Manufacturers National Bank*, 168 Pa. 309; 31 Atl. 58; affirmed 167 U. S. 461); Act of July 15, 1897, P. L. 292, amended by Act of May 2, 1925, P. L. 497, and Act of April 25, 1929, P. L. 677. Some of the earlier of these acts provided for the taxation of the shares of trust companies upon the same basis as shares of banks were taxed, but by the Act of June 1, 1889, P. L. 420, trust companies were made liable for a so-called capital stock tax which is in fact a tax upon assets and no tax was levied upon the shares in such companies. The Act of 1907 (*supra,* note 1) was passed in order to conform taxation applicable to trust companies with that then current with respect to banks. As stated in *Commonwealth* v. *Mortgage Trust Co.,* 227 Pa. 163, 175; 76 Atl. 58: "The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed. . . . This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company business grew in magnitude . . . the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks."

other than national bank stock.[10] And the discrimination found upon the earlier appeal in failing to accord proportionate exemption to federal securities similar to that extended to exempt shares of domestic corporations has been removed, for all are now accorded like treatment by way of deduction.

Fifth. The fact that the shareholders of a trust company whose investments consist of national bank stock would pay no tax, because R. S. 5219 permits but a single tax thereon which has been paid by the company as owner, whereas those holding shares in a trust company which owns only other federal securities would not be entitled to a similar total exemption but only to a proportionate deduction unless it could be shown that those securities were purchased from capital, surplus, and undivided profits, does not evidence an illegal discrimination against such securities. The inability of a state to measure a tax by certain assets exempted by federal law does not preclude it from reckoning in the tax base all those it can reach. And the principle of equal protection does not demand that because one company owns wholly exempt securities, with consequent exemption of its shareholders from the exaction, the state shall abstain from taxing the shareholders of another company whose investments carry no such exemption.

Sixth. The state courts have held that nonresident as well as resident shareholders are within the scope of the statute, and we are bound by this construction. The appellant argues that as thus applied the statute would take their property without due process and deny them equal protection in violation of the Fourteenth Amendment of the Constitution of the United States since the taxing

[10] *Van Allen* v. *Assessors,* 3 Wall. 573; *National Bank* v. *Commonwealth,* 9 Wall. 353, 359; *Cleveland Trust Co.* v. *Lander,* 184 U. S. 111; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103.

power of Pennsylvania is limited to persons and property within her jurisdiction. The contention was overruled by the State Supreme Court, and we think rightly so, upon the authority of *Corry* v. *Baltimore,* 196 U. S. 466. There this court held that under a similar statute Maryland and its municipal subdivisions could impose a levy for revenue upon nonresident shareholders measured by the value of their shares in a domestic corporation. The distinctions between that case and this, to which the appellant points, are not significant. In reliance upon *Tappan* v. *Merchants' National Bank,* 19 Wall. 490, wherein we held it competent for the United States to provide by a statute which became part of the charter of every national bank that the shares shall be taxable to the shareholders by the state wherein the bank is located, the court proceeded, in the *Corry* case, to the proposition that where a state statute made similar provision for the taxation of the shares of nonresident stockholders at the home of a domestic corporation, the legislation did not violate the Fourteenth Amendment.[11] There the corporation was made liable for the payment of the tax and given a right of reimbursement over against the shareholders. Here the appellant has the option either to pay the tax from its general fund or to collect it from the shareholder and pay it over to the State. The distinctions thought by the appellant to require a different ruling in this case are that, in the *Corry* case, the act declaring the liability of the shares of nonresidents antedated the charter of the corporation and provided that the situs of shares owned by nonresidents should, for the purposes of taxation, be at the domicile of the corporation in the state of Mary-

[11] The case has been cited repeatedly with approval. *Covington* v. *First National Bank,* 198 U. S. 100, 112; *Hawley* v. *Malden,* 232 U. S. 1, 12; *Rogers* v. *Hennepin County,* 240 U. S. 184, 191; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69, 81.

land whereas, in the instant case, the statute imposing the tax on shares, which has been held to include the shares of nonresidents, was adopted twenty years after the appellant's incorporation and says nothing about the situs of the shares. We think these differences are unimportant in respect of the principle involved. The state constitution for many years prior to the granting of the charter contained the reserved right to alter, amend, and repeal corporate charters, and every stockholder acquired his shares with full knowledge that his interest in the corporation was subject to regulation and taxation. Moreover, the shares represent a property interest, an aliquot proportion of the whole corporate assets. The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the state of the corporation's domicile. The property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state;[12] and this, notwithstanding the ownership of the stock may also be a taxable subject in another state.[13]

The judgment is

Affirmed.

---

[12] *Stockholders Bank* v. *Supervisors,* 88 Va. 293; 13 S. E. 407; *Scandinavian-American Bank* v. *Pierce County,* 20 Wash. 155; 55 Pac. 40; *State* v. *Travelers Insurance Co.,* 70 Conn. 590; 40 Atl. 465; *St. Albans* v. *National Car Co.,* 57 Vt. 68; *Koochiching Co.* v. *Mitchell,* 186 Iowa 1216; 173 N. W. 151.

[13] *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234.

UNITED STATES *v.* ANDREWS, EXECUTRIX.

CERTIORARI TO THE COURT OF CLAIMS.

No. 48. Argued December 8, 9, 1937.—Decided January 3, 1938.

1. The taxpayer made timely claim for overpayment of income tax due to failure in the return to deduct for loss on worthless shares of certain corporations. After expiration of the two year limitation (Revenue Act of 1928), he sought to amend by including another overpayment for the same year which resulted from returning as dividends payments received from another corporation, which were not dividends and should have been reported as giving rise to a capital gain, of less amount. *Held:*

   (1) That the second claim was not properly an amendment of the first, but a separate claim on a new and unrelated ground, and was barred by the statute. P. 520.

   (2) The fact that the first claim, though for a specific transaction, contained also a "general relief" demand for any other or greater sum which might be found due to the taxpayer, could not justify the amendment. P. 524.

   (3) Neither could it be upheld because the Commissioner, before the statute ran, had learned from the corporation which had made the payments that they were not dividends but the proceeds of a sale of shares owned by the taxpayer, and had so informed the revenue agent, it not appearing that, prior to the attempted amendment, the Commissioner knew that the taxpayer was a shareholder in that company or knew that the reported receipt of dividends had reference to such payments. P. 526.

2. In deciding whether a tax-refund claim is subject to an amendment, the analogies of pleading are helpful, but they will not be so followed as to ignore the necessities and realities of administrative procedure. P. 523.

   A claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to such relief, can not be amended to discard that basis and invoke action requiring examination of matters previously not germane.

84 Ct. Cls. 460; 17 F. Supp. 980, reversed.

CERTIORARI, *post*, p. 664, to review a judgment sustaining a claim based upon an overpayment of income tax.

Mr. Norman D. Keller, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Edward J. Ennis* were on the brief, for the United States.

Mr. Fred R. Seibert for respondent.

By leave of Court, *Mr. Percy W. Phillips* filed a brief as *amicus curiae,* in support of respondent.

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are called upon to determine whether a claim for refund of income tax, asking repayment of a definite sum upon a specific ground, is susceptible of untimely amendment to recover a greater sum on a new and unrelated ground.

The respondent, on behalf of the estate she represented, paid the income tax shown to be due by her return, which exhibited an item of gross income of $110,891 as "dividends from domestic corporations." Of this total $36,750 was erroneously reported as dividends from the M. A. Hanna Company. This amount was paid her pursuant to a recapitalization of the company in which the estate owned preferred stock and, instead of being returned as a dividend, should have been treated as giving rise to a capital gain of $7,411.50.

In December 1931 the respondent was advised by an Internal Revenue agent that her return, reporting the receipt as a dividend, was considered correct, subject to the approval of the Bureau in Washington, and that if later information should indicate a material change in the amount of tax the statutes would require a redetermination of tax liability. October 6, 1932, as a result of conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the

Agent in Charge at Cleveland, Ohio, that the cash received by preferred stockholders in the recapitalization of the company represented proceeds from a sale and that gain or loss therefrom should be determined upon the basis of the cost of the original stock. The respondent was not notified of the ruling until August 22, 1934.

February 1, 1933, respondent filed a claim for the refund of $995.52, based upon an alleged loss in the taxable year due to the worthlessness of stocks of two corporations. Consideration and action thereon were delayed pending the outcome of litigation which would affect the soundness of the claim. In 1936 this claim was rejected in part but allowed to the extent of $160, which was refunded.

June 29, 1934, after expiration of the statutory period for filing refund claims,[1] the respondent presented a claim for $6,454.09 in which she stated that it was "filed as an amendment and amplification of claim for refund filed February 1, 1933" and asserted that the sum of $36,750 reported as a dividend was not such but represented the proceeds of sale of stock of the Hanna Company at a profit of $7,411.50 and that the error in the return resulted in an overpayment of $6,454.09.

November 2, 1935, the Commissioner advised the respondent that, while an overpayment had been made, a refund would be denied because the claim of June 1934 was wholly unrelated to that of February 1, 1933, being an independent demand based upon an entirely different ground. Pursuant to the Commissioner's holding that the latter claim was not filed within the period prescribed by law and, therefore, could not be allowed, official notice of rejection was mailed December 16, 1935. The respondent brought suit in the Court of Claims which gave judgment for her in the amount of $5,536.97.[2]

---

[1] Revenue Act of 1928, c. 852, § 322 (b) (1), 45 Stat. 791, 861.

[2] 84 Ct. Cls. 460; 17 F. Supp. 980.

Upon petitioner's representation that the decision is in conflict with decisions of this court and of two circuit courts of appeals we granted the writ of certiorari. We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund.

Notwithstanding the reliance of each of the parties on recent decisions of this court none of them rules the precise question now presented. They point the way, however, to a correct decision.

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the claim merely stated that there had been an erroneous overpayment the amount of which was shown by stating the taxpayer's true net income, the tax due thereon, and the amount previously paid. The claim asked repayment of the difference or any greater sum which might be found to be due. Upon the footing of this general claim a complete audit of the taxpayer's books was made and an overpayment in excess of the amount claimed was determined. After notification of this fact, but before rejection, the taxpayer amended the claim by making it specific and setting forth the supporting facts in detail. The amendment was held effective.[3]

In *United States* v. *Factors & Finance Co.*, 288 U. S. 89, additional assessments were made subsequent to payment of the amount shown to be due by the respondent's return. After paying part of the sum so assessed the taxpayer filed a claim for abatement of the unpaid balance. In connection with that claim the Commissioner ordered a full examination of the taxpayer's affairs, which was made. While this audit was in progress the taxpayer filed a claim for refund, couched in general terms, stating that, as there had been no final audit of its return, the purpose of the claim was to save the taxpayer's

[3] See also *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384.

rights under the statutes and permit the Commissioner to refund any excess paid beyond the amount found to be due. No statement of grounds for the claim was included. After the period of limitations had expired an amended claim was filed setting forth the grounds in detail and asking special assessment under § 210 of the Revenue Act of 1917. In the interval between the filing of the first and the amended claim the Commissioner had disposed of the claim for abatement but not of the claim for refund. After the receipt of the amendment the Commissioner considered the case on the merits and found that the taxpayer's invested capital could not be satisfactorily ascertained and that a special assessment should have been made under § 210 but he rejected the claim on the ground that the amendment was not timely. We held the amendment permissible. The opinion points out that the very generality of the original claim required that the Commissioner's audit go into the question of invested capital and that, therefore, the more specific amendment called attention to no new matter not covered by the investigation the Commissioner had to make in examining the claim as originally filed.

In each of these cases the claim failed to comply with a Treasury Regulation requiring that the grounds for the relief demanded should be set forth under oath and in detail. We held that while the Commissioner might promptly have rejected the claims for failure to comply with the regulation such compliance was a matter he could waive and, if he considered the merits, the claim was susceptible of any amendment which would not amount, under the rules of pleading in actions at law, to an alteration of the cause of action and would not require the Commissioner to make a new and different inquiry than that which he was called upon to make in order to consider the general grounds asserted in support of the claim as presented.

In *Bemis Bro. Bag Co.* v. *United States,* 289 U. S. 28, the taxpayer, in its original claim for refund, requested a special assessment under §§ 327 and 328 of the Revenue Act of 1918 and submitted a supporting statement as to its affairs wherein it sought relief on three distinct grounds specified in the sections in question and submitted facts and arguments in support of each of the grounds. Two of these grounds called the Commissioner's attention to the fact that the taxpayer's invested capital had been erroneously computed. After consideration of the claim the Commissioner notified the taxpayer that there was no basis for relief under § 327 (b), which furnished one of the grounds put forward by the taxpayer, but he apparently overlooked the circumstance that relief was also claimed under subdivisions (a) and (c) of that section. The taxpayer filed a protest and an amendment, which made no change of any importance in the facts and arguments already submitted, but asked that computation of the tax under § 328 be granted or, in the alternative, certain items the Commissioner had stricken from invested capital be restored. Since the original notice to the Commissioner was to the effect that valuable assets had been omitted from invested capital it would have been open to the taxpayer in the first instance to ask for relief under §§ 327 and 328 or, in the alternative, for a recomputation of its invested capital in accordance with the facts set forth in the original claim. The mere addition of the prayer for alternative relief was not a departure from the claim and did not amount to a new and untimely claim but constituted a proper amendment.

In *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73, a situation materially differing from those involved in the foregoing cases was presented. There the taxpayer's claim for refund asserted that, owing to abnormal conditions affecting invested capital and income, there could be no fair computation of the tax by the appraisal of the

cash value of its property under § 326 of the Revenue Act of 1918 and it should, therefore, have the benefit of a special assessment under §§ 327 and 328, which provide for computation of the tax in such cases without reference to the value of the invested capital and for determination of the tax according to the ratio which the average tax of representative corporations engaged in a similar business bears to their average net income. In response to the claim the Commissioner advised the taxpayer that he could not consider the propriety of a special assessment until the statutory net income and invested capital were determined and asked the taxpayer, therefore, to acquiesce in the net income and invested capital shown in the Revenue Agent's report or submit any exceptions it might have thereto. The taxpayer filed no such exceptions but apparently acquiesced in the determination. The Commissioner then proceeded on the basis of the facts he had ascertained and advised the taxpayer the case was not one for special assessment and the claim would be rejected. Thereafter, at an oral hearing accorded by the Commissioner before final rejection of the claim, the taxpayer presented an amendment in which it set forth that, in ascertaining its invested capital, real estate had been undervalued and certain intangibles had been improperly excluded from the computation. This court held that such an amendment, filed after the expiration of the period of limitations, could not be considered, first, because it totally changed the taxpayer's cause of action, if the analogies of pleading were to be regarded, and, second, because the original claim did not challenge the Commissioner's determination of invested capital, and an amendment which attacked this determination, fundamental to the taxpayer's contention, was in effect a new claim based upon a complete reversal of the taxpayer's former position.

In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such

form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

With these settled principles in mind we turn to the circumstances disclosed in the present case. The claim here was not general but specific. It did not assert generally that income, gross or net, had been overappraised or, generally, that the taxpayer was entitled to deductions not taken or granted. On the contrary, it pointed to two specific items of deduction which had not been taken and to which the taxpayer claimed to be entitled. It stated that during the taxable year the taxpayer's holdings of stock in two named corporations had become worthless, entailing a deductible loss of $995. While the claim added the phrase that the taxpayer claimed the sum named, or any greater sum which might be ascertained to be due, this did not call upon the Commissioner to make a complete reaudit of the taxpayer's return. The fact that he might have done so is immaterial. He could have acted on the claim, as apparently

he did, by investigating the affairs of the two corporations. It was ascertained that litigation was in process upon the outcome of which would depend a decision as to the alleged worthlessness of some of the shares in question. He, therefore, naturally postponed action on the claim until the termination of that litigation. While matters were in this posture, and after the period of limitation had expired, the respondent presented a so-called amendment of her claim having no relation whatever to the items set forth in the original claim, but dealing with a wholly distinct item of $36,750 reported as dividends received and asking that it be eliminated from that category and that the transaction be reclassified as capital gain upon a basis which would result in a reduction of tax by some $6,000. This is not a case where the Commissioner waived the regulation with respect to the particularity with which the grounds of the claim must be set forth. There was no need for him to do so. The claim was not general like that in the *Memphis Cotton Oil* case and the others following in its train. It was as specific as it could be made and pointed unerringly to the items the Commissioner must consider. It called for no general audit of the taxpayer's affairs and apparently none was made. An investigation of the items designated could not have the least relation to that attempted to be opened in the untimely amendment. The respondent urges that these considerations are of no legal significance, since the claim not only called for redress of a specified grievance but demanded general relief as well. She insists we have likened a claim for refund to an action for money had and received and have required the Commissioner to accept and act upon a bill of particulars furnished him before actual rejection of the claim although the period of limitation has expired. But, as we said in *United States* v. *Henry Prentiss & Co., supra,* p. 84, "This does not mean that a pleader who abandons

the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure."

Were it not for the presence in the original claim of the demand for refund of any other or greater sum which might be found due the taxpayer, we think it could not even be suggested that the claim was a general one for money had and received. Save for that clause the demand was of a specific amount based upon a specific transaction. Whether adjudication in strict analogy to the rules of pleading would permit the amendment we need not determine for the necessities and realities of administrative procedure preclude any such result. *United States* v. *Henry Prentiss & Co., supra,* p. 85. The very specification of the items of complaint would tend to confine the investigation to those items and there is no evidence that the examination was more extended.

Nor can the respondent gain advantage from the Commissioner's ruling communicated to his agent at Cleveland. There is no finding that, prior to the attempted amendment, the Commissioner knew the respondent was a stockholder of the Hanna Company or, if he did, that his attention was called to the fact that the reported receipt of dividends had reference to what the taxpayer received in respect of preferred stock of that company.

These views accord with the decisions of two circuit courts of appeal.[4] The respondent relies upon two decisions of the Court of Claims: *Youngstown Sheet & Tube Co.* v. *United States,* 7 F. Supp. 290, and *Con. P. Curran Printing Co.* v. *United States,* 15 F. Supp. 153. In the first a claim for additional depreciation depletion and amortization of an investment in mining properties was

[4] *Bryant Paper Co.* v. *Holden,* 63 F. (2d) 370; 65 F. (2d) 1012; *Swedish Iron & Steel Corp.* v. *Edwards,* 1 F. Supp. 335; affirmed 69 F. (2d) 1018; *United States* v. *Richards,* 79 F. (2d) 797; *New York Trust Co.* v. *United States,* 87 F. (2d) 889.

timely made. As a result of this claim a general audit of the taxpayer's affairs was had and resulted in the determination of a deficiency much greater than the amount of refund claimed. Upon appeal to the Board of Tax Appeals the deficiency was set aside and the Board found an overassessment due to failure to allow the claimed deduction and also deductions for depreciation of other assets. The Commissioner agreed that the overpayment found by the Board was correct. Thereupon the taxpayer filed, out of time, an amendment to claim additional specific deductions in accordance with the findings of the Board. The Commissioner allowed a refund of the item originally claimed but refused a refund of the others on the ground that the amendment sought to introduce new and distinct matters. In an action for recovery of the overpayment found by the Board, and claimed in the original and amended claims, the Court of Claims gave judgment for the taxpayer. We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts. A similar situation is disclosed in the second case. The decisions were, however, put by the Court of Claims upon the same ground as in the instant case,—that a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items,—a view we hold untenable.

The judgment is

Reversed.

UNITED STATES *v.* GARBUTT OIL CO.

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

No. 262. Argued December 9, 1937.—Decided January 3, 1938.

1. An oil operating company made timely claim for refund of an additional income tax, basing it upon the specific grounds that proper deduction for amortization had not been made, and that, in respect of excess profits tax, its invested capital had been understated. While this claim was pending, it sought to amend by setting up, as a further ground, that during the tax year it had received no income taxable, because its entire production of oil had been distributed in kind to its lessors and to its shareholders. *Held,* not a permissible amendment but a new claim untimely filed. *United States* v. *Andrews, ante,* p. 517. P. 531.
2. The Commissioner of Internal Revenue is without power to waive the bar of the statute of limitations against a claim for a tax-refund. P. 533.

89 F. (2d) 749, reversed.

CERTIORARI, *post,* p. 671, to review the reversal of a judgment for the United States in an action to recover an alleged overpayment of income tax.

Mr. Norman D. Keller, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Harry Marselli* and *Edward J. Ennis* were on the brief, for the United States.

Mr. L. A. Luce, with whom *Mr. John B. Milliken* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The issue in this case is similar to that presented in *United States* v. *Andrews, ante,* p. 517. The action was brought by the respondent in the District Court for Southern California to recover an alleged overpayment of in-

come taxes for 1919. There is no controversy as to the facts found by the trial court. The respondent, a California corporation, acquired a lease of oil property October 3, 1907. April 10, 1911, the directors resolved that all oil produced after January 1 of that year should be transferred in kind to the lessors to the extent of their royalty interest and to the company's stockholders pro rata to their respective holdings, so long as the latter should pay calls for money necessary to defray the company's expenses. The resolution remained in effect to and including the year 1919 and distribution of all oil produced was made accordingly. In its books of account and its return for income tax the respondent recorded at market value the oil produced and treated the difference between that value and the cost of production as income. The Commissioner of Internal Revenue followed the same method in computing taxable income. In its 1919 return the respondent disclosed a net income of $16,928.61 and a tax liability of $2,072.68 which was paid during the year 1920. The Commissioner, as the result of an audit, assessed an additional tax of $3,105.65 which was paid April 3, 1925.

March 30, 1929, within the four year period of limitations prescribed by the applicable statute,[1] the respondent filed a claim for the return of the additional tax so paid, based upon two grounds: first, that the respondent was entitled to an additional deduction of $12,500 for the amortization of the cost of a drilling contract with Union Oil Company by which the latter, in consideration of $250,000 par value of respondent's stock, agreed to provide expenses of developing the leased oil property, reimbursement to be made only out of oil produced; and, second, that, in respect of excess profits tax, its invested capital had been understated by failure to include the unrecovered cost of the same contract in the sum of $109,375.

[1] Revenue Act of 1926, c. 27, § 284 (a) (b) (1) (2), 44 Stat. 9, 66.

While this claim was pending, but subsequent to the expiration of the period of limitation, the respondent filed a "Statement of Garbutt Oil Company . . . for the purpose of perfecting and completing claim for refund covering alleged overpayment of income tax for the calendar year 1919." Therein the respondent asserted that it "now develops that a further reason exists in support of" the pending claim since, by distribution of oil in kind, the respondent realized no taxable income during 1919, and that "it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full," for the reasons set forth in the statement. Refund was demanded of the entire tax paid for 1919 ($5,178.33) "or so much thereof as is properly refundable within the statute of limitations." August 12, 1929, the Commissioner wrote the respondent, concerning the merits of the original claim and the amendment, stating that a refund of $3,105.65 would not be allowed but that a hearing could be had upon the proposed rejection if requested in writing. On October 4, 1929, a conference was held but it does not appear whether the merits of the amendment were discussed. November 13, 1929, the Commissioner advised the respondent that the claim would be rejected on the merits and that the new contention embodied in the statement filed would be rejected as it was not referred to in the timely claim and was presented only after the expiration of the period of limitations and after the expiration of the time allowed to perfect informal claims, pursuant to a Treasury decision. Formal rejection of the claim was made November 21, 1929.

The respondent brought suit for the recovery of the $3,105.65, it being admitted that the remainder of the tax paid for the year 1919 could not be recovered because not claimed within the four year period specified in the statute. At the trial the grounds of the refund

claim originally filed were abandoned and recovery was sought upon the basis of the statement filed after the expiration of the statutory period of limitation. The court held that the latter did not constitute an amendment of the claim originally filed and came too late although it also found that the Commissioner had considered the late contention on its merits. Judgment was entered in favor of the United States. The Circuit Court of Appeals reversed, holding the statement filed as an amendment was germane to the original refund claim and that both were grounded in substantially the same facts.[2] We granted certiorari to resolve alleged conflict of decision.

In view of what has been said in *United States* v. *Andrews, supra,* it is necessary only to inquire in the instant case whether the original claim was specific and the so-called amendment completely shifted to a totally different ground for refund.

The transactions of the taxpayer which gave rise to its tax liability were exceedingly simple due to the fact that it had resorted to distribution of all the oil produced, partly to its lessors as royalty and partly to its stockholders in return for their advancing the corporate expenses. If it was liable for income tax the method of calculation it adopted was apparently the correct one.

Claim for refund was not filed until 1929 when the statute of limitations had barred refund of all payments made by the respondent except the amount of the additional assessment paid in 1925. In an effort to recover that much of the tax paid for the year 1919 the claim set out two grounds: first, that a deduction of $12,500 should be allowed for amortization of a drilling contract which the company had and, second, that its invested capital should have been increased by more than $100,000 to embrace the unrecovered cost of this drilling contract. The

[2] 89 F. (2d) 749.

claim directed the Commissioner's attention to these two items only. It gave him no notice that the taxpayer claimed not to have been in receipt of any income whatever for the taxable year. The documents would not naturally suggest any such claim for, as in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, the ground asserted in the later demand was totally inconsistent with and involved a negation of that specified in the claim for refund. Before the Commissioner had acted on the claim for refund the respondent, in an effort to evidence continuity and identity of claim, filed its so-called statement perfecting and completing the claim for refund. This abandoned the grounds originally alleged in support of the claim. The position taken in the amendment was that the taxpayer had no income whatever and that if the Commissioner refused refund on the basis of a rejection of the deductions claimed from gross income in the original demand, he should find that the taxpayer's operations were not productive of any income to it.

In defense of the amendment the respondent says that it was claiming only the $3,105.65 paid in 1929 pursuant to the additional assessment; that in no event could it recover the entire tax paid; that if the original grounds for claiming refund of payment of the sum in question had been held valid this would have been sufficient to require the refund of the whole of the sum, and the amended claim would have no different result. This contention is advanced to persuade us that, after all, the cause of action in this case was for the recovery of $3,105.65 as money had and received to the respondent's use, and that, therefore, there is no departure and no new cause of action asserted by the amendment. To adopt this view would be to disregard what was said in earlier cases to the effect that the analogies of pleading must not be pressed to such an extent as to disregard the realities of administrative procedure. The claim as filed called for no investigation

of the question whether the taxpayer's transactions gave rise to income. On the contrary, the grounds advanced assumed the receipt of income. The claim being thus specific the Commissioner was entitled to take it at face value and to examine only the points to which it directed his attention. It would be to disregard the natural course of procedure in the Bureau to suppose that grounds thus specifically asserted would direct attention to another at war with them.

The respondent urges that although the amendment was not timely, the Commissioner, in considering the merits of the position taken therein, waived any objection which might have been available to him that this position was not disclosed in the original claim. The contention is bottomed upon the fact that, in his letter of August 12, 1929, the Commissioner refers to the reasons advanced in the untimely statement. The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: "The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research." In the cited case, and others decided at about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits. This was far from holding that after

the period set by the statute for the filing of claims he had power to accept and act upon claims that complied with or violated his regulations. *Tucker* v. *Alexander,* 275 U. S. 228, cited by the respondent, is clearly distinguishable. There a timely claim was filed and disallowed. It alleged two specific grounds for refund. Suit was brought to recover the alleged overpayment and again reliance was placed on the same two specific grounds. At the trial of the action, and within the period of limitations, the taxpayer abandoned the grounds alleged in its claim and complaint and asserted a new ground. Counsel for the Government stated that the new question brought forward was the only one involved in the case and stipulated as to the amount to be recovered if the trial court should hold in favor of the taxpayer on this new ground. The court did so. On appeal the Government, for the first time, raised the point of the insufficiency of the claim for refund, and the Court of Appeals held that the new basis for the claim did not sustain recovery because reference had not been made to it in the refund claim. This court decided that there was an express waiver as to the form and contents of the claim and that counsel representing the Government had power, prior to the expiration of the period of limitation, to waive the objection that the supposed basis for refund was not disclosed in the claim. In so holding the court adverted to the fact that the Commissioner was not deceived or misled by the deficiency of the claim and that it was in the interest of justice that in the circumstances the claimant be not remitted to the resort of filing a new claim and pursuing it through the Bureau and the courts. The opinion expressly recognized that no officer of the government has power to waive the statute of limitations and cited, in support of the proposition, *Finn* v. *United States,* 123 U. S. 227, saying: "Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States

which otherwise would not exist—consequences which do not attach to the waiver here." 275 U. S. 232.

The statement filed after the period for filing claims had expired was not a permissible amendment of the original claim presented. It was a new claim untimely filed and the Commissioner was without power, under the statute, to consider it.

The judgment is

Reversed.

UNITED STATES *v.* McGOWAN ET AL.

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

No. 138. Argued December 17, 1937.—Decided January 3, 1938.

1. The Reno Indian Colony is situated on lands owned by the United States within the State of Nevada, which were acquired by purchase for the purpose of establishing a permanent settlement for needy non-reservation Indians of the State and for the Washoe Tribe of Indians. It is under the superintendence of the Federal Government. *Held* "Indian country" within the meaning of 25 U. S. C. § 247, subjecting to forfeiture automobiles and other vehicles used in taking intoxicants into the "Indian country." P. 539.
2. That an Indian settlement has been designated by Congress as a "colony" rather than a "reservation" does not prevent the application to it of a law relating to the "Indian country." P. 539.
3. Congress alone has the right to determine the manner in which the Nation's guardianship over the Indians shall be carried out. P. 538.
4. That the State has not relinquished jurisdiction over the area occupied by the Reno Indian Colony does not prevent the application to it of the federal law forbidding taking intoxicants into the "Indian country." P. 539.

89 F. (2d) 201, reversed.

CERTIORARI, *post*, p. 666, to review a decree affirming a decree of the District Court, 16 F. Supp. 453, dismissing,

in two cases consolidated for trial, libels seeking forfeiture of automobiles under U. S. C., Tit. 25, § 247.

Mr. William H. Ramsey, with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* were on the brief, for the United States.

No appearance for claimants-respondents.*

Mr. Justice Black delivered the opinion of the Court.

The Court of Appeals affirmed a decree of the District Court dismissing libel proceedings brought by the United States praying forfeiture of two automobiles used to carry intoxicants into the Reno (Nevada) Indian Colony.[1] The proceedings were instituted under Title 25, U. S. C. § 247 which provides in part: [2]

"Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other person, shall be subject to . . . seizure, libel, and forfeiture . . ."

Both courts below concluded that the Reno Indian Colony is not "Indian country" within the meaning of this statute.

The only question for determination is whether this colony is such Indian country. In this inquiry, both the legislative history of the term "Indian country" and the traditional policy of the United States in regulating the sale of intoxicants to Indians are important.

---

* The Government, in an Appendix to its brief, printed a brief submitted for the defendants in the District Court.

[1] Certiorari granted, *post,* p. 666.

[2] 39 Stat. 970.

The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1917 [3] and in 1926.[4] The purpose of Congress in creating this colony was to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement.[5]

The words "Indian country" have appeared in the statutes relating to Indians for more than a century.[6] We must consider "the changes which have taken place in our

[3] 39 Stat. 123, 143.

[4] 44 Stat. 496. The Act of 1917, under authority of which 20 acres of land were bought, contained items reading as follows:

"For the purpose of procuring home and farm sites, with adequate water rights, and providing agricultural equipment and instruction and other necessary supplies for the nonreservation Indians in the State of Nevada, $15,000 . . ."

"For the purchase of land and water rights for the Washoe Tribe of Indians, the title to which is to be held in the United States for the benefit of said Indians, $10,000, to be immediately available; for the support and civilization of said Indians, $5,000; in all, $15,000."

On recommendation of the Secretary of the Interior the 1926 additional appropriation was made and 8.38 acres were added to the Colony to take care of additional worthy Indian families who were anxious to establish homes in the Colony. See, House Report No. 795, 69th Congress, 1st Session.

[5] Hearings on the 1917 Act disclosed the following statement by the Senator sponsoring the appropriation:

"These Indians live just from hand to mouth. . . . They have no reservation to live on, and no protection whatever, and it is an outrage. . . . It is useless to go and appropriate for some public lands unless you can acquire water rights for them. . . . Those who take the most interest in Indian affairs in our State (Nevada) think the best thing to do is to purchase a tract of real agricultural land, say, 100 acres, close to Carson City, with a water right, where these Indians can raise garden stuff and chickens, and have a home and a market for their produce." Hearings, Comm. on Indian Affairs, U. S. Senate, on H. R. 20150, Vol. 1, pp. 226, 227 (1915).

[6] See, Act of June 30, 1834, 4 Stat. 729, c. 161.

situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." [7] Also, due regard must be given to the fact that from an early period of our history, the Government has prescribed severe penalties to enforce laws regulating the sale of liquor on lands occupied by Indians under government supervision. Indians of the Reno Colony have been established in homes under the supervision and guardianship of the United States. The policy of Congress, uniformly enforced through the decisions of this Court, has been to regulate the liquor traffic with Indians occupying such a settlement.[8] This protection is extended by the United States "over all *dependent Indian communities within its borders,* whether within its original territory or territory subsequently acquired, and *whether within or without the limits of a State.*" [9] [Italics added.]

The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people.[10] Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out,[11] and it is immaterial whether Congress designates a settle-

[7] *Ex parte Crow Dog,* 109 U. S. 556, 561; *Clairmont* v. *United States,* 225 U. S. 551, 557.

[8] The House Committee Report on the 1917 appropriation reads in part: "The active and wholesome policy of the present commissioner in preventing the sale of intoxicating liquors to *the Indians* and in using their surplus or tribal funds in the purchasing of live stock to put on their reservations has been a very long step in the right direction." [Italics added.] House Report, Volume 1, 64th Congress, 1st Session, Report No. 87, page 2.

[9] *United States* v. *Sandoval,* 231 U. S. 28, 46.

[10] Cf. *United States* v. *Pelican,* 232 U. S. 442, 450.

[11] *United States* v. *Sandoval, supra.*

ment as a "reservation" or "colony." In the case of *United States* v. *Pelican,* 232 U. S. 442, 449, this Court said:

"In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*" [Italics added.]

The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory.[12] ". . . Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States . . ." *United States* v. *Ramsey,* 271 U. S. 467, 471.

When we view the facts of this case in the light of the relationship which has long existed between the Government and the Indians—and which continues to date[13]—it is not reasonably possible to draw any distinction between this Indian "colony" and "Indian country." We conclude that § 247 of Title 25, *supra,* does apply to the Reno Colony.

2. The federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.[14]

[12] *Hallowell* v. *United States,* 221 U. S. 317; Constitution, Art. IV, Sec. 3, Cl. 2.

[13] Cf. Act of June 18, 1934, c. 576, 48 Stat. 984.

[14] See, *Hallowell* v. *United States, supra; Surplus Trading Co.* v. *Cook,* 281 U. S. 647.

Under the findings made by the District Court in this cause, a decree of forfeiture should have been rendered against the automobiles involved. The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for action to be taken in accordance with this opinion.

Reversed.

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

UNITED STATES *v.* RAYNOR.*

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

No. 146. Argued November 12, 15, 1937.—Decided January 3, 1938.

1. Section 150 of the Criminal Code provides that "whoever shall have or retain in his control or possession after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined . . ." etc. *Held*, the words "similar paper adapted to the making of any such obligation" embrace paper similar to though not identical with the adopted distinctive paper and which is adapted to the making of counterfeits of government obligations. Pp. 545, 551.
2. Possession by an unauthorized person, of paper of practically the same color, weight, thickness and appearance of the distinctive paper theretofore adopted by the Secretary of the Treasury for obligations and securities of the United States; and which was cut to the dimensions of genuine twenty dollar notes and *rattled* like

* Together with No. 147, *United States* v. *Fowler*, also on writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit.

genuine money; and upon the surface of which were designed red and blue marks closely resembling the red and blue fibers embedded in the distinctive paper,—*held,* a violation of the Act. Pp. 542, 552.

3. There is nothing in the legislative history of § 150 of the Criminal Code which requires that the words "similar paper adapted to the making of any such obligation" be construed as applying only to the distinctive paper adopted by the Government, or to paper identical therewith. P. 546.
4. A construction of a statute which results in an inconsistency is not favored. P. 547.
5. The construction here given § 150 of the Criminal Code is not inconsistent with a grant of authority to certain officials to permit possession of otherwise illicit paper. P. 551.
6. The decision of the Circuit Court of Appeals in *Krakowski* v. *United States,* 161 Fed. 88, holding that the Act prohibited possession of the distinctive paper only, is unsound; and the fact that Congress subsequently revised and codified the criminal laws without change in this particular does not require that that decision be followed. P. 552.
7. One decision construing a statute can not be regarded as a well settled interpretation. P. 552.
8. Penal statutes need not be given their narrowest meaning, but may be given their fair meaning in accord with the evident legislative intent. P. 552.

89 F. (2d) 469, reversed.

CERTIORARI, *post,* p. 667, to review judgments reversing judgments sentencing two defendants after conviction upon an indictment for an offense against the currency.

Assistant Attorney General McMahon, with whom *Solicitor General Reed,* and *Messrs. William W. Barron* and *W. Marvin Smith* were on the brief, for the United States.

Mr. John Elliott Byrne, with whom *Messrs. George R. Jeffrey* and *W. H. F. Millar* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondents were convicted in a federal district court for violating a provision of § 150 of the Criminal Code,[1] which reads:

"whoever shall have or retain in his control or possession after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both."

The Circuit Court of Appeals reversed,[2] holding that the act did not prohibit the possession of any except the distinctive paper adopted by the Treasury, and that other paper was not prohibited even though it closely resembled the distinctive paper and was well suited for successful counterfeiting. The court accordingly believed that the evidence did not support a conviction.

The evidence disclosed that:

In 1928, the Secretary of the Treasury adopted a distinctive paper for obligations and securities of the United States; this paper was a high grade rag bond having a sharp rattle, very little gloss, and short fine silk fibers distributed throughout; in 1936, respondents had possession of paper of practically the same color, weight, thickness and appearance as this distinctive government paper and cut to the dimensions of twenty dollar government obligations; respondents' paper rattled like genuine money; it did not have red and blue silk fibers throughout, but red and blue marks were so expertly designed upon its surface that one judge, dissenting below, after

[1] 18 U. S. C., § 264; 35 Stat. 1116.

[2] 89 F. (2d) 469.

a careful examination of these marks with a magnifying glass, was still wholly uncertain whether they were actually woven in the fabric or were traced on the surface.

Did respondents' possession of this paper violate the act?

The paper was not only perfectly adapted for counterfeiting, but it is difficult to conceive of its use for any other purpose. The history and language of the act are both of importance in determining whether Congress intended to make it a crime to possess, without authority, so close an imitation of the genuine paper adopted by the Treasury.

1. The history of the law under which respondents were convicted dates from a special session of Congress in 1837. That Congress was called upon to pass legislation to meet emergency conditions following crop failures, general business distress, unemployment and discontent. Urged to action by these conditions, Congress authorized the issue of a then unprecedented amount of treasury notes. It had long been a criminal offense to make, utter, or pass counterfeit money. Realizing that the protection of the currency required more stringent laws against counterfeiters,[3] Congress made it a crime to possess any plate, blank note, or paper to be used for counterfeiting pur-

[3] Counterfeiting increases in periods of commercial distress, unemployment, and poverty. Even prior to 1837, poverty contributed to offenses against the currency, see Re Halmagh Ackerman, 5 N. Y. City Hall Rec. (1820) 140, and counterfeiters kept paper in their possession which was used for making counterfeit obligations, Re Guy Johnson and William Johnson al. William Price, John Strickland, and Edward O'Melly, 5 N. Y. City Hall Rec. (1820) 138. In 1837 the prospect of increased counterfeiting—due to distressed economic conditions and the fact that non-federal agencies, both public and private, had already put a large amount of paper in circulation—indicated the need recognized by Congress in strengthening the law. See, Dewey "Financial History of the United States," Longmans, Green & Co. (N. Y.) 1915, p. 233. See Knox, "United States Notes," Scribner's (N. Y.) 1899, p. 40 *et seq.*

poses.[4] This early forerunner of the present act provided in part:

"If any person . . . shall have in his custody or possession *any paper adapted to the making of bank notes, and similar to the paper upon which any such notes shall have been issued,* with intent to use such paper . . . in forging or counterfeiting any of the notes issued as aforesaid . . . such person . . . shall be sentenced" etc.

This original provision prohibited the possession of "similar" paper adapted to making "bank notes" but such "bank notes" obviously were to be forged or counterfeit—not genuine. This first act thus prohibited—not the genuine—but counterfeit paper, intended to be made into counterfeit obligations, and its language and meaning were substantially reënacted in 1847, 1857, 1860, 1861 and 1862.[5]

Beginning December, 1860, Congress, to meet imperative needs, again authorized great increases in government obligations. By July, 1862, new issues of currency and unsettled conditions had so stimulated counterfeiting that Congress made special funds available to detect and punish those guilty of the crime.[6] Such action proved inadequate to curb counterfeiters, and in 1863, Congress reënacted, strengthened and strongly reinforced the 1837 prohibition against possession of paper for counterfeiting.[7] The 1863 law made it a crime to "imitate, counterfeit, make, or sell any paper such as that used, or provided to be used, for the fractional notes." Although the law had prohibited the possession of paper imitating the genuine

[4] Act of October 12, 1837, c. 2, §§ 10, 11, 5 Stat. 201, 203.

[5] Act of January 28, 1847, c. 5, §§ 9, 10, 9 Stat. 118, 120; Act of December 23, 1857, c. 1, §§ 12, 13, 11 Stat. 257, 259; Act of December 17, 1860, c. 1, §§ 12, 13, 12 Stat. 121, 123; Act of July 17, 1861, c. 5, § 10, 12 Stat. 259, 261; Act of February 25, 1862, c. 33, §§ 6, 7, 12 Stat. 345, 347, 348.

[6] Act of July 11, 1862, c. 142, § 5, 12 Stat. 532, 533.

[7] Act of March 3, 1863, c. 73, § 8, 12 Stat. 709, 713.

since 1837, this 1863 amendment struck vigorously at all who in any manner trafficked in such imitation paper.

By July, 1864, the government had outstanding approximately two billion dollars in war obligations, and the counterfeiter had become a still greater public enemy. Under these circumstances, with more currency to be issued, and the necessity for protection from counterfeiters greatly accentuated, Congress once more reënacted the 1837 Act[8] and made it a more effective weapon against counterfeiters.[9] The element of intent was stricken from the offense and the mere unauthorized possession of imitation paper was made a crime. Congress also combined the phrase "paper adapted to the making of bank notes" with the phrase "similar to the paper upon which any such notes shall have been issued." It is the phrase resulting from this combination—"*similar paper adapted to*

[8] Act of June 30, 1864, c. 172, §§ 10, 11, 12, 13 Stat. 218, 221, 222.

[9] In the period preceding this enactment there was again a marked increase in counterfeiting. "There is reported to be in circulation throughout the United States, at the present time, over three thousand issues of counterfeit, spurious, raised and altered bank bills—an average of two issues to every bank in operation. Supposing each issue would average one thousand bills, which is a moderate calculation, there would be three million counterfeit bills in circulation; and the cry is, still they come!" Reedy, "The Universal Bank Note, Draft and Check Detector," New Orleans, 1858, p. 15. This growth resulted in alarming injury to the currency. "Annual Report, Assn. of Banks for the Suppression of Counterfeiting," Boston, 1859. After 1860, counterfeiting increased steadily. *Id.* 1860; *id.* 1862. "Specie payments were suspended on December 28, 1861. The war was carried on chiefly by the use of treasury notes as a circulating medium." Knox, *supra*, p. 84. See Hepburn, "A History of Currency in the United States." MacMillan (N. Y.) 1915, pp. 179–204. However, by October 1862, it was reported that counterfeiting was widespread in America and uneasiness was being felt among Americans about the genuineness of the treasury and other notes issued by the United States. "The Bankers Magazine," London, Vol. XXII, p. 615 (1862). Improved means of preventing counterfeiting in order to maintain public faith in the currency became of great importance.

making such obligations"—which was construed by the court below to limit the prohibited paper to the genuine Treasury-adopted paper. These phrases, carried in the law from 1837 to 1864, had obviously referred to any paper suitable for counterfeiting. If the Congress of 1864 did intend by combining these phrases to exempt from the act all who had possession of imitation paper, it thereby deliberately weakened the chance of the government to convict and punish counterfeiters. We do not impute such a purpose to Congress. By the change made in 1864 Congress undoubtedly intended to make the law a more effective weapon against counterfeiters. Indeed, two days after this amendment was passed Congress authorized a special appropriation to detect and punish counterfeiters.[10] It is beyond belief that Congress intended to relax the law against counterfeiters at a time when the Nation was engaged in financing a war. Such a construction would be neither logical nor reasonable. The section now under consideration is plainly the culmination of a long series of legislative acts, each of which has declared it to be a crime to have possession of paper, counterfeiting the distinctive paper, and suitable to be made into counterfeit obligations. Each change since 1837 was intended to make the possession of counterfeit paper more dangerous for counterfeiters.

Finding nothing in the history of this law which supports the construction given it by the court below, we proceed to an examination and analysis of the particular language believed to justify that construction.

2. That particular language is the phrase *"similar paper adapted to making such obligations."* The word "similar," and the phrase "adapted to making such obligations

---

[10] Act of July 2, 1864, c. 210, § 3, 13 Stat. 344, 351.

or securities," both describe the type of paper the possession of which is prohibited. The definitions given by the court below to this word and this phrase are irreconcilable.

That court defined "similar" to mean "somewhat alike"; "not exactly alike"; "like, but not exactly the same." "Similar paper," thus defined, cannot be identical with the distinctive paper adopted by the government, because while the two papers would be "somewhat alike," they would not be "exactly alike" or "exactly the same." Similarity is not identity, but resemblance between different things.[11] Under this definition, "similar paper," the possession of which is prohibited, is not identical with, but differs from the distinctive paper.

However, after giving this definition to similar paper (which is prohibited by the act), the court below concluded that the phrase "adapted to making such obligations" limits the prohibition of the act to the distinctive paper. This conclusion is not consistent with the determination that "similar"—also describing the paper prohibited—designates paper which is different from the distinctive paper. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress.[12]

There is no inconsistency in the act unless it is assumed that the word "obligations" refers to genuine obligations only. Since words that have one meaning in a particular context frequently have a different significance in an-

---

[11] *Greenleaf* v. *Goodrich,* 101 U. S. 278, 282, 283. See, *Rhode Island Hospital* v. *Olney,* 16 R. I. 184; 13 Atl. 118.

[12] *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.,* 91 U. S. 656.

other,[13] it is necessary to consider the context of the words "such obligations," in order to determine their significance. The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled "Offenses against the Currency." The provisions of this chapter were enacted to prevent and punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

Examining the context of the words under consideration we find that the word "obligations" appears throughout the Chapter relating to offenses against the currency, and does not always apply to "genuine" obligations, but may, and often does refer to "counterfeit" or "spurious" obligations. In order to distinguish between counterfeit and genuine instruments, the provisions in some instances specifically designate notes as "false, forged or counterfeited" as in § 149. On the other hand, § 152 makes it a crime for any person, without authority, to make tools to be used in printing "any kind or description of *obligation or other security of the United States now or hereafter to be authorized by the United States* . . ." . . . Although these quoted words are "any kind of . . . obligation . . . authorized by the United States," the reference is not to genuine obligations, but to counterfeit obligations, not only printed "without authority" but printed with counterfeit tools made by the counterfeiter. It is apparent from the context that in this instance the phrase "obligation . . . authorized by the United States" refers to a counterfeit

[13] *Porto Rico Sugar Co.* v. *Lorenzo*, 222 U. S. 481; *Lamar* v. *United States*, 240 U. S. 60; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427.

obligation. Both before and since the 1837 act words such as "bills," "notes" and "obligations" have been used as meaning counterfeit instruments.[14]

The relative positions of the words we are examining are important. The first word describing the prohibited paper is "similar." Unless the paper possessed is "similar" to the distinctive paper of the government, its possession is not prohibited. Genuine obligations can only be made from the genuine distinctive paper, with a genuine design; with genuine lithographing; and with genuine signatures. Conversely, counterfeit obligations would be the result of designs, lithographing, signatures or paper—not gen-

---

[14] As illustrative, the following extracts from cases involving offenses against the currency refer to false or counterfeit instruments: "When a man has the possession of the number of *notes* alleged in the indictment, with an intention of uttering and passing them for the fraudulent purpose expressed, he has done all that, in words, is necessary to constitute the offense." *Commonwealth* v. *Cone,* 2 Mass. 132, at p. 134 (1806); "Without mentioning any other differences, it is sufficient to observe, that to constitute the crime described in the former, the possession of at *least ten bills is necessary* . . ." *Brown* v. *Commonwealth,* 8 Mass. 59, at p. 71 (1811); "Bowdain Brastow, was indicted and tried for passing a *$10 bill of the Merchants' Bank* . . ." Re Halmagh Ackerman, *supra,* p. 140 (1820); "In the same place, they found a copper-plate press, a plate for engraving *$2 bills on the Merchants' Bank,* and under the roller of the press, *a bill* of that description recently struck off." Re Guy Johnson & William Johnson al. William Price, John Strickland and Edward O'Melly, *supra,* p. 138 (1820); cf. *State* v. *Randall,* 2 Vt. (Aiken) 89, (1827); (cf. *Baldwin* v. *Van Deusen* where it is stated: "In reference to bank-bills, bills of exchange, promissory notes and securities for money, the natural and general, if not the universal, antithesis or opposite of genuine, is 'counterfeit.' Hence we say of a bank-bill it is a *genuine bill*—i. e., not a counterfeit bill . . ." 37 N. Y. 487, at p. 493, (1868)); see, *Wiggains* v. *United States,* 214 Fed. 970, at p. 971; "*The bonds* admittedly belonged to the plaintiff in error." *Forlini* v. *United States,* 12 F. (2d) 631, at p. 634; " . . . appellant visited the basement while counterfeiting operations were in progress and participated in conversations as to

uine, but merely "similar" to the genuine. When, therefore, Congress used the words "similar paper" it included within its prohibition an imitation or counterfeit of the genuine paper. The effect was the same as though it had prohibited possession of a government obligation bearing a signature "similar" to the signature of the Secretary of the Treasury. After the appearance of the word "similar," subsequent words descriptive of the prohibited paper require a construction that will give effect to the Congressional intent to prohibit the possession of paper which is an imitation or counterfeit of that adopted by the government.

In *United States* v. *Howell,* 11 Wall. 432, 436, this Court construed a similar statute which so far as pertinent provided:

"That if any person . . . shall falsely make, forge, counterfeit, or alter . . . any note . . . issued under the authority of this act, or heretofore issued under acts to authorize the issue of Treasury notes or bonds; . . . or shall have or keep in possession, . . . any such false, forged, counterfeited, or altered note . . . [such person] shall be . . . guilty of felony . . ." etc.

The defendant indicted under that statute urged that the words "such . . . note" referred back to those notes

---

the appearance of the bills that were being made and the necessity of putting more yellow in the coloring"; *Nebbelink* v. *United States,* 66 F. (2d) 178; "One *bill* was found in his clothes, and he volunteered to show the officers where the rest were. . . . The sole issue was as to whether after Hatlen showed him the *bills,* he co-operated with him in disposing of them . . ." *United States* v. *Gates,* 67 F. (2d) 885; "The *obligations* were described as United States notes and identified by denomination, series number, and plate numbers." *Simon* v. *United States,* 78 F. (2d) 454, at p. 455. The word "banknote" may mean—not a genuine—but a counterfeit obligation. Webster's New International Dictionary (Merriam, 1914) in defining the word "counterfeit" uses as an illustration, "The banknote was a *counterfeit.*"

that had been "issued under the authority of this act"; that notes issued under authority of the act were genuine; that the act, therefore, did not prohibit passing or possessing a counterfeit note.

This Court gave credit for the plausibility of such an argument, but said it was:

"at war with common sense, which assures us that the purpose of the act was to punish the making of counterfeits of the notes and bonds described in the statute. . . . We are to give due weight to all of the words employed in describing the instrument, . . . So we speak of a bank note. Now if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note." P. 436.

So, in this case, paper which was in the possession of an unauthorized person and which was merely similar to genuine government paper, could not possibly be adapted to making genuine government obligations. In this statute, the words "similar paper adapted to making government obligations" imply that the similar paper should be adapted to making obligations that purport to be genuine and valid, but are not.

This construction is not inconsistent with a grant of authority to certain officials to permit possession of the prohibited paper. In this same Chapter containing laws to protect the currency of the United States there are other similar grants of authority relating to counterfeiting devices and permission can also be granted to possess the actual counterfeiting instruments or obligations.

The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski* v. *United States,* 161 Fed. 88, held that the act only

prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation.[15] It is not necessary to determine the effect of including this act in the Revised Statutes and the Criminal Code.

We are not unmindful of the salutary rule which requires strict construction of penal statutes. No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress.[16] Certainly, if Congress had intended to prohibit only the possession of distinctive paper it would have simply used the words "distinctive paper" instead of the distinguishing words "similar paper adapted to the making of any such obligation."

The evidence does support the conviction of respondents. The judgment of the Court of Appeals is reversed and the judgment of conviction is affirmed.

Reversed.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I have reached a different conclusion.

The judicial function, as many times we have been told, does not include the power to amend a statute. And

---

[15] For prosecutions under the Act subsequent to the *Krakowski* case, *supra*, see the following cases: *United States* v. *Rosen* (W. D. Tex.), February 14, 1931; *United States* v. *Regsich and Grubich* (W. D. Pa.), December 16, 1920; *United States* v. *Marchetti* (N. D. Ohio), June 18, 1924; *United States* v. *Maratea and Plocket* (E. D. Pa.), January 21, 1932.

[16] *United States* v. *Giles*, 300 U. S. 41.

while penal statutes are not to be construed so strictly as to defeat the obvious intention of the lawmaker, nevertheless—"Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses." *United States* v. *Resnick,* 299 U. S. 207, 210.

We think the opinion just handed down undertakes to import a meaning into the pertinent statute at war with its words. That statute requires the existence of four distinct elements before the accused can be held guilty of violating it: (1) the adoption by the Secretary of a distinctive paper for the obligations and other securities of the United States; (2) possession or retention by the accused of "similar paper"; (3) the paper to be "adapted to the making of any such obligation or other security"; and (4) the possession or retention not to be under the authority of the Secretary of the Treasury or some other proper officer of the United States.

The word "similar," it is true, generally indicates resemblance and not exact identity, although in some cases it may mean "identical" or "exactly like." *Fletcher* v. *Interstate Chemical Co.,* 94 N. J. L. 332, 334; 110 Atl. 709. The distinction is illustrated by the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Fontain,* 127 Mass. 452, 454, where it was held that the words "similar offense" meant an offense identical in kind. The court said, "The word 'similar' is often used to denote a partial resemblance only. But it is also often used to denote sameness in all essential particulars. We think the Legislature intended to use it in the latter sense in the statute we are considering." To determine the precise meaning of the word here, we must turn to the statute. The crucial elements there disclosed are those embraced by clause (2), requiring that the paper possessed or retained be "similar paper"

to that adopted by the Secretary, and by clause (3) which requires that the paper be adapted to the making of "such" obligation or security. It is as necessary to give appropriate effect to the latter clause as it is to the former. It is not enough that the paper would be "similar" paper within the meaning of clause (2) standing alone; for it does not stand alone, but is associated with and qualified by clause (3). Nothing is better settled in the law of statutory construction than the rule that words by themselves may have a particular meaning, but that this meaning may be enlarged or restricted when considered in connection with other associated words. And this is more especially true where the associated words supplement and qualify the preceding ones as they do here.

In order to apply the rule, we must ascertain the meaning of clause (3), since that adds the requirement that the similar paper shall be adapted to the making of "such" obligation or security. That is to say, we first must determine the import of the word "such"; and that is disclosed by clause (1), providing for the adoption of distinctive paper for the obligations and securities of the United States. This means, and can only mean, genuine obligations and securities, since it cannot be supposed either that the Secretary, by clause (1), is authorized to adopt paper for any that are not genuine, or that his authority under clause (4) is not alone to permit possession of paper adapted to making genuine obligations but extends to paper which resembles the adopted paper only enough to make it adaptable for counterfeiting those obligations. It follows, necessarily, that it is genuine obligations and securities and not counterfeits of them that are embraced by the word "such" in clause (3).

The provisions of the statute were not meant to cover counterfeiting, or preparations antecedent to counterfeiting. Their whole purpose was to penalize possession or

retention by unauthorized persons of the distinctive kind of paper which the Secretary has adopted for the making of the obligations of the United States; language which, as we have said, necessarily imports genuine obligations, because if not genuine they would not be obligations of the United States at all.

The government, however, takes the view that the statute extends to the possession of paper suitable, not for making genuine obligations, but for *counterfeiting* them. And this view, as we understand it, is also taken by the court in its present opinion. The difficulty with that view, however, is that it requires the introduction of an amendment so that clause (3), instead of reading "adapted to the making of any such obligation," etc., will read "adapted to the making of *counterfeits of* any such obligation," etc. Such an assumption of legislative power is inadmissible.

That the paper here in question, even if in the hands of the Treasury, was not adapted to the making of genuine obligations, is beyond dispute. The distinctive feature of the paper adopted by the Secretary is the presence of short, fine red-and-blue silk fibers impregnated in and distributed throughout a high-grade rag bond paper. These silk fibers are entirely absent from the paper here in question; and while it might have been used for counterfeiting government obligations, it was not adapted to making the genuine articles. The present decision brings within the reach of the statute every stationer who has in his possession for sale any high-grade rag bond paper, if it is capable of being used for counterfeiting government obligations. For the statute, it will be observed, requires no criminal intent, and nothing beyond mere possession or retention.

The view of the statute which we have expressed was adopted thirty years ago by the Circuit Court of Appeals for the Second Circuit in *Krakowski* v. *United States,*

161 Fed. 88. In the meantime, Congress has left the statute in its original form. The government did not see fit to ask review of the *Krakowski* case, but has apparently acquiesced in it for all those years. This court should not be expected to disregard the established rules of statutory construction in order to remedy a situation which Congress could have cured, and may still cure, by a simple act of legislation. We think the well-reasoned opinion of the court below should be accepted and its judgment affirmed.

LANASA FRUIT STEAMSHIP & IMPORTING CO. *v.* UNIVERSAL INSURANCE CO.

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

No. 57. Argued December 10, 1937.—Decided January 10, 1938.

1. In deciding this case concerning the liability of an insurer for loss of a cargo of fruit, both courts below assumed that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding of the ship and consequent delay. *Held* that this Court, in reviewing the question decided, will make the same assumptions. P. 559.
2. Application of a general coverage clause of a marine insurance policy *held* unaffected by a rider attached for an additional premium, after the policy had been long in effect, but canceled before the occurrence of the loss. P. 560.

   The rider covered losses not embraced in the marine perils against which the policy insured and it also covered losses which were already covered by the policy, and there was room for difference of opinion as to exactly how far the rider overlapped.
3. Stranding of the ship is a peril of the sea. P. 561.
4. The doctrine of proximate cause is applied strictly in marine insurance cases. P. 562.
5. A vessel carrying a cargo of bananas stranded *en voyage*. The stranding caused delay, with the result that the fruit, which was sound when shipped and, but for the delay, would have been

marketable upon arrival at destination, was spoiled by decay—a total loss. *Held* that the stranding was the proximate cause of the loss, and that the loss was covered by insurance against perils of the sea. P. 562.

6. In marine insurance cases, the proximate cause of loss is the efficient cause, not necessarily that cause, in a chain or series, which was nearest in time to the event. P. 562.

89 F. (2d) 545, reversed.

CERTIORARI, *post*, p. 664, to review the affirmance of a judgment in favor of the respondent Insurance Company, in an action on a policy of marine insurance. The case had been removed to the District Court from the Court of Common Pleas of Baltimore City.

Messrs. George Forbes and *Henry L. Wortche* for petitioner.

Mr. D. Roger Englar, with whom *Messrs. Frank B. Ober* and *Martin Detels* were on the brief, for respondent.

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

This action was brought upon a policy of marine insurance. Judgment for respondent was affirmed by the Circuit Court of Appeals, 89 F. (2d) 545, and certiorari was granted.

Petitioner was the owner of a cargo of bananas aboard the Norwegian steamship "Smaragd." While proceeding up Chesapeake Bay to Baltimore on July 21, 1935, the vessel stranded and before she could be floated the entire cargo of bananas became overripe and rotted causing a total loss. Petitioner held a floating policy of insurance which had been issued by respondent on June 23, 1933. The general coverage clause of the policy embraced perils of the sea.

To the declaration setting forth these facts and claiming that the loss was within the coverage of the policy, respondent filed four pleas, the first two pleading the general issue and the two others being special pleas. Petitioner joined issue on the first and second pleas and demurred to the third and fourth. The District Court overruled the demurrer to the third plea and, as that decision was considered by the parties and the court to be conclusive of the issue, final judgment was entered for respondent.

The third plea, thus sustained, set forth a rider which, for an additional premium, had been added to the policy on April 4, 1934, and had been canceled on January 25, 1935, before the loss occurred. The rider amended the policy so as to provide that the coverage should be "free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom." The insurers also assumed liability for such loss in consequence of delay resulting from breakage of shaft, loss of blades from propeller, and derangement or breakage of machinery or rudder and/or stern post, "whether or not the vessel be stranded, sunk, burned or in collision" provided that the loss amounted to ten per cent. after deducting five per cent. for ordinary loss.

On the cancellation of the rider it was agreed that the policy should have the same coverage as prior thereto, and the premium rate was reduced from 60 cents to the original rate of 25 cents on the $100 of risk. 89 F. (2d) p. 546.

In affirming the judgment, the Circuit Court of Appeals observed that the judgment had been entered upon the pleadings and that petitioner had conceded that its right to recover depended upon the construction of the policy.

89 F. (2d) pp. 545, 546. The appellate court then examined the policy and after a review of authorities in this country and in England held that the loss was not within the general coverage clause relating to perils of the sea. The court in concluding its opinion referred to the rider as showing that the parties had interpreted that clause in the same way. *Id.,* p. 549. We granted certiorari because of the importance of the principal question thus determined by the Court of Appeals, a question which had not been decided by this Court and as to which the decisions of other courts were said to be in conflict.

We are met by two preliminary questions. The first of these is with respect to the sufficiency of the declaration. It is suggested that the declaration does not allege that the bananas were shipped in sound condition and that they would have been merchantable at the end of a normal voyage, and that there is no allegation as to the duration of the delay. It does not appear that these questions were raised in the District Court and they were not dealt with by the Court of Appeals, which evidently assumed the sufficiency of the declaration to present the main question as to the interpretation of the general coverage clause. Both courts below have decided the case upon the assumption that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding and the consequent delay. In view of this course of proceedings we make the same assumption. If any question as to the condition of the cargo or length of the delay and its effect had been presented in the trial court, it might have been met by amendment of the declaration and the issue could have been tried; and if the main question, upon the assumption stated, has been wrongly decided and the case is remanded to the District Court, there will still be opportunity to try any other issues of fact or law which may properly be presented.

The other preliminary question is with respect to the effect of the rider above mentioned. We do not regard that endorsement as either controlling or persuasive. Manifestly it did not affect the application of the general coverage clause. That clause had been in effect for a long period before the rider and by express agreement that clause remained in effect after the rider was canceled. The rider covered losses not embraced in the marine perils against which the policy insured and it also covered losses which were already covered by the policy, and there was room for difference of opinion as to exactly how far the rider overlapped. The actual views of the parties when the rider was obtained and the reasons for its cancellation are not shown with any definiteness. For all that appears the insured may have been advised and may have assumed that the coverage clause of the policy gave protection in such a case as is here involved and may not have desired to continue to pay the additional premium for the other losses described. We are not called upon to speculate as to the state of mind of the insured's officers and one asserted ambiguity is not to be cured by another. If the general coverage clause permits recovery, we see nothing to defeat it in what was done in connection with the rider.

Petitioner thus states the main question broadly: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz. stranding, has so delayed the voyage that the cargo has become a total loss?

Respondent contends (1) that deterioration of perishable cargo caused through inherent vice while the vessel is delayed by a sea peril, is not, without more, covered under a marine policy which does not expressly insure against such deterioration; and (2) that in order to recover for such deterioration it must be shown that the adventure was not merely delayed but frustrated by rea-

son of the vessel's forced departure from the course of her voyage, as, for example, where the vessel has put into a port of distress and remained there for a period which constituted a virtual abandonment or frustration of the voyage.

In considering these contentions, we start with the fact that the vessel, while proceeding up Chesapeake Bay, stranded. That is alleged and conceded. Stranding is a peril of the sea. *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438; *Richelieu & Ontario Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U. S. 408, 421; Arnould on Marine Insurance, 11th ed., § 816; Winter on Marine Insurance, 2d ed., p. 156. Loss through stranding was within the coverage of the policy. This, as the court below observed, was expressly recognized in the warranties against particular average in which loss by stranding was excepted. 89 F. (2d) pp. 546, 547. And it was the stranding which caused the delay. The case is not one of the mere lengthening of a voyage due to the ordinary vicissitudes of wind and wave against which the underwriter does not insure, *Jordan* v. *Warren Insurance Co.*, 1 Story, 342, 352; Fed. Cas. No. 7524, and we are not called upon to determine in what circumstances other than those now presented delay may be considered to be due to a peril of the sea within the meaning of the policy.

The cargo was perishable fruit. Respondent insists that its decay was caused by inherent vice which began to operate as soon as the fruit was picked. But, although perishable, the cargo was insured for the voyage against sea perils and the sole question is whether a sea peril caused the loss. As we have said, we must assume for the present purpose, in view of the way in which the case was presented and determined below, that the fruit was sound when shipped and would have been merchantable on arrival after a normal voyage, and that had it not been

for the delay due to the stranding of the vessel, the loss would not have occurred despite the perishable nature of the cargo.

We are not impressed by the argument that to permit recovery it must appear that the adventure was not merely delayed but that it was frustrated through a forced departure of the vessel from the course of her voyage and the putting into a port of distress. So far as the cargo in question was concerned, the adventure was frustrated by the stranding and the cargo became a total loss before the vessel could be floated. That loss was just as complete as if the vessel had been compelled to put into a port and the voyage had then been abandoned.

The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. *Insurance Company* v. *Boon,* 95 U. S. 117, 130; Arnould on Insurance, 11th ed., § 783.

The subject was discussed in an illuminating way by Lord Shaw in his judgment in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society,* [1918] A. C. 350, 368–371. He said (p. 369):

"To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends

infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

"What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

There, in a policy insuring a ship, there was a warranty of exception in case of hostilities or warlike operations, and the question was whether the loss of the vessel fell within the exception. The vessel was torpedoed and sustained severe injuries but succeeded in making the outer harbor of the port of Havre. Notwithstanding all efforts by pumping and otherwise, she bumped, broke her back, and sank. It was contended that she perished by a peril of the sea because sea water entered the gash in her side which the torpedo made. The entry of the sea water was indeed a peril of the sea and was proximate in time to the sinking. But as "proximate cause is an expression referring to the efficiency as an operating factor upon the result" it was held that "the real efficent cause" of the sinking of the vessel was that she was torpedoed and hence that the loss was within the exception.

In the *Leyland* case the House of Lords approved the decision of the Court of Appeal in *Reischer* v. *Borwick* [1894] 2 Q. B. 548, where the policy covered collision with any object but excluded perils of the sea. The ship struck a snag which made a hole in her. She was anchored and the leak was temporarily plugged. Then, while she was being towed towards the nearest dock for

repair, the water burst through the hole and she had to be run aground and abandoned. The contention was that the proximate cause of the damage was the excepted marine peril of the inrush of the sea water. But the Court of Appeal held that the proximate cause was the collision with the snag.

The same principle applies although within the network of causation there may be found the operation of natural forces to which a disaster, within the coverage of the policy, has given play. The decision of Justice Story in *Magoun* v. *New England Marine Insurance Co.*, 1 Story 157; Fed. Cas. No. 8961, is an illustration. In that case the question was whether the loss was due to a restraint and detainment of government within the words of a policy insuring the vessel and freight. It appeared that there had been an arrest and detainment by the authorities of New Granada; that the vessel had been restored, but that, when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that she had been so damaged that she could not perform the voyage without great repairs which would cost more than the vessel was worth; that hides belonging to the cargo had become rotten and were thrown overboard and that no other vessel could be found to carry the residue of the cargo to destination. The vessel was accordingly abandoned to the underwriters, and Justice Story held that the abandonment was good and the underwriters were liable for a total loss. He said (p. 164):

"The argument is, that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, *Causa proxima, non remota, spectatur,* and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me, that this is not a

correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself."

In support, Justice Story referred to the decision of the Court in *Peters* v. *Warren Insurance Co.*, 14 Pet. 99, in which he delivered the opinion. In that case he put the following illustration (p. 110):

"Suppose a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become gradually so putrescent as to be required to be thrown overboard for the safety of the crew: the immediate cause of the loss would be the act of the master and crew; but there is no doubt that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea."

And in the same case, Justice Story took occasion to observe that if there be any commercial contract, which, more than any other, "requires the application of sound common sense and practical reasoning in the exposition of it," it is "certainly a policy of insurance." *Id.*, p. 109.

If we apply this principle of the "real efficient cause" to the instant case, it can hardly be doubted that upon the facts assumed the loss would be within the coverage of the policy. Indeed this is not strongly contested, but it is insisted that the case is controlled by certain precedents to which we should give heed in dealing with an ancient form of words. These precedents are found in certain English cases to which the Circuit Court of Appeals referred. The court recognized that a number of American cases had taken a different view but thought that, in the absence of a contrary decision by this Court or any federal court, the cited English cases should be followed in the view that in the field of marine insurance "it is highly desirable that our decisions be kept in harmony with those of England." 89 F. (2d) p. 549.

Reference is made to the case of *Taylor* v. *Dunbar*, L. R. 4 C. P. 206. There meat shipped at Hamburg for London was delayed on the voyage by tempestuous weather and solely by reason of such delay became putrid and was necessarily thrown overboard. The court held that it was not a loss by perils of the sea. Judge Keating said that the facts showed "beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage," and "that delay was occasioned by tempestuous weather." But he held "that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea," did not entitle the assured to recover. Judge Montague Smith, concurring, said that if it were held "that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea," the court would "be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions."

The case of *Pink* v. *Fleming*, L. R. 25 Q. B. D. 396, upon which chief reliance is placed, was a case of collision. It was necessary for the damaged ship to put into a port for repairs and for that purpose to discharge a portion of the goods insured, consisting of fruit. The goods were reshipped but on arrival it was found that being of a perishable nature they had been damaged by the handling necessary for their discharge and reshipment and by the delay. The Court of Appeal held that the collision was not the proximate cause of the loss and that there could be no recovery on the policy. Lord Esher said:

"The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however,

which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do."

The court thought that the case was governed by *Taylor* v. *Dunbar, supra.* Lord Esher added—"With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them." [1]

It seems that neither of these cases went to the House of Lords, and we find it impossible to reconcile Lord Esher's ruling—"that according to the English law of marine insurance only the last cause can be regarded"—with the elaborate exposition of the doctrine of proximate cause which has been given by the House of Lords in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, supra,* from which we have quoted. And it is recognized in England that "Passages in Lord Esher's judgment in *Pink* v. *Fleming* . . . to the effect that only the cause last in time can be looked to, cannot now be supported." Arnould on Marine Insurance, 11th ed., § 783, *note* (*r*). So far as the English rule, however, relates to losses, on ship or goods, "proximately caused by delay, although the delay be caused by a peril insured against," it has been embodied in statute which apparently applies to all goods, perishable or otherwise, unless the policy otherwise provides. That statute of course is controlling in relation to

[1] As to other English decisions cited below, *Tatham* v. *Hodgson,* 6 T. R. 656, and *Inman Steamship Co.* v. *Bischoff,* L. R. 7 App. Cas. 670, see Arnould on Marine Insurance, 11th ed., §§ 781, 785.

English practice in that class of cases. Marine Insurance Act, 1906, § 55 (2) (b). L. R. Statutes, 6 Edward VII, p. 227. There is no statute applicable here which so restricts the doctrine of proximate cause, as we understand it and as it is set forth in the *Leyland* case, and the weight of American authority is contrary to the doctrine of *Pink* v. *Fleming*.

In *Williams* v. *Smith*, 2 Caines 1 (1804), the action was on a policy of insurance covering a cargo consisting chiefly of naval stores, including tar in barrels, on a voyage from New York to Algiers. The vessel experienced severe weather which resulted in such serious damage that it was compelled to put into Cadiz as a port of distress. There more than half of her lading was taken out and the vessel moved to the usual place for repairing. While there an epidemic fever broke out which prevented all business and made it impossible to obtain permits for taking the cargo from the place where it had been landed. Meanwhile the vessel was driven to sea by a storm and sustained further injuries and on returning to Cadiz it was found that the cargo, both on shore and on board, from the heat of the climate and violence of the gale, was deteriorated more than one half of its original value. As the whole would not have produced enough to fit the ship for the completion of her voyage, the vessel and the cargo were abandoned to the underwriters. The court charged the jury, among other things, that "any damages which arose in consequence of the fever at Cadiz, were within the perils of the policy." The jury brought in a verdict for a total loss. The court denied a new trial, Judge Kent stating in his opinion "that the damage resulting from the pestilence at Cadiz" was covered by the policy. The court found it unnecessary to decide "whether a pestilence is a peril direct within the policy," but held that it formed "a sound excuse for delay at Cadiz" and "if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss."

In *Tudor* v. *New England Marine Insurance Co.*, 12 Cush. 554, the suit was upon a policy of insurance on a cargo of ice shipped from Boston to Calcutta. It was agreed that the ice was properly packed and surrounded with non-conductors of heat. Under the stipulations of the policy, the insurer could be liable, if at all, only for a total loss. There was also a clause that there should be no liability "for ice melting in consequence of putting into port." By perils of the sea, the vessel sprung a leak which increased and it became necessary to put away for a port. On taking out her cargo, in order to ascertain her condition and the practicability of repairs, it was found that the ice had settled, a portion of it having been melted by the sea water which had come in contact with it by reason of the leak. The ice was taken out and sold for a very small sum in comparison with its estimated value at the port of delivery. The voyage was abandoned. It was denied that the loss was occasioned by a peril of the sea. The insured had judgment for a total loss. The court considered it to be well settled that if an article insured as free from average be "placed in such a condition, that in consequence of inevitable deterioration or decay, it cannot be carried to the port of destination, but will necessarily, before the completion of the voyage, be wholly destroyed, and it is accordingly sold, at an intermediate port," this would constitute a total loss within the meaning of the policy. The court also held that the exception of the risk of ice "melting in consequence of putting into port" did not include "a loss occasioned by the melting of the ice from other causes, or a combination of other causes." The real cause was the injury to the vessel which made it necessary to take out the ice in a port in the tropics. See, also, *Musgrave* v. *Mannheim Insurance Co.*, 32 Nov. Sc. Rep. 405.

Cory v. *Boylston Insurance Co.*, 107 Mass. 140, is cited by respondent as an answer to the *Tudor* case, but the latter was not overruled or even mentioned. In the *Cory*

case a vessel with wine on board met with severe gales which prolonged her voyage and caused her to ship much sea water, and upon her arrival at the port of destination the cases of wine were found to be more or less wet either by the sea water or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed. The case was controlled by special provisions of the policy. The policy provided that the insurers should not be liable for loss by leakage unless occasioned by stranding or collision, or "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea peril." The court thought that the latter clause was inserted with a knowledge of the decisions in *Baker* v. *Manufacturers' Insurance Co.,* 12 Gray 603, and *Montoya* v. *London Assurance Co.,* 6 Exch. 451. To bring a case within that clause the court held that it was not enough "that perils of the sea should be the efficient, and, within the rule laid down in the previous decisions, the proximate cause, by which the sea water was shipped," but that the sea water "must come into actual contact with the articles, for the damage to which the underwriters are sought to be charged."

Respondent also cites *Perry* v. *Cobb,* 88 Me. 435, where the insurance was on a cargo of lime shipped by a brig from Rockland to New York. The voyage was prolonged on account of rough weather but the vessel arrived tight and only slightly damaged. No sea water had reached the cargo unless in a few instances where a hatch had been taken off or once when the cabin was flooded. That damage was far below the partial loss which had been excepted from the coverage. The remaining damage was "from the shrinking of the staves of the barrels and slacking up of the cooperage," causing a loss of contents and

making the barrels insecure for hoisting,—a condition which was claimed to have resulted from the rolling and pitching of the vessel caused by the storms of an unusually protracted voyage. The court said that "All authorities agree that a protracted voyage is not a sea peril within a marine policy, because it is not an unusual event, but one of the natural incidents to sea transit"; that the evidence was conflicting "as to the proximate cause for the condition of the cargo upon its arrival"; that the associates, who in this case had insured each other and to whom it was agreed that the question of liability should be submitted, were men of large experience in burning and shipping lime; and that their decision against the plaintiff "must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year," without any "unusual sea peril." The conclusion was that the principal damage to the cargo came "from its own inherent qualities, excited by the long continued transit." *Id.*, pp. 449, 450.

In the case of *Bond* v. *The Superb,* 1 Wall. Jr. 355; 3 Fed. Cas. 845, also cited by respondent and the court below, the decision of Mr. Justice Grier at circuit turned upon the question of liability for general average and in this view had distinguishing features.

Fourteen years ago a case closely resembling the one at bar came before the New York courts. *Brandyce* v *United States Lloyds* (*The Corsicana*), 207 App. Div. 665; 203 N. Y. S. 10; 239 N. Y. 573; 147 N. E. 201. The action was upon policies covering a cargo of potatoes insured against perils of the sea. The vessel, in consequence of a collision at sea with some unknown object, was compelled to put into Charleston for repairs where it was found necessary to discharge the cargo. After repairs the vessel resumed her voyage but, on account of the delay,

the potatoes because of sprouting and rot had to be sold. They were not injured directly in the collision or touched by sea water. The precise question presented was "whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils within the meaning and intent of the policy of insurance." The Appellate Division reviewed the authorities in England and in this country. The court held that mere delay on the voyage, as a result of which cargo is spoiled or damaged, was not a ground for recovery. But the court found that the collision, the sea peril insured against, was the real cause of the loss. The court said: "The evidence indicates that if the *Corsicana* had not been damaged by reason of sea perils, the potatoes would have arrived sound. The proximate cause of the loss, therefore, was the sea peril, because it was the *efficient* dominant cause which, although incidentally involving *delay,* placed the cargo in such a condition that, because of inevitable deterioration or decay, it could not be reshipped and carried to its destination." The Court of Appeals of New York stated the question in the same way and affirmed the judgment.

We lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstances give rise. Such a case is not before us. The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, meaning the real efficient cause of the loss, requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McReynolds and Mr. Justice Sutherland are of opinion that the case was correctly decided by the court below on grounds adequately stated.

BIDDLE *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 55. Argued December 9, 10, 1937.—Decided January 10, 1938.

1. The Revenue Act of 1928 provides that, in the case of a citizen of the United States, the income tax imposed by the Act shall be credited (up to a specified limit) with the amount of any "income taxes paid" during the taxable year to any foreign country. *Held* that the meaning of the phrase "income taxes paid" is to be found in our own revenue laws rather than in the statutes and decisions of the foreign country to which deductible tax payments are said to have been made. P. 578.
2. Under the British law, as found in this case, a corporation pays the "standard" (normal) income tax on its profits, computed at the rate in force when it received them. When the profits are divided, the shareholder is not liable to any tax in respect of his dividend unless his income is such as to subject him to a surtax. In paying a dividend, the corporation has express permission to deduct "the tax appropriate thereto" and is directed to certify to the shareholder the gross amount of the dividend, the rate and amount of the income tax "appropriate" to the gross amount, and the net amount actually paid the shareholder. The tax "appropriate" to the dividend is computed by applying the standard rate for the year of distribution to the value of the money or property distributed and will equal the tax at the standard rate paid by the corporation if, and only if, that rate was the same for the year in which the profits were earned as in the year when they are distributed. The shareholder's surtax is computed upon the gross dividend,—the dividend that he actually receives plus the tax deducted by the corporation. If his income is exempt, or less than the minimum subject to surtax, refund is made accordingly. The purpose of the certificate is to aid him in computing his surtax and in securing the benefit of any refund. *Held:*

---

* Together with No. 505, *Helvering, Commissioner of Internal Revenue,* v. *Elkins,* on certiorari to the Circuit Court of Appeals for the Third Circuit.

(1) That (aside from any question of surtax) the amount so certified as the tax "appropriate" to a dividend is not a tax paid by the shareholder and can not be credited against his United States income tax under Rev. Act 1928, § 131 (a), as a tax paid to a foreign country. P. 579.

(2) It is not deductible from his gross income under § 23 (c) (2) of that Act, which allows deduction of income taxes imposed by the authority of any foreign country. P. 583.

3. Departmental tax rulings not promulgated by the Secretary of the Treasury, are of little aid in interpreting a tax statute. P. 582.
4. Where the meaning of a statute is plain, subsequent reënactment does not adopt contrary administrative construction. *Id.*
5. The presumption that Congress, in reënacting a statute, can ascertain the course of administrative interpretation and, knowing its own intent, will correct the administrative ruling if mistaken, can not apply to rulings upon the intent of other legislative bodies. Rulings of our taxing authorities upon the force and effect of a tax law of a foreign country can not have any more binding effect on courts than in the case of any determination of fact which calls into operation the taxing statutes. P. 582.

86 F. (2d) 718, affirmed.
91 F. (2d) 973, reversed.

CERTIORARI, *post*, pp. 664, 677, to review judgments of two Circuit Courts of Appeals one of which reversed, while the other affirmed, a decision of the Board of Tax Appeals, 33 B. T. A. 127, upholding deficiency assessments on income taxes.

Mr. Frank J. Wideman, with whom *Messrs. Forrest Hyde, William R. Spofford* and *Freeman J. Daniels* were on the brief, for petitioner in No. 55.

Mr. William R. Spofford, with whom *Mr. Schofield Andrews* was on the brief, for respondent in No. 505.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* were on the briefs, for respondent in No. 55 and petitioner in No. 505.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Ward V. Tolbert* and *John L. McMaster,* on behalf of F. W. Woolworth Co.; *Mr. Bernhard Knollenberg,* on behalf of the National Cash Register Co.; *Mr. Claude R. Branch,* on behalf of the United Shoe Machinery Corp.; and *Mr. Mitchell B. Carroll,* all in support of the taxpayers; and by *Mr. William H. Hotchkiss,* on behalf of the London & Lancashire Insurance Co., in support of the Government.

Mr. Justice Stone delivered the opinion of the Court.

In their British income tax returns, stockholders in British corporations are required to report as income, in addition to the amount of dividends actually received, amounts which reflect their respective proportions of the tax paid by the corporation on its own profits. The principal question raised by these petitions is whether these amounts constitute "income . . . taxes paid or accrued during the taxable year to [a] foreign country" so as to entitle the stockholders, if they are citizens of the United States, to credits of those amounts upon their United States income tax, by virtue of § 131 (a) (1) of the Revenue Act of 1928. A further question is whether any of the amounts not so available as a credit may be deducted from gross income under § 23 (c) (2) of the Act for the purpose of ascertaining the net income subject to tax.

Petitioner in No. 55 and respondent in No. 505, hereafter called the taxpayers, received cash dividends during the taxable years 1929 and 1931, respectively, on their stock in three British corporations. Each of the corporations having itself paid or become liable to pay the British tax on the profits thus distributed, no further exaction at the "standard" (normal) rate was due the British government on account of the distribution from either the stock-

holders or the corporation.[1] Only in the case of individuals whose income exceeds a stated amount is a surtax levied. In these circumstances the corporations are directed to certify to shareholders, at the time of sending out warrants for the dividends, the gross amount from which the income tax "appropriate thereto" is deducted, the rate and amount of the income tax appropriate to the gross amount, and the net amount actually paid.[2]

The tax "appropriate" to the dividend is computed by applying the standard rate for the year of distribution, to the value of the money or other property distributed.[3] The amount so computed will equal the tax paid at the standard rate by the corporation on its profits if, but only if, the tax rate is the same in the year when the profits are earned as in the year when they are distributed.

One of the companies availed itself of the statutory permission [4] to declare a gross dividend, from which it deducted the tax before actual distribution, certifying to the

[1] British Income Tax Act 1918, 8 and 9 Geo. V, c. 40, as amended by § 38, Finance Act of 1927, 17 and 18 Geo. V, c. 10. General Rule 1 of the 1918 Act provides, "Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act." By § 237 of the 1918 Act "body of persons" includes "any company . . . whether corporate or not corporate."

[2] Section 33, Finance Act of 1924, 14 and 15 Geo. V, c. 21.

[3] The Act of 1918 prescribes general rules for the assessment and collection of taxes "on profits from property, trade or business." By General Rule 20 it is provided that the tax is to be paid on the "full amount" of the profit "before any dividend thereof is made in respect of any share . . . and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." The tax "appropriate" to a dividend payment is the standard rate of tax for the year in which the dividend is declared, regardless of the rate at which the amount distributed was in fact taxed when it was received by the company. *Hamilton* v. *Commissioners of Inland Revenue*, 16 British Tax Cases, 213, 229, 234; *Neumann* v. *Commissioners of Inland Revenue*, 18 British Tax Cases, 332, 359, 361.

[4] General Rule 20, Income Tax of 1918.

taxpayers that the dividend would be paid "less" income tax. The other two companies declared the dividend in the amount distributed to stockholders and certified that it was "free of tax." The certificates of the latter did not purport to show any deduction of tax from a gross dividend, but did indicate the amount of the tax appropriate to the dividend and showed the same net return to stockholders as if the tax had been deducted from a computed gross dividend.

In their returns transmitted to the Department of Inland Revenue of the British government, the taxpayers reported as income subject to surtax the amount of income taxes appropriate to their dividends, in addition to the money actually received, and paid surtaxes on that total sum. In their United States income tax returns for those years, the taxpayers included in gross income the entire sums so reported in the British returns. Up to the limit set by § 131 (b), they claimed as credits against the tax payable to the United States the amount of British tax appropriate to the dividends as well as the amount of surtax paid. A deduction from gross income was claimed under § 23 (c) (2) for the amount by which the limit was exceeded.

Deficiency assessments of the taxpayers were brought to the Board of Tax Appeals for review. There the issues were narrowed to the questions now before us, whether the taxpayers, after adding to gross income the amounts included in the British returns as taxes appropriate to the dividends received, were then entitled to deduct those amounts from the tax as computed, to the extent permitted by § 131 (b), and whether the excess was a permissible deduction from gross income.

The board held that the sums in dispute should not have been included in gross income, because they represented neither property received by the taxpayers nor the discharge of any taxes owed by them to the British

government. It held further that § 131 (a) (1) of the Revenue Act of 1928, which directs that the income tax be credited with "the amount of any income . . . taxes paid or accrued during the taxable year to any foreign country . . ." is inapplicable because the United Kingdom fails to tax dividends at the normal rate, and hence the taxes appropriate to dividends were paid by the corporations rather than the taxpayer stockholders.

In No. 55 the Court of Appeals for the Second Circuit affirmed the determination of the board, 86 F. (2d) 718, since followed by that circuit in *F. W. Woolworth Co.* v. *United States,* 91 F. (2d) 973, and the Court of Appeals for the Third Circuit, in No. 505, reversed, 91 F. (2d) 534, following a decision of the Court of Appeals for the First Circuit in *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363. We granted certiorari to resolve this conflict of decision, and because of the importance of the question in the administration of the revenue laws.

At the outset it is to be observed that decision must turn on the precise meaning of the words in the statute which grants to the citizen taxpayer a credit for foreign "income taxes paid." The power to tax and to grant the credit resides in Congress, and it is the will of Congress which controls the application of the provisions for credit. The expression of its will in legislation must be taken to conform to its own criteria unless the statute, by express language or necessary implication, makes the meaning of the phrase "paid or accrued," and hence the operation of the statute in which it occurs, depend upon its characterization by the foreign statutes and by decisions under them. Cf. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 294; *Weiss* v. *Weiner,* 279 U. S. 333, 337; *Burnet* v. *Harmel,* 287 U. S. 103, 110.

Section 131 does not say that the meaning of its words is to be determined by foreign taxing statutes and decisions, and there is nothing in its language to suggest that

in allowing the credit for foreign tax payments, a shifting standard was adopted by reference to foreign characterizations and classifications of tax legislation. The phrase "income taxes paid," as used in our own revenue laws, has for most practical purposes a well understood meaning to be derived from an examination of the statutes which provide for the laying and collection of income taxes. It is that meaning which must be attributed to it as used in § 131.

Hence the board's finding, supported as it is by much expert testimony, that "the stockholder receiving the dividend is regarded in the English income tax acts as having paid 'by deduction or otherwise' the tax 'appropriate' to the dividend" is not conclusive. At most it is but a factor to be considered in deciding whether the stockholder pays the tax within the meaning of our own statute. That must ultimately be determined by ascertaining from an examination of the manner in which the British tax is laid and collected what the stockholder has done in conformity to British law and whether it is the substantial equivalent of payment of the tax as those terms are used in our own statute.

We are here concerned only with the "standard" or normal tax. The scheme of the British legislation is to impose on corporate earnings only one standard tax, at the source, and to avoid the "double" taxation of the corporate income as it passes to the hands of its stockholders, except as they are subject to surtax which the corporation does not pay. The corporation pays the standard tax and against it the remedies for non-payment run. It has been intimated that the shareholder may be held to payment of the tax in the event of the corporation's default, *Hamilton* v. *Commissioners of Inland Revenue,* 16 British Tax Cases, 213, 236, but the contrary view finds more support in judicial opinion, *id.* at 230; *Dalgety & Co., Ltd.* v. *Commissioners of Inland Revenue,* 15 British Tax Cases, 216.

238; *Neumann* v. *Commissioners of Inland Revenue,* 18 British Tax Cases, 341, 345, 358, 362–363, 368, and was adopted by the taxpayers' expert.

Although the corporation, in the United Kingdom as here, pays the tax and is bound to pay it, the tax burden in point of substance is passed on to the stockholders in the same way that it is passed on under our own taxing acts where the tax on the corporate income is charged as an expense before any part of the resulting net profit is distributed to stockholders. See Magill, Taxable Income, 24 *et seq.* Whether the tax is deducted from gross profits before a dividend is declared, or after, when the deduction is taken from the gross dividend, the net amount received by the stockholder is the same. Under either system, if no dividend is declared no tax is paid by the stockholder.[5] If a dividend is declared it must be paid, however the deduction is made, from what is left after the corporation has paid taxes upon its earnings. The differences in the two methods of deduction are to be found only in the formal bookkeeping data which, in the British system, are communicated to the stockholders, not for the purpose of laying or collecting the tax which the corporation has already paid or must pay, but to aid the stockholders in computing their surtax and in securing the benefit of any refund of the tax.

The stockholders' surtax is computed upon the gross dividend, the dividend which he actually receives plus the tax deducted.[6] If the stockholder's income is exempt or less than the minimum amount subject to the tax, refund is made to him of the proportionate share of the tax paid

[5] Cf. *Dalgety & Co., Ltd.* v. *Commissioners of Inland Revenue,* 15 British Tax Cases 216, 238; *Neumann* v. *Commissioners of Inland Revenue,* 18 British Tax Cases 341, 345, 358, 362–363, 368.

[6] *Hamilton* v. *Commissioners of Inland Revenue,* 16 British Tax Cases 213, 229, 234; *Neumann* v. *Commissioners of Inland Revenue,* 18 British Tax Cases 332, 345, 358–360, 361.

by the corporation.[7] It is upon these features of the British system that the taxpayers chiefly rely to support their argument that the stockholder pays the tax. For these limited purposes, which do not affect the assessment and payment of the tax, it is true that the British acts treat the stockholder as though he were the taxpayer. But with respect to the surtax the stockholder pays it and the taxpayers here have received for its payment the credit which our statute allows. Inclusion of the deducted amount in the base on which surtax is calculated, together with the provisions for refund of the tax to the stockholder who, in any event, bears its economic burden, are logical recognitions of the British conception that the standard tax paid by the corporation is passed on to the stockholders.

Our revenue laws give no recognition to that conception. Although the tax burden of the corporation is passed on to its stockholders with substantially the same results to them as under the British system, our statutes take no account of that fact in establishing the rights and obligations of taxpayers. Until recently they have not laid a tax, except surtax, on dividends, but they have never treated the stockholder for any purpose as paying the tax collected from the corporation. Nor have they treated as taxpayers those upon whom no legal duty to pay the tax is laid. Measured by these standards our statutes afford no scope for saying that the stockholder of a British corporation pays the tax which is laid upon and collected from the corporation, and no basis for a decision that § 131 extends to such a stockholder a credit for a tax paid by the corporation—a privilege not granted to stockholders in our own corporations. It can hardly be said that a tax paid to the Crown by a British corporation subject to United States income tax is not a tax paid

[7] Income Tax Act of 1918, §§ 29 (1), 55 (1), 211 (1) as amended by Finance Act, 1920, § 27 (1).

within the meaning of § 23 (c) (2), of the 1928 Act, which allows a deduction from gross income for taxes paid to a foreign country, cf. *Welch* v. *St. Helens Petroleum Co.*, 78 F. (2d) 631, or that its stockholders could take credit under § 131 for their share of the tax on the theory that they also had paid it.

The taxpayers urge that departmental rulings sustaining credits or deductions by stockholders of British corporations, S. M. 3040, IV–1 C. B. 198; S. M. 5363, V–1 C. B. 89; I. T. 2401, VII–1 C. B. 126; G. C. M. 3179, VII–1 C. B. 240, have taken on the force of law by virtue of the reënactment of the deduction and credit provisions carried into §§ 23 and 131 of the 1928 Act. Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467–468, these rulings rest for their conclusions as to the application of § 131 upon their interpretation of the nature and effect of the British legislation. The presumption that Congress, in reënacting a statute, can ascertain the course of administrative interpretation and, knowing its own intent, will correct the administrative ruling if mistaken, cannot apply to rulings upon the intent of other legislative bodies. So far as the rulings with which we are now concerned sought to state the force and effect of British law they can have no more binding effect on courts than in the case of any determination of fact which calls into operation the taxing statutes. So far as they have construed our own statute as adopting the British characterization, they plainly misinterpret an unambiguous provision. Where the law is plain the subsequent reënactment of a statute does not constitute adoption of its administrative construction. *Iselin* v. *United States*, 270 U. S. 245; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740; *Helvering* v. *New York Trust Co.*, *supra*.

What we have said is decisive of the second question, whether any of the amounts not available for credit under § 131 may be deducted from gross income for the purpose of arriving at taxable net income. By § 23 (c) (2) of the 1928 Act the deductions of "income . . . taxes imposed by the authority of any foreign country" are limited to taxes paid or accrued. Since we have held that the taxpayer has not paid or become subject to the foreign tax here in question, the section by its terms is inapplicable.

No. 55, affirmed.
No. 505, reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER are of opinion that the applicable rule was correctly stated by the lower court in No. 505, *Elkins* v. *Commissioner,* 91 F. (2d) 534, and by the Circuit Court of Appeals for the First Circuit in *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363, and that the challenged judgment in No. 55 should be reversed and that in No. 505 affirmed.

WRIGHT *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 37. Argued November 16, 1937.—Decided January 17, 1938.

1. In the last clause of Const., Art. I, § 7, par. 2, which provides: "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law," the words "the Congress" refer to the entire legislative body consisting of both Houses. P. 587.
2. The Constitution neither defines what shall constitute a return of a bill by the President, nor denies the use of appropriate agencies in effecting a return. P. 589.

3. A bill, passed by both houses of Congress, was presented to the President of the United States on Friday, April 24. On Monday, May 4, the Senate took a recess until Thursday noon, May 7. The House of Representatives remained in session. On May 5, the President returned the bill with a message setting forth his objections addressed to the Senate, in which the bill had originated; and bill and message were delivered on that day to the Secretary of the Senate. When the Senate reconvened on May 7, the Secretary advised the Senate of the return of the bill and the delivery of the President's message. On the same day the President of the Senate laid before it the Secretary's letter and the message. The message was read and with the bill was referred to the Senate Committee on Claims. No further action was taken. *Held* that the bill did not become a law. Pp. 589, 598.
4. The constitutional provisions involved should not be so construed as to frustrate either of two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. P. 596.
5. *Pocket Veto Case*, 279 U. S. 655, distinguished. General expressions in an opinion are to be taken in connection with the case in which they were used. P. 593.

84 Ct. Cls. 630, affirmed.

CERTIORARI, 301 U. S. 681, to review an order of the Court of Claims (without opinion) overruling an application for the reopening and retrial of a case which had previously been dismissed in 60 Ct. Cls. 519. The claimant relied upon a new enabling provision, passed by Congress, disapproved of by the President, which the Government claimed had not become a law.

Mr. Ashby Williams, with whom *Mr. James J. Lenihan* was on the brief, for petitioner.

Assistant Attorney General Whitaker, with whom *Solicitor General Reed*, and *Messrs. Henry A. Julicher* and *Paul A. Sweeney* were on the brief, for the United States.

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

The question is whether Senate Bill 713, 74th Congress, 1st session, which was passed by both Houses of Congress, became a law.

The bill was presented to the President of the United States on Friday, April 24, 1936. It had originated in the Senate. On Monday, May 4, 1936, the Senate took a recess until noon, Thursday, May 7, 1936. The House of Representatives remained in session. On May 5, 1936, the President returned the bill with a message addressed to the Senate setting forth his objections. The bill and message were delivered to the Secretary of the Senate. When the Senate reconvened on May 7, 1936, the Secretary advised the Senate of the return of the bill and the delivery of the President's message.[1] On the same day

[1] This communication was as follows:

"United States Senate,
Washington, May 7, 1936.

Hon. John N. Garner,
President of the Senate.

My dear Mr. President:

On Friday, April 24, 1936, the Committee on Enrolled Bills of the Senate presented to the President of the United States the enrolled bills (S. 713) granting jurisdiction of the Court of Claims to hear the case of David A. Wright, and (S. 929) for the relief of the Southern Products Co., which had passed both Houses of Congress and been signed by the Speaker of the House of Representatives and the President of the Senate.

The Senate, at 3:25 p. m. Monday, May 4, 1936, took a recess until 12 noon on Thursday, May 7, 1936.

During the interim the President of the United States sent by messenger two messages addressed to the Senate, each dated May 5, 1936, giving his reasons for not approving, respectively, Senate bill 713 and Senate bill 929. The Senate not being in session on the last day which the President had for the return of these bills under the provisions of the Constitution of the United States, in order to

the President of the Senate laid before it the Secretary's letter and the message of the President of the United States. The message was read and with the bill was referred to the Senate Committee on Claims. No further action was taken.

The bill granted jurisdiction to the Court of Claims to rehear and adjudicate petitioner's claim against the United States. Accordingly on September 14, 1936, petitioner presented his petition to the Court of Claims. The Government opposed the petition upon the ground that the bill had never become a law and the Court of Claims denied the petition. In view of the importance of the question certiorari was granted. 301 U. S. 681.

The applicable provisions of the Constitution are found in Article I, § 7, Paragraph 2, which provides:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the

---

protect the interests of the Senate, so that it might have the opportunity to reconsider the bills, I accepted the messages, and I now present to you the President's veto messages, with the accompanying papers, for disposition by the Senate.

Sincerely yours,

EDWIN A. HALSEY,
Secretary of the Senate."

Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

1. The first question is whether "the Congress by their adjournment" prevented the return of the bill by the President within the period of ten days allowed for that purpose.

"The Congress" did not adjourn. The Senate alone was in recess. The Constitution creates and defines "the Congress." It consists "of a Senate and House of Representatives." Art. I, § 1. The Senate is not "the Congress."

The context of the clause itself points the distinction. It speaks of the "House of Representatives" and of the "Senate," respectively. It speaks of the return of the bill, if the President does not approve it, "to that House in which it shall have originated"; of reconsideration by "that House," and, in case two thirds of "that House" agree to pass the bill, of sending it together with the President's objections to the "other House" and, if approved by two thirds of "that House," the bill is to become a law. Provision is made for the taking of the votes of "both Houses" and for the recording of the names of those voting for and against the bill on the Journal "of each House respectively."

Then, after this precise use of terms and careful differentiation, the concluding clause describes not an adjournment of either House as a separate body, or an adjournment of the House in which the bill shall have originated, but the adjournment of "the Congress." It cannot be supposed that the framers of the Constitution did not use this expression with deliberation or failed to appre-

ciate its plain significance. The reference to the Congress is manifestly to the entire legislative body consisting of both Houses. Nowhere in the Constitution are the words "the Congress" used to describe a single House.

To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. "In expounding the Constitution of the United States," said Chief Justice Taney in *Holmes* v. *Jennison,* 14 Pet. 540, 570, 571, "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." See, also, *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 333, 334; *Ogden* v. *Saunders,* 12 Wheat. 213, 316; *Myers* v. *United States,* 272 U. S. 52, 151; *Williams* v. *United States,* 289 U. S. 553, 572, 573.

The argument addressed to the word "their" in the phrase "the Congress by their adjournment," is futile. The argument is that the use of the plural would not be unusual or inappropriate if the reference were to a single House. There is no question that both singular and plural forms are used in the Constitution with reference to each House separately. See Article I, § 3, Paragraphs 2, 4, 5, 6; Article I, § 5, Paragraphs 1, 2, 3. The plural is used in the phrase "their Journal" in the paragraph under consideration. But the question is not whether the use of the plural is inappropriate in referring to a single House or its members. It is sufficient to say that there is certainly no inappropriateness in the use of the

plural in relation to "the Congress" as composed of both Houses, and that use in no way changes the significance of that term.

The phrasing of the concluding clause is entirely free from ambiguity and there is no occasion for construction.

2. The argument to the contrary rests upon the premise that a bill cannot be returned by the President to the House in which it originated when that House during the session of Congress is in recess, and hence that the concluding clause of Paragraph 2 of § 7 of Article I, referring to an adjournment by the Congress, should be rephrased by judicial construction in order to deal with that situation. We think that the premise is faulty and the rephrasing inadmissible.

Paragraph 4 of § 5 of Article I provides:

"Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

It will be observed that this provision is for a short recess by one House without the consent of the other "during the Session of Congress." Plainly the taking of such a recess is not an adjournment by the Congress. The "Session of Congress" continues.

Here, the recess of the Senate from May 4th to May 7th was during the session of Congress and under that provision. In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.

Nor was there any practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary

of the Senate was functioning and was able to receive, and did receive, the bill. Under the constitutional provision the Senate was required to reconvene in not more than three days and thus would be able to act with reasonable promptitude upon the President's objections. There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body? To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.

These practical considerations were well put by Mr. Hatton W. Sumners in his argument as *amicus curiae* on behalf of the Committee on the Judiciary of the House of Representatives in the *Pocket Veto Case,* 279 U. S. 655. He said:

"There is no language in the provision governing this passing of bills between the President and Congress, or any recognized rule of construction which, while permitting the Congress in the first instance to send bills to the President by a messenger, as is done without question, and the President to receive such bills through an appropriate agent even when himself absent from his office; and the President, though he may be away from the Capital, at the time returning the bill by messenger to the Congress, though the Constitution declares 'he,' the President, shall return it, which would prevent the House of origin

from receiving these same bills through a proper agent if that House were engaged in other business or temporarily absent from their Chambers. It is against all reason and every recognized rule of construction, when the avoidance of unnecessary delay is so clearly manifest in the provision sought to be construed, that a construction should be superimposed which would make for delay regardless of every desire and of every effort of the President and of the Congress in the situation indicated."

And referring to the provision of the Constitution above quoted as to adjournments by either House for not more than three days during the session of Congress, he said:

"In such a situation what is to occur? Is the bill to become a law despite the objections of the President? The Congress has not adjourned, and yet the President cannot make return of the bill to the House of its origin in session because it is not in session. Is the bill to die with the Congress in existence, possibly the House of origin only having adjourned earlier than usual on the last day permitted for the return of the bill? Is there no rational construction of the Constitution possible which will make effective all the safeguards with regard to legislation established in the Constitution, and yet make operative under every circumstance, the general plan set up by the Constitution?"

And, again, with respect to the agencies of the Houses of Congress, Mr. Sumners observed that "The Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses are in session, and when they are not in session." He found "nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills." He added that

"a rule of construction or of official action which would require in every instance the persons who constitute the

Houses of Congress to be in formal session in order to receive bills from the President would also require the person who is President personally to return such bills. . . .

"The right of constructive delivery is necessary not only to facilitate legislative procedure, prevent delay, and to hold the President's powers within the limits imposed by the Constitution, but it is also necessary in order to hold the Congress within proper bounds by preventing bills to which the President may object from becoming law without reconsideration by the Congress.

"The adjournment of a House for not more than three days, without the consent of the other House, is not an adjournment of Congress.

"If the Senate should be in executive session, on a matter of the highest public importance, refusing to be interrupted, on the last day of the period in which return may be made, that would not even be an adjournment of one House of the Congress; and yet return could not be made if constructive delivery is not permitted.

"It could not be held that Congress was adjourned when the Senate was in executive session performing its constitutional duty, and the other House in actual session. The sensible thing to do in such a case, would be for the messenger of the President, finding himself unable to make delivery to the Senate, to make the delivery to the Secretary of the Senate. There is nothing in the Constitution to prohibit that being done."

The absence of any practical obstacle to the return of a bill when a House is in temporary recess during the session of the Congress is illustrated by what was done in this instance. The Senate was in recess from May 4th to noon of May 7th. The President's time for consideration expired on May 6th. He delivered the bill with his objections to the Secretary of the Senate on May 5th. The Secretary presented the bill with the President's ob-

jections to the President of the Senate on May 7th and on that day the bill and the objections were laid before the Senate and were referred to the appropriate committee. The fact that Mr. Sumners' contention in the *Pocket Veto Case* was unavailing with respect to the effect of an adjournment of the Congress at the close of its first regular session, in no way detracts from the pertinence and cogency of these observations as addressed to the situation which is now presented.

3. The chief, if not the sole, reliance for the argument that the bill could not be returned by the President during the Senate's recess is our decision in the *Pocket Veto Case, supra.* We do not regard that decision as applicable for two reasons: (1) the present question was not involved, and (2) the reasoning of the decision is inapposite to the circumstances of this case.

In the *Pocket Veto Case,* the Congress had adjourned. The question was whether the concluding clause of Paragraph 2 of § 7 of Article I was limited to a *final* adjournment of the Congress or embraced an adjournment of the Congress at the close of the first regular session. The Court held that the clause was not so limited and applied to the latter. In interpreting the word "adjournment," and in referring to other provisions of the Constitution using the word "adjourn," the Court was still addressing itself to a case where there had been an adjournment by the Congress. The Court did not decide, and there was no occasion for ruling, that the clause applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress. Any observations which could be regarded as having a bearing upon the question now before us would be taken out of their proper relation. The oft-repeated admonition of Chief Justice Marshall "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and that if

they go "beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision," has special force in this instance. *Cohens* v. *Virginia,* 6 Wheat. 264, 399.

In the *Pocket Veto Case* the Court expressed the view that the House to which the bill is to be returned "is the House in session," and that no return can be made to the House when it is not in session as a collective body and its members are dispersed. But that expression should not be construed so narrowly as to demand that the President must select a precise moment when the House is within the walls of its Chambers and that a return is absolutely impossible during a recess however temporary. Such a conclusion, as we shall presently endeavor to show, would frustrate the fundamental purposes of the constitutional provision as to action upon bills. The Court in the *Pocket Veto Case* was impressed with the impropriety of a delivery of the bill by the President during a period of adjournment "to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid." "In short," said the Court, "it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as

to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return to the House had expired." *Id.*, pp. 684, 685.

These statements show clearly the sort of dangers which the Court envisaged. However real these dangers may be when Congress has adjourned and the members of its Houses have dispersed at the end of a session—the situation with which the Court was dealing—they appear to be illusory when there is a mere temporary recess. Each House for its convenience, and during its session and the session of Congress, may take, and frequently does take, a brief recess limited, as we have seen, in the absence of the consent of the other House, to a period of three days. In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical. If we regard the manifest realities of the situation, we cannot fail to see that a brief recess by one House, such

as is permitted by the Constitution without the consent of the other House, during the session of Congress, does not constitute such an interruption of the session of the House as to give rise to the dangers which, as the Court apprehended, might develop after the Congress has adjourned.

4. The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. *Edwards* v. *United States,* 286 U. S. 482, 486. We should not adopt a construction which would frustrate either of these purposes.

As to the President's opportunity for consideration, we have held that he may still approve bills and that they will become laws, if he acts within the time allotted for that purpose, although Congress meanwhile has adjourned. *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423; *Edwards* v. *United States, supra.* It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become laws if the adjournment of the Congress prevents their return. *Edwards* v. *United States, supra.*

Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. This opportunity is as important as that of the President. But if the return of a bill is impossible during a temporary recess of a House while Congress is in session, either the President may be obliged to cut short the time for his consideration so as to be sure to get his objections before the House while it is within the walls of its Chambers, or, if the President takes the allotted time and attempts to return

the bill during the recess, his objections will either be unavailing or the Congress will be denied opportunity to pass upon them. If, as we think, the concluding words of Paragraph 2 of § 7 are inapplicable then, as Congress has not adjourned, the bill, if not deemed to have been returned, will become a law despite the President's disapproval. Or, if that clause were deemed applicable and the return of the bill be considered to have been prevented by the recess, the bill would not become a law and Congress, although in session, would not be able to pass the bill over the President's objections.

The extremely technical character of the argument which would make impossible the return of a bill because a House has taken a temporary recess is manifest. Suppose the President, who is clearly entitled to his ten days for consideration, sends the bill to the House in which it originated with his objections on the afternoon of the tenth day, but that House has adjourned at noon on that day until the following morning. Then, on the argument now advanced as to the construction of the concluding clause of Paragraph 2 of § 7, the bill would not become a law and the objections of the President would operate practically as an absolute veto although the Congress was in session and ready to consider his objections. Or if that result does not follow, in the view that the clause does not apply because Congress has not adjourned, then, if the bill is not regarded as returned, it becomes a law although the President has shown his disapproval within the ten days. These difficulties disappear if we dispense with wholly unnecessary technicalities as to the method of return and give effect to realities.

We agree with the Government that the precedents of executive action which have been cited are not persuasive. The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions or arguments, but by the applica-

tion of the controlling principles of constitutional interpretation.

We are not impressed by the argument that while a recess of one House is limited to three days without the consent of the other House, cases may arise in which the other House consents to an adjournment and a long period of adjournment may result. We have no such case before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect.

We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law.

The judgment is

Affirmed.

MR. JUSTICE CARDOZO took no part in the decision of this case.

MR. JUSTICE STONE.

I agree that the legislation now in question did not become a law, not, as the Court holds, because the bill vetoed by the President was returned to the Senate within the ten-day period or to any person authorized to receive the bill in its behalf, but because the Senate by its adjournment prevented the return and thus called into operation the provision that the bill "shall not be a Law" where adjournment prevents its return to the house in

which it originated, within the ten days allowed to the President to sign or disapprove it.[1]

The reasons assigned by the Court for its conclusion seem to me to have no application to the case now before us, and leave in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance.

Nothwithstanding the cogently reasoned ruling of a unanimous court in the *Pocket Veto Case*, 279 U. S. 655, 682, that the "House" to which a bill is to be returned by the President means a house in session, we may assume for present purposes that each house of Congress, by appropriate action, may constitutionally confer upon its secretary, clerk, or some other officer, authority to receive a bill returned to it by the President. But it does not appear that any such authority has ever been conferred on the secretary of the Senate, or that he has hitherto assumed to act in that capacity. In the *Pocket Veto Case* this Court held that in 1926 it had not; and

[1] Article I, § 7, Cl. 2, of the Constitution reads as follows:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

the Senate has since taken no step in that direction, perhaps because of our dictum in that case that such action would be unconstitutional.

The houses of Congress, being collective bodies, transacting their routine business by majority action, are capable of acting only when in session and by formal action recorded in their respective journals, or by recognition, through such action, of an established practice. Since the foundation of the government it has been the settled usage of both houses of Congress to receive messages from the President and bills disapproved and returned by him, when in session. It does not appear that in the past the secretary of the Senate or any other person has assumed to act for either house in receiving a bill returned by the President, and in one recorded instance the secretary of the Senate and its President declined so to act.[2] There has been no action and no usage of either house recognizing the existence of such authority in any one. *Pocket Veto Case, supra,* 682 *et seq.*

The secretary of the Senate is appointed by that body to serve at its pleasure, and his duties are prescribed by the Senate rules. They give no hint that among these duties is the important function of acting as the Senate in the receipt of bills returned to it by the President during the ten-day period, or retaining them in custody pending its reassembly when the return is during an adjournment. Not only have both houses of Congress failed to designate any person to receive bills returned to them by

[2] On May 19, 1888, President Cleveland attempted to return a bill to the Senate during an adjournment, by tendering it to the secretary and to the President of the Senate. Both officers rejected the tender, "claiming that the return of said bill and the delivery of said message could only properly be made to the Senate when in actual session." President Cleveland's message, Senate Journal, 50th Cong., 1st Sess.

the President, but in one instance they explicitly refused to take such action when it was proposed.[3]

The conclusion seems inescapable that whatever constitutional power the Senate and House may possess to designate an officer to receive in their behalf bills returned by the President, they have not exercised it; the Constitution, which directs that bills shall be returned to the house in which they originate, has made no such designation, and neither the Constitution nor any statute, rule or usage has indicated any person who could so act, or prescribed for anyone duties embracing such a function.

In such circumstances delivery of a bill to the secretary of the Senate during its adjournment would seem to be no more a compliance with the constitutional requirement than would its deposit by the President's messenger with the sergeant-at-arms, a doorkeeper, or any other person not clothed with authority or charged with official duty in the premises, who might be induced to receive the bill and undertake to bring it to the attention of the Senate upon reassembly.[4]

Doubts as to the scope and effect of the rule now announced by the Court are multiplied by the intimation that a different rule may be applied in the case of adjourn-

[3] In 1868 a bill reported by the Senate Judiciary Committee and passed by majority vote of the Senate, provided for a return of a bill to a house not sitting by delivery of it at the office of the secretary of the Senate or of the clerk of the House, as the case might be. Strong opposition to the bill developed in Senate debate, the bill was not reported out of the Judiciary Committee of the House, and failed of passage. *Pocket Veto Case, supra,* 686 *et seq.*

[4] The fact that the Senate has taken pains to confer express authority in some instances, by formal resolution, Gilfry, Precedents, 226, 462, by rule, Senate Manual, 1936, 5, 8, 12, 36, or by standing order, *id.* at 128 *et seq.*, persuades that the important power to receive a bill would not be conferred *sub silentio.*

ment of either house of Congress, with the consent of the other, for more than three days, and that the present decision can, in some way not disclosed, be distinguished from our ruling in the *Pocket Veto Case,* where the return of a bill to the Senate was held to have been prevented by the adjournment of the Senate, pursuant to concurrent resolution, from July 3rd to November 10th, the House having at the same time adjourned *sine die.* But such an intimation can rest on nothing more substantial than our unwillingness to face the obvious consequences of what is now decided. If it be said that an essential difference between the present case and the *Pocket Veto Case* lies in the fact that here the President delivered the bill with his veto message to the secretary of the Senate, and that there he retained it without signing, then the rule which is now announced will, for all practical purposes, expire with its birth. We can hardly assume that a President would invite further Congressional action by a return of a bill with his veto to a secretary or other officer of the house concerned, during its adjournment, if by retention of the bill without signing, he could make the veto absolute.

Again, if it be said that a distinction is to be drawn between adjournment of one house for three days and longer adjournments taken with the concurrence of the other house, no plausible reason can be advanced for saying that the secretary or any other officer of the Senate possesses authority to receive returned bills during a three-day adjournment which he does not possess during a four-day or longer adjournment during a session of Congress. In the *Pocket Veto Case* the Senate adjourned during a session of Congress for four months, the House consenting, but the ten days allowed for consideration of the bill by the President expired the day after adjournment. If the decision in that case is to stand with this it can only be because the secretary in the former lost on the day after

adjournment an authority which he retained for a day after adjournment in the latter. If lost, it was either because the adjournment was for longer than three days and was thus one which could not be effected without a concurrent resolution, or because the other house had not remained in session. Such distinctions find as little support in Constitution, laws and Congressional practice, and in reason, as does the proposition that the secretary of the Senate is, by virtue of his appointment as such, clothed with authority to receive in its behalf bills returned by the President.

If in the *Pocket Veto Case* the secretary of the Senate, where the bill originated, had authority after adjournment during the session, to receive it in behalf of the Senate, the adjournment did not prevent the return by the President, and the bill, upon his failure to sign or return it, became law by virtue of the constitutional provision just as did some 173 other bills which, until this moment, have been regarded as dead letters, as they were declared to be in the *Pocket Veto Case, supra,* 691.[5] If

[5] A memorandum prepared in the office of the Attorney General and transmitted by the President to Congress in 1927, H. Doc. No. 493, 70th Cong., 2d Sess., cites more than 400 bills and resolutions which were passed by Congress and submitted to the President less than ten days before final or interim adjournment of Congress, which were not signed by the President or returned with his disapproval. Of these, 119 were instances in which the adjournment was for a session of Congress as distinguished from its final adjournment. None of these bills or resolutions were placed upon the statute books or treated as having become a law. No attempt appears to have been made to enforce them in the courts, except the law involved in the *Pocket Veto Case*. It does not appear that in any of these instances either house of Congress has taken any official action indicating that in its judgment any of these bills became laws. See the *Pocket Veto Case, supra,* 690, 691. Examination of the House Calendars shows that in the period since that covered by the Attorney General's memorandum, 54 bills have been pocketed before the end of a Congress with no attempt to return them. This was done twice

the Court was wrong on that point, its decision was wrong, and in the interests of a definite and precise constitutional procedure in a field where definiteness and precision are of paramount importance, it should now be frankly overruled.

If I am wrong in my conclusion that the President did not in this case return the bill to the Senate by returning it to its secretary during adjournment, then adjournment did not prevent its return, the President's veto became effective, and there is no occasion for the Court to indulge in an academic discussion of what may in other circumstances be the effect of an adjournment alone of the house in which a bill originates, which actually prevents such a return. The pronouncement now made that the President may be so deprived of the veto power ought to be avoided not only because, in my opinion, it is an erroneous interpretation of the Constitution which may have grave consequences, but because it is unnecessary to the decision. If the experience of one hundred and fifty years of constitutional interpretation has taught any lesson, it is the unwisdom of making solemn declarations as to the meaning of that instrument which are unnecessary to decision. They can serve no useful purpose and their only effect may be to embarrass the Court when decision becomes necessary. *O'Donoghue* v. *United States*, 289 U. S. 516, 550; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627. The declaration now made, for the first time, that the Constitution has left an undefined area in which the veto power cannot be

---

in the Seventy-first Congress, once in the Seventy-second Congress, twenty-eight times in the Seventy-fourth Congress, and twenty-three times in the First Session of the Seventy-fifth Congress. See also Veto Messages: Record of Bills Vetoed and Action Taken Thereon by the Senate and House of Representatives, Fifty-first Congress to Seventy-fourth Congress, Inclusive, 1889–1936, compiled under the direction of Edwin A. Halsey, Secretary of the Senate (1936).

exercised, is the more unfortunate since, in the circumstances, it seems almost certain that the Court will be called upon to reëxamine it.

If, on the other hand, I am right in my view that the President was here prevented from returning the bill, we are brought unavoidably to the decision of the question presented by the petition for certiorari and argued at the Bar as the controlling question, whether the President is deprived of the veto power whenever return of a bill within the prescribed ten days is prevented by the adjournment alone of the house in which the bill originated.

The framers, in seeking to establish and preserve the presidential veto, were aware that the originating house, unlike the President who is without incentive to avoid receipt of a bill which he is free to veto, might have the strongest motives to avoid the veto of a bill, if that were possible, by preventing its return or by challenging the fact of its return. They accordingly took care to provide for the return of a bill to the originating house by an act of public notoriety—its delivery to the house in session; and recognizing that return might be prevented by adjournment, they declared that in that case it should not become a law.

The possibility that a return may be prevented by the adjournment of a single house during a session of Congress is not removed by deciding that a secretary or some other officer of the originating house may receive a returned bill during the period of a three-day adjournment. Either house may and does on occasion adjourn for longer periods, with the consent of the other.[6] An adjournment coincident with death or absence of the officer may prevent the return. Whatever authority in the premises the Senate or the House may give to its officer, it may

[6] Cannon, Precedents, Vol. 8, p. 816.

withhold or withdraw. If the dictum now pronounced correctly states the fundamental law, the originating house may shorten the period for the exercise of the veto power or thwart it altogether by the simple expedient of adjournment after withdrawing the supposed authority of any officer to receive the vetoed bill.

This Court has emphasized, as does the language of the Constitution, the great importance of the veto power and the dominating purpose expressed in the constitutional provision that the power shall not be curtailed or the ten days, allowed for its exercise, shortened. *Edwards* v. *United States,* 286 U. S. 482, 486, 493–494; *Pocket Veto Case, supra,* p. 678. The words make it certain that the only adjournment which can prevent return of a bill by the President is that of the house in which the bill originates and to which, if vetoed, it is to be returned. Continuance in session of the other house does not facilitate return. No more can its adjournment obstruct return. Adjournment by the originating house can alone have the consequence to be guarded against, prevention of return. Hence, it was adjournment of the originating house with which the framers were concerned. There is no reason of which we are aware, and none has been suggested, for supposing that in creating and protecting the veto power they regarded the adjournment *vel non* of the non-originating house as of any consequence, or that they had any thought of leaving the President stripped of the veto power, either by chance or by design, whenever the originating house adjourned without the other. The men who created the framework of our government are not lightly to be charged with such an omission. The charge now made finds its only support in a punctilio of grammar.

". . . we must never forget, that it is a constitution we are expounding." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407. Its provisions are not to be interpreted like those of a municipal code or of a penal statute, though

even the latter is to be read so as not to defeat its obvious purpose, *United States* v. *Raynor, ante,* p. 540, or lead to absurd consequences. *United States* v. *Katz,* 271 U. S. 354, 362. In defining their scope something more is involved than consultation of the dictionary and the rules of English grammar. They are to be read as a vital part of an organic whole so that the high purpose which illumines every sentence and phrase of the instrument may be given effect in a consistent and harmonious framework of government.

The Court has hitherto consistently held that a literal reading of a provision of the Constitution which defeats a purpose evident when the instrument is read as a whole, is not to be favored. The phrase "due process" in the Fifth and Fourteenth Amendments has long since been expanded beyond its literal meaning of due procedure. See *Davidson* v. *New Orleans,* 96 U. S. 97; cf. Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 373. The term "contract" in the contract clause is not confined literally to the contracts of the law dictionary. *Dartmouth College* v. *Woodward,* 4 Wheat. 518. The prohibition against their impairment has never been taken to be inexorable. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, and cases cited at 430 *et seq.* The injunction that no person "shall be compelled in any Criminal Case to be a witness against himself" is not literally applied. *Brown* v. *Walker,* 161 U. S. 591, 595. "From whatever source derived," as it is written in the Sixteenth Amendment, does not mean from whatever source derived. *Evans* v. *Gore,* 253 U. S. 245. See, also, *Robertson* v. *Baldwin,* 165 U. S. 275, 281, 282; *Gompers* v. *United States,* 233 U. S. 604, 610; *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501; *United States* v. *Lefkowitz,* 285 U. S. 452, 467.

But here, regardless of the constitutional purpose and the larger considerations which have usually guided our interpretation of the Constitution as an instrument of

government, it is insisted that the phrase "unless the Congress by their Adjournment prevent its Return" cannot be taken to include the adjournment alone of the single house whose adjournment is in every case the only effective means of preventing a return. It is said that the word "Congress" used to describe the body whose adjournment occasions the pocket veto, followed as it is by the plural possessive pronoun "their," can refer only to the two houses comprised in "the Congress" and hence cannot refer to adjournment of a single house. This subordination of the framers' main objective to a meticulously grammatical interpretation of their words is unwarranted. It would hardly be suggested that the command, "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy," (Art. I, § 5, cl. 3) calls for the concurrence of the judgment of all the members of a house, in order to ban publication of a journal: "their Judgment" is obviously that of the controlling part of the membership—that part whose opinion, under applicable rules of congressional procedure, is decisive of the question. A similar analysis based on the purpose and context of the clause now before us demands recognition that the draftsmen were concerned with the adjournment only of that part of the Congress to which return was to be made and whose absence would thus prevent return of a bill by the President. In the light of these dominant facts it seems plain that in using the words "their Adjournment" the framers referred to any action taken by the members of Congress of either house or both houses, which was effective to prevent return of a bill by the President to the originating house. The very force of the circumstances to which the words are applied gives emphasis to "Adjournment" as that which prevents return, and to "their" as referring to the action of those members of Congress which effects

the adjournment. This usage parallels that in the clause requiring the publication of the journals of both houses "excepting such Parts as may in their Judgment require Secrecy." In both instances the significant action, adjournment or the exercise of judgment as the case may be, is that of those members whose action is effective to accomplish the contemplated result—there, prohibition of publication; here, prevention of return to the originating house. Thus read, no word is without appropriate meaning and the clause is consistent both with the obvious purpose and with the grammatical usage appearing elsewhere in the Constitution.

I cannot ignore that purpose and say that for no discernible reason other than our present-day notions of grammatical construction we are compelled to read the words as excluding from the operation of the clauses designed to protect the veto power, every case where the return of a bill is prevented by adjournment of a single house.

MR. JUSTICE BRANDEIS concurs in this opinion.

MINNESOTA TEA CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 106. Argued December 16, 1937.—Decided January 17, 1938.

Money received by a corporation by exchange in a reorganization and turned over to its stockholders proportionally in pursuance of the plan of reorganization and subject to their agreement to assume and pay off indebtedness of the corporation of the same amount, which they thereupon fulfilled, was not *distributed,* within the meaning of § 112 (d) (1) and (2) of the Revenue Act of 1928, and the gain included was therefore taxable to the corporation. P. 612.

32094°—38——39

In purpose and effect, the transaction was to pay the corporation's debts, using the stockholders as a conduit.

89 F. (2d) 711, affirmed.

CERTIORARI, *post*, p. 665, to review a decree reversing a decision of the Board of Tax Appeals, 34 B. T. A. 145, overruling an income tax assessment. See s. c. 296 U. S. 378.

Mr. James G. Nye for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris, Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner, in 1928, brought about the organization of the Peterson Investment Company, and transferred to it certain assets in exchange for the entire capital stock of that company. The stock was immediately distributed to petitioner's stockholders. Soon thereafter, petitioner transferred its remaining assets to Grand Union Company in exchange for 18,000 shares of that company's stock and $426,842.52 in cash. The cash was immediately transferred to and divided among petitioner's stockholders, in proportion to their stock holdings, in pursuance of a plan of reorganization. The Board of Tax Appeals, upon its first consideration of the case, held that no reorganization had been effected under § 112 (i) (1) (B) of the Revenue Act of 1928. 28 B. T. A. 591. The Circuit Court of Appeals concluded otherwise, reversed the Board, and remanded the case to the Board for further consideration. 76 F. (2d) 797. Upon review, pursuant to a writ of certiorari, we affirmed the judgment of the

Circuit Court of Appeals. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378.

Upon the remand, the Board, after consideration, refused to follow the ruling of the commissioner that $106,471.73 of the $426,842.52 constituted taxable assets in the hands of petitioner. 34 B. T. A. 145. The court below, reversing the action of the Board, sustained the view of the commissioner, 89 F. (2d) 711; and the case again comes here upon writ of certiorari.

The facts are not in dispute. In addition to those already stated, it appears that immediately before the receipt by petitioner of the $426,842.52, its stockholders, at a special meeting, adopted the following resolution:

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

When the cash was "distributed," petitioner's debts amounted to $106,471.73, about $6,500 of which was owing to the stockholders themselves. In pursuance of the resolution, the stockholders paid all the debts, retaining sums, aggregating about $6,500, necessary to discharge the amount of petitioner's indebtedness to them.

The question for determination is whether the delivery of the $106,471.73 by petitioner to the stockholders, an equal sum thereafter being applied by them to the payment of petitioner's debts in pursuance of the resolution, constituted a distribution within the meaning of the provisions of § 112 (d) (1) and (2) of the Revenue Act of 1928, copied in the margin.[1]

These provisions plainly establish that, in respect of any cash received and not "distributed," there was a taxable gain to petitioner. And, quite as plainly, payment of the debts by petitioner, if made directly by petitioner to the creditors, would not have been a distribution under the statute; for that contemplates a distribution to stockholders, and not payment to creditors. If, then, petitioner had followed the simple course of retaining in its own hands the sum here in question, and subsequently paying it directly to the creditors, it necessarily would

[1] "(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

result that liability of petitioner for a tax on the amount of gain could not be avoided. And, obviously, this is the effect of what was done, although circuitously.

The money was received by petitioner and was available for the payment of its debts. It was put into the hands of the stockholders upon the express understanding, as shown by the resolution heretofore quoted, that they would assume all the corporate debts of petitioner, and would enter into a written agreement with petitioner "whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold" the corporate stock and securities which it had received in the reorganization "without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company . . ."

In pursuance of the resolution, the stockholders received the money from petitioner to the extent of $106,471.73, not as a distribution for their benefit but as a fund the equivalent of which they were bound to pass on, and did pass on, to the creditors. The conclusion is inescapable, as the court below very clearly pointed out, that by this roundabout process petitioner received the same benefit "as though it had retained that amount from distribution and applied it to the payment of such indebtedness." Payment of indebtedness, and not distribution of dividends, was, from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. A given result at the end of a straight path is not made a different result because reached by following a devious path. The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors, all along intended to come to their hands, so transparently artificial that further discussion would be a needless waste of time. The

relation of the stockholders to the matter was that of a mere conduit. The controlling principle will be found in *Gregory* v. *Helvering,* 293 U. S. 465, 469–470; and applying that principle here, the judgment of the court below is

Affirmed.

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

OCEAN BEACH HEIGHTS, INC., ET AL. *v.* BROWN-CRUMMER INVESTMENT CO. ET AL.

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

No. 10. Argued December 8, 1937.—Decided January 17, 1938.

1. In the absence of a law authorizing the creation of a municipality *de jure* there can be none *de facto*. P. 619.
2. Acting under a Florida statute granting no authority to include non-contiguous areas, electors residing on the west side of a bay incorporated a town with boundaries described as embracing also land on the east side. Holders of bonds thereafter issued by the town and defaulted, sought, by litigation in the federal court against the town and east side land owners, to require a tax levy on all of the lands, to provide payment. *Held:*

   (1) Under the statute the town had acquired no jurisdiction, *de jure* or *de facto,* over the east side lands. P. 619.

   (2) Acquiescence by owners of east side land in earlier attempted exercises of jurisdiction over them upon the part of the town authorities, including taxation, could not invest the town with *de facto* jurisdiction. *Id.*

   (3) The bill should be dismissed. P. 620.

87 F. (2d) 978, reversed.

CERTIORARI, 301 U. S. 673, to review the affirmance of a decree granting an injunction to restrain interference with the levy of a town tax on land for the payment of the plaintiffs' bonds. See also 69 F. (2d) 105; 11 F. Supp. 73.

Messrs. Henry K. Gibson and *J. Julien Southerland,* with whom *Messrs. Scott M. Loftin, John P. Stokes* and *James E. Calkins* were on the brief, for petitioners.

Messrs. Giles J. Patterson and *T. J. Blackwell* for respondents. *Messrs. Dewey Knight* and *A. Frank Katzentine* were with *Mr. Blackwell* on the brief.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is whether for the payment of its outstanding bonds the respondent town may tax petitioners' lands which, without statutory authority, were included by boundaries defined in proceedings for its incorporation. Petitioners' contention is that the lands never were within the boundaries of the towns *de jure* or *de facto* and that therefore they are not subject to its taxing power.

The Florida statutes empower the male inhabitants of any hamlet, village or town "to establish for themselves a municipal government" (Compiled General Laws, 1927, § 2935) to be designated an incorporated town if it contains less than 300 registered voters, § 2936. They require notice specifying time and place of meeting and the proposed corporate limits, § 2937, and direct that "the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate and not less than twenty-five in number, shall select a corporate name . . . for the municipality . . . and designate by definite metes and bounds the territorial limits," § 2938.

In 1892, in *Town of Enterprise* v. *State,* 29 Fla. 128; 10 So. 740, 744; the state supreme court held that the statute did not permit incorporation of disconnected tracts of land, found a part of the territory proposed to be incorporated to be disconnected from the other part, and declared (p. 145): "An attempt to incorporate two distinct

detached tracts of land, as corporate territory under one government, is unauthorized and void. . . ."

In 1926, electors residing in Dade County, Florida, on the west side of Biscayne Bay, incorporated a town, Miami Shores, now called North Miami. The boundaries specified by the incorporators included approximately 16 square miles, 14 of which were on the west side of the bay and had a population of 2,500. Two square miles were on the east side and had but 12 inhabitants. Though nearly vacant, these lands were much more valuable than all the property on the west side. The water separating the two areas is about a half mile wide. At the time of incorporation, construction of a causeway had been commenced, but its beginnings having been destroyed by hurricane later in that year, it has not been built. By land the distance between the settlement on the west side and the east side area is about ten miles, and to go by land from one to the other it is necessary to pass through another municipality. Petitioners own lands on the east side.

Between January 1, 1927 and April 1, 1928, the town issued bonds, $238,000 of which are outstanding. In each bond the town pledged its faith and credit for payment and declared that provision had been made for the levy and collection, each year that the bond remained outstanding and unpaid, of sufficient taxes on all taxable property within its limits to pay principal and interest as they came due. But none of the bonds contained any statement indicating the boundaries of the town or in any manner representing that any part of the area on the east side of the bay was within its limits. The bonds were validated by decrees of the circuit court for Dade County, §§ 5106–5109, Compiled General Laws, 1927. No owner of east side land was party to the validation suits and no question as to whether the town included any part of the lands east of the bay was there involved. Pro-

ceeds of the bonds were used for the construction of permanent improvements; the only part spent on the east side was $6,000 for mosquito eradication, most of which went for equipment which the town still owns.

In a *quo warranto* suit brought by the State on the relation of its attorney general in August, 1929, and in a later suit brought by owners of east side lands to cancel tax certificates on their lands, the state supreme court held that the statute relied on for creation of the municipality did not authorize inclusion of non-contiguous areas. *Mahood* v. *State,* 101 Fla. 1254; 133 So. 90. *Leatherman* v. *Alta Cliff Co.,* 114 Fla. 305; 153 So. 845. And in those suits it was finally adjudged that the east side was not and never had been a part of the incorporated town, and that the town never acquired jurisdiction *de jure* or *de facto* over the land east of the bay. A decree of ouster as to the east side land was entered in December, 1931, and tax certificates on lands on that side were canceled. No bondholder was a party to either of these suits.

Prior to the *quo warranto* suit, the jurisdiction of the town over the east side was not challenged by the State, property owners or others. And until prevented by the decree of ouster, the town exerted municipal authority on both sides of the bay within the boundaries defined by west side electors acting to incorporate the town. It laid taxes on east side lands, some of which were paid by petitioners.

In 1930 respondent sued the town in the United States District Court for Southern Florida and got judgment on nine of the bonds. There was involved no question as to whether the east side lands ever were within the town or liable to be taxed to pay the bonds. In 1931 respondent brought in the same court a mandamus suit to compel the town and its officers to levy taxes on all the lands within the boundaries defined by the incorporators.

Owners of land on the east side including petitioners were permitted to intervene. They maintained that the town had no jurisdiction over their lands or authority to tax them. The court entered a decree commanding the town and its officers to tax all the property within the town limits as originally defined. The town and its officers did not object to the decree nor appeal from it. The intervening east side owners attempted to have it reviewed in the Circuit Court of Appeals. The court held that, as the judgment was not against them, they had no standing to question it and dismissed their appeal. 69 F. (2d) 105.

Then respondent brought this suit for itself and other bondholders against the town, its officers, the clerk of the circuit court of Dade County, and east side land owners, including the petitioners. It alleged that the town was unable to pay the bonds unless permitted to levy and collect taxes on east side property; that the town and its officers were ready and willing so to do, but were prevented by the decrees in the *Mahood* and *Leatherman* cases, and that the clerk of the circuit court was bound by the decree in the latter case. It prayed an injunction to restrain petitioners from interfering, by use of the ouster decree or otherwise, with the levy or collection of taxes on east side lands for the payment of respondent's judgment and the outstanding bonds and to restrain the town and the clerk of the court from refusing to levy or to take steps required for collection of such taxes. The town and its officers answered and in effect joined in the prayer of the bill. Petitioners moved to dismiss, the court denied their motion; two of them answered. The parties introduced their evidence, the court found the facts and entered its decree substantially as prayed. Petitioners alone appealed. The Circuit Court of Appeals affirmed on the ground that the town *de facto* included the east side lands. 87 F. (2d) 978.

That view cannot be sustained. This case differs essentially from those dealing with good faith attempts to organize municipalities under unconstitutional enactments presumed valid until adjudged repugnant to fundamental law. See, e. g., *Clapp* v. *Otoe County,* 104 Fed. 473, 482. *Speer* v. *Board of County Comm'rs,* 88 Fed. 749, 765. *Ashley* v. *Board of Supervisors,* 60 Fed. 55, 64. *City of Winter Haven* v. *Gillespie,* 84 F. (2d) 285, 287. *State* v. *City of Cedar Keys,* 122 Fla. 454, 462, 463; 165 So. 672. In the absence of a law authorizing the creation of a municipality *de jure* there can be none *de facto.* McQuillan, Municipal Corporations (2nd ed.), § 175. *City of Guthrie* v. *Wylie,* 6 Okla. 61, 66; 55 Pac. 103. *Norton* v. *Shelby County,* 118 U. S. 425, 444. *Shapleigh* v. *San Angelo,* 167 U. S. 646, 655–656. *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1, 13. *United States* v. *Royer,* 268 U. S. 394, 397. *Evenson* v. *Ellingson,* 67 Wis. 634, 646; 31 N. W. 342. *Duke* v. *Taylor,* 37 Fla. 64, 77; 19 So. 172. The town *de jure* could not be made to include the east side. *Mahood* v. *State, supra. Leatherman* v. *Alta Cliff Co., supra.* Mere inspection of the statute and the defined boundaries unmistakably shows that the west side electors were without authority to incorporate the east side tract with that in which they resided. Unquestionably, these were detached tracts within the meaning of the statute. The state supreme court having held that attempted incorporation of detached areas was unauthorized and void (*Town of Enterprise* v. *State, supra*) there existed no color of authority for the inclusion of the east side. The east side lands could not be brought within the taxing power of the town by the owners' acquiescence in its attempted exertion of jurisdiction over them and payment of taxes thereon that it in form laid prior to the ouster decree. The town *de facto* could not derive from the consent of the east side owners jurisdiction that it *de jure* was without capacity to receive. The consent of owners of land located beyond permissible limits of the

municipality cannot be made to serve as would a statutory grant of power. *Hayes* v. *Holly Springs*, 114 U. S. 120, 126–127. *Merrill* v. *Monticello*, 138 U. S. 673, 693–694. As the east side lands never became liable to be taxed by the town to pay its bonds, respondents were not entitled to restrain petitioners from defending against levy and collection of the taxes or to any relief in this suit. The decree of the Circuit Court of Appeals will be reversed and the case will be remanded to the district court with directions to dismiss the bill.

Reversed.

THE CREEK NATION *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 140. Argued January 3, 1938.—Decided January 17, 1938.

1. Creek lands, erroneously surveyed as lands of other tribes, were, because of the error and through misapplication of an Act of Congress, disposed of by allotment and patent in severalty to members of the other tribes and by sale and patent to settlers. *Held* that the taking took place not at the date of the Act but at the times of the several dispositions; and valuations for the purpose of fixing compensation must be as of those times. Cf. s. c. 295 U. S. 103. P. 620.
2. Rules laid down to govern the valuations. P. 622.

84 Ct. Cls. 12, reversed.

CERTIORARI, *post*, p. 666, to review a judgment fixing compensation to the Creek Nation for lands taken by the United States.

Mr. W. W. Spalding, with whom *Mr. Paul M. Niebell* was on the brief, for petitioner.

Mr. N. A. Townsend, with whom *Solicitor General Reed*, *Assistant Attorney General McFarland* and *Mr. Oscar A. Provost* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

When this case was here before[1] petitioner was held entitled to recover compensation from the respondent for the taking of lands belonging to the petitioner constituting a portion of a larger tract granted to the Creek Nation in 1833. The boundary lines of petitioner's lands had been erroneously run in 1872 and, as a result, an area set apart for other Indian tribes included over five thousand acres belonging to the petitioner. Those tribes ceded their lands to the respondent upon an agreement that allotments should be made to their members in severalty. The Act of February 13, 1891,[2] which ratified this agreement, provided that any lands not so allotted should be opened to settlement and sold to settlers, the proceeds to be covered into the Treasury as public moneys. Pursuant to this statute lands which in truth belonged to petitioner were, due to the error in the survey of 1872, allotted and patented to Sac and Fox Indians and sold and patented to settlers in the period from 1893 to 1909. The patentees have since held adversely to petitioner. As was said in the former opinion, "The tribe contended for the value in 1926, when the suit was brought; while the Government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, at the time the lands were disposed of under the act of 1891." It was held that the alternative contention was correct and, as the Court of Claims had awarded the petitioner judgment for the 1926 value, the cause was reversed and remanded. Upon a further hearing that court overruled the claim of petitioner that the dates of actual disposal were those as of which value

[1] *United States* v. *Creek Nation*, 295 U. S. 103.

[2] C. 165, 26 Stat. 749.

should be ascertained and valued the lands taken as of February 13, 1891, the date of the act pursuant to which the executive had caused them to be patented.

In the former opinion, after holding that the approval of the erroneous survey in 1873 did not constitute an appropriation of petitioner's lands, the court said: "But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time, . . ."

The court below has misinterpreted that decision. The act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States. The petitioner is entitled to the present full equivalent of the value of the lands, without improvements, as of the date of the patents of the various parcels, if, as we assume, the patent in each instance issued promptly after the delivery of the final certificate; but if a substantial interval elapsed between the date of certificate and of patent, then as of the date of the certificate. A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

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

Counsel for Parties.

UNITED STATES *v.* STEVENS, ADMINISTRATRIX, ET AL.

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

No. 143. Argued January 3, 4, 1938.—Decided January 17, 1938.

An ex-soldier, upon entering the National Home for Disabled Soldiers, situate in Massachusetts, contracted with its Board of Managers, pursuant to the Act of June 25, 1910, that upon his death while a member of the Home, all of his personal property should become vested in the Board of Managers for the sole use and benefit of the post fund of the Home, subject to be reclaimed by any legatee or person entitled to take the same by inheritance, at any time within five years after his death. He left no will. *Held:*

1. The contract was valid and consistent with the law of Massachusetts. Notice to the heirs unnecessary. P. 626.

2. That his bank deposits, not having been claimed by his next of kin within five years of his death, became the property of the Home. P. 628.

89 F. (2d) 151, reversed.

CERTIORARI, *post*, p. 666, to review the reversal of a judgment, 15 F. Supp. 139, recovered by the United States in a suit against a trust company owing money on deposit to the credit of a deceased veteran, and against the administrator of his estate, and persons claiming to be his heirs at law and next of kin. The decree of the District Court required that the trust company pay the United States the amount of the fund and enjoined the individuals from asserting any claim to it.

Mr. Paul Campbell, with whom *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Henry A. Julicher* were on the brief, for the United States.

Mr. James E. Carroll, with whom *Messrs. Charles B. Rugg* and *Warren F. Farr* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Can the United States enforce a contract executed by an ex-soldier in order to obtain admission into the National Home for Disabled Volunteer Soldiers, which contract provides that upon the death of the veteran while a member of the Home, all his personal property shall pass to the Home subject to be reclaimed within five years by any legatee or person entitled to receive the property by inheritance?

The district court held the contract valid and enforceable.[1] The Court of Appeals reversed.[2]

The facts disclose that:

Thomas McGovern, a native of Ireland, served in the United States Army from 1877 to 1882; in 1904 his wife and three daughters left him, but a son, Robert, continued to live with McGovern until 1918 when the son (represented in this cause by a guardian) was committed to a state home for the insane; the complete severance of all family ties and associations continued until McGovern's death, and the wife and daughters, living most of the time in Boston, Massachusetts, were wholly unaware of his whereabouts for the last twenty years of his life, most of which were spent in nearby Chelsea; under these circumstances, McGovern, age 72, in his application for admission to the Home, stated that the names and addresses of his wife and nearest relatives were unknown, and that he desired admission because he was "unable on account of his disability to earn his living"; a doctor's certificate showed that his mental condition was good, at the date of admission, but that he needed medical treatment and attention due to serious physical weakness and ailments. His written agreement with the Home stated:

---

[1] 15 F. Supp. 139.

[2] 89 F. (2d) 151.

"The said Thomas McGovern hereby agrees that, in event of his death while a *member of the National Military Home* for Disabled Volunteer Soldiers, leaving no heirs at law or next of kin, all personal property owned by him at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers *for the sole use and benefit of the post fund of said home, and that all personal property of the said Thomas McGovern shall upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member; . . .*" [Italics added.]

At the time of his admission into the Home, McGovern had savings deposits which were his personal property. September 17, 1928, while an inmate of the Home, he died intestate. His wife died in 1933 without knowledge of his death, and none of the daughters learned of his death until October 19, 1935. No claim to McGovern's property was filed with the Home within five years after his death.

In this action brought by the United States to require payment to the Home of funds of McGovern on deposit in a Massachusetts bank at his death, it is contended:

(1) that, because McGovern left surviving heirs, the title to his personal property did not pass to the Home;

(2) that the Act of June 25, 1910[3] authorizing the Home to make the contract with McGovern is invalid.

---

[3] Act of June 25, 1910, c. 384, 36 Stat. 703, 736, U. S. C., Title 24, § 136:

"Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission

1. There is no ambiguity in the contract or in the Act which authorized it. No words in the contract indicate that the personal property should pass to the Home only in the absence of persons entitled to take by law. On the contrary, both the contract and the Act evince a clear intent that the personal property of the veteran, when not claimed by heirs or legatees *within five years after the veteran's death,* should pass to the Home to be used to provide comforts and entertainment for its inmates. "The measure [the Act of 1910] leaves the member free to dispose by will and safeguards to the legatees and heirs the right *within five years* to reclaim 'all the property' that belonged to him at the time of his death. As to that, there is no ambiguity and therefore nothing to construe." [Italics added.] *National Home* v. *Wood,* 299 U. S. 211, 216.

2. The Court of Appeals was of the opinion that the Act of Congress authorizing the contract was void as an interference with the reserved rights of the state of the veteran's legal domicile when he died (Massachusetts)

---

of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each *applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided.*" [Italics added.]

in that "it was at most but an attempt to make a future testamentary disposition of McGovern's property, when such a disposition could only be effected by will."

This contract, however, is valid under the applicable state law.[4] The Supreme Court of Massachusetts in 1931 in the case of *Hale* v. *Wilmarth,* 274 Mass. 186, 189; 174 N. E. 232, said, "The statute of wills, . . . does not prevent an owner of property from stipulating by contract for the disposition of his property at the time of his death."[5]

During the life of the veteran, his property was his own to dispose of as he desired; his was an "intent to make a more binding and irrevocable provision than a legacy could be" [6] and a stipulation for notice to his heirs of the fact of his death was not required to make the provision valid. "Not until the ancestor dies is there any vested right in the heir." *Jefferson* v. *Fink,* 247 U. S. 288, 294.

In passing the Act of June, 1910, Congress merely directed the terms and conditions under which veterans, consistently with state law, can obtain admittance to Homes built, maintained and operated by the government for the benefit of veterans. Homes for the aged, needy, or infirm, in return for the benefits bestowed by them, generally receive some benefit from any property or estates of their members.[7]

---

[4] "Contracts respecting the disposition of one's property after death, are not uncommon." *Murphy* v. *Murphy,* 217 Mass. 233, 236; 104 N. E. 466.

[5] See, also, *Holyoke National Bank* v. *Bailey,* 273 Mass. 551; 174 N. E. 230; *Ex parte Simons,* 247 U. S. 239.

[6] *Krell* v. *Codman,* 154 Mass. 454; 28 N. E. 578.

[7] See *United States* v. *Bowen,* 100 U. S. 508 (Cf. *Order of St. Benedict* v. *Steinhauser,* 234 U. S. 640). See Digest of Poor Relief Laws of the Several States and Territories as of May 1, 1936, prepared by Robert C. Lowe and Staff, Legal Research Section, under the supervision of A. Ross Eckler, Coördinator of Special Inquiries, Division of Social Research, Works Progress Administration.

When McGovern entered this Home he was aged, without family ties, lonely and physically incapacitated. There he received care, food, shelter and companionship. He would have been privileged to remain in the Home even though, after admittance, he had chosen to make the members of his family the recipients of the money, by gift, by will, or by notifying them to claim his property after his death.

The claim of the Government is based on a contract between the veteran and the Home. Nothing in the record indicates that the agreement was not fairly and voluntarily entered into between the parties, or that it was inequitable, unjust or not upon valuable consideration. Both parties were competent to make the contract. This contract is valid and enforceable, and since no claim was made by heirs or legatees within five years after his death, the veteran's personal property passed to the Home for the benefit of its inmates. The decree of the Court of Appeals is not in harmony with these views and is

Reversed.

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

UNITED STATES *v.* JACKSON.

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

No. 199. Argued January 5, 6, 1938.—Decided January 17, 1938.

Sec. 17 of the Economy Act of March 20, 1933, declared that "All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of . . . the World War, . . . are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed . . . " *Held* that it was not intended thereby to

repeal "automatic insurance" granted by § 401 of the War Risk Insurance Act, as amended, in the case of soldiers of the World War who died or became permanently disabled without having applied for insurance within 120 days after entrance into or employment in active service. P. 631.

89 F. (2d) 572, affirmed.

CERTIORARI, *post*, p. 673, to review the affirmance of a recovery of "automatic insurance" in a suit in behalf of an infant whose father had been drafted into the military service in April, 1918 and had died two weeks later without having applied for War Risk insurance.

Mr. Fendall Marbury, with whom *Solicitor General Reed*, and *Messrs. Julius C. Martin, Wilbur C. Pickett* and *W. Marvin Smith* were on the brief, for the United States.

Messrs. R. K. Wise and *Warren E. Miller* for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question is whether the Economy Act [1] repealed § 401 of the War Risk Insurance Act [2] and thereby deprived veterans and their beneficiaries of "automatic insurance."

---

[1] Sec. 17, Act of March 20, 1933, c. 3, 48 Stat. 11: "All public laws granting medical or hospital treatment, domiciliary care, compensation, and *other allowances*, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of . . . the World War, . . . are hereby repealed, and all laws granting or *pertaining to yearly renewable term insurance* are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. . . ." [Italics added.]

[2] Sec. 401 of the War Risk Insurance Act as amended Dec. 24, 1919, c. 16, 41 Stat. 371, 375: ". . . Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expira-

In this suit, brought by the son of a soldier who died in service, both the district court [3] and the Court of Appeals [4] were of the opinion that the Economy Act did not terminate the rights of a beneficiary of automatic insurance. We granted certiorari limiting consideration to the question of the repeal of the law providing automatic insurance.[5]

During the World War, it was the policy of the Government to allow soldiers one hundred and twenty days after enlistment or drafting within which to apply for and purchase insurance. For this period, it was intended that they be protected as though they had bought government insurance. In furtherance of this policy, Congress provided that all veterans, who died or became totally and permanently disabled within one hundred and twenty days after their entrance into active service, should be automatically "deemed to have applied for and to have been granted insurance."

It is here contended that the words of the Economy Act repealing "other allowances" and "laws . . . pertaining to yearly renewable term insurance" are broad enough to include a repeal of automatic insurance. With this contention we cannot agree.

---

tion of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each; . . . If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to . . . his child . . .: *Provided, however,* That no more than two hundred and forty of such monthly installments, . . . shall be so paid."

[3] 14 F. Supp. 132.

[4] 89 F. (2d) 572.

[5] 302 U. S. 673.

Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied.[6]

While the Economy Act explicitly repealed all laws which granted ". . . medical or hospital treatment, domiciliary care, compensation and other allowances, pension, disability allowance, . . . retirement pay . . . and all laws granting or pertaining to yearly renewable term insurance . . .," Congress did not include "automatic insurance" in this detailed list of benefits repealed.

The words "other allowances" have a well settled meaning. "Allowances" in veterans' legislation, in the Veterans' Bureau and in Army terminology[7] has never been considered synonymous with, or inclusive of, automatic insurance; this word ordinarily refers to extra and special items (in addition to regular compensation) such as nurse hire, training pay, and "travel pay and allowances."[8]

The words "all laws *granting* or *pertaining* to yearly renewable term insurance" refer only to laws which are enactments upon the subject of yearly renewable term insurance. Section 401 did not grant yearly renewable term insurance nor is it an enactment upon that subject. It provided for those soldiers who died in service before they had an opportunity to purchase yearly renewable term insurance or any other type of insurance. This law, therefore, did not pertain to yearly renewable term in-

[6] *United States* v. *Yuginovich,* 256 U. S. 450; *United States* v. *Noce,* 268 U. S. 613; see, *Cope* v. *Cope,* 137 U. S. 682.

[7] See, as to meaning of "allowances," *Jones* v. *United States,* 60 Ct. Cls. 552, 567; *United States* v. *Landers,* 92 U. S. 77.

[8] An illustration of the meaning of "allowances" appears in that Section (17) of the Economy Act which is relied upon as the repeal, to wit: "That, subject to such regulations as the President may prescribe, *allowances may be granted for burial and funeral expenses and transportation of the bodies (including preparation of the bodies) of deceased veterans of any war to the places of burial thereof in a sum not to exceed $107 in any one case.*"

surance but to protection for soldiers who never had and never could obtain yearly renewable term insurance.

It is to be remembered that automatic insurance applied to that particular group of American soldiers who either were killed, died, or became wholly and permanently incapacitated before they had a reasonable opportunity to obtain insurance of any kind. It may be that Congress did not believe it proper to economize at the expense of those veterans who came out of the Army with health completely destroyed or to the detriment of the beneficiaries of soldiers who lost their lives in service without a reasonable opportunity to apply for insurance.

Certainly the reason which prompted the passage of the express provisions of § 401 is such that, in the absence of subsequent legislation equally express, they are not overthrown by mere inference or implication.[9] Only clear and unequivocal language would justify a conclusion that benefits, provided by a grateful government because of death and permanent incapacity of its soldiers, are to be wholly withdrawn for reasons of economy. Special provisions benefiting either soldiers who became incurably helpless in the Army or the dependents of soldiers who died or were killed in the service of their country cannot justifiably be repealed by implication.[10] There is no irreconcilable conflict between § 401 and the Economy Act and effect can reasonably be given to both.[11] The judgment of the Court of Appeals is therefore

Affirmed.

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

---

[9] *Rosencrans* v. *United States,* 165 U. S. 257.

[10] Cf. *United States* v. *Greathouse,* 166 U. S. 601.

[11] Cf. *Washington* v. *Miller,* 235 U. S. 422, 428; see, also, *Posadas* v. *National City Bank,* 296 U. S. 503 *et seq.*

DECISIONS PER CURIAM, ETC., FROM OCTOBER 4, 1937, THROUGH JANUARY 17, 1938.*

No. 32. ROSS, RECEIVER, *v.* KNOTT, TREASURER OF FLORIDA, ET AL. October 4, 1937. M. G. McNair, present Receiver of the First National Bank of Perry, substituted as the party petitioner in place of Iron Ross, former Receiver, on motion of *Mr. George P. Barse* for the petitioner. Reported below: 87 F. (2d) 817.

No. 411. ROYAL INDEMNITY CO. ET AL. *v.* HOAGE, DEPUTY COMMISSIONER, ET AL. October 4, 1937. Frank A. Cardillo, present Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, substituted as a party respondent in place of Robert J. Hoage, former Deputy Commissioner, on motion of *Mr. Frank H. Myers* for the petitioners. Reported below: 67 App. D. C. 142; 90 F. (2d) 387.

No. —, original. EX PARTE ALBERT LÉVITT. Motion for leave to file a petition for an order requiring Mr. Justice Black to show cause why he should be permitted to serve as an Associate Justice of this Court. Decided October 11, 1937. *Per Curiam:* The grounds of this motion are that the appointment of Mr. Justice Black by the President and the confirmation thereof by the Senate of the United States were null and void by reason of his ineligibility under Article I, Section 6, Clause 2, of the Constitution of the United States, and because there was

*MR. JUSTICE CARDOZO participated in the session of December 10, 1937, but, because of illness, was absent throughout the rest of the period covered by this volume. MR. JUSTICE BLACK took no part in the consideration or decision in respect of judgments or orders announced on October 11, 1937, or prior thereto.

For decisions on applications for certiorari, see *post,* pp. 663, 682; for rehearing, *post,* p. 771.

no vacancy for which the appointment could lawfully be made. The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. *Tyler* v. *Judges,* 179 U. S. 405, 406; *Southern Ry. Co.* v. *King,* 217 U. S. 524, 534; *Newman* v. *Frizzell,* 238 U. S. 537, 549, 550; *Fairchild* v. *Hughes,* 258 U. S. 126, 129; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488. The motion is denied. *Mr. Albert Lévitt, pro se.*

No. —, original. Ex parte Patrick Henry Kelley. Motion for hearing on the title of Mr. Justice Black as a member of this Court. Decided October 11, 1937. *Per Curiam:* The motion is denied. *Ex parte Albert Lévitt, supra. Mr. Patrick Henry Kelley, pro se.*

No. 99. Eureka Productions, Inc. *v.* Lehman, Governor, et al. Appeal from the District Court of the United States for the Southern District of New York. Decided October 11, 1937. *Per Curiam:* The motion of the appellees to affirm is granted and the order denying an interlocutory injunction is affirmed. (1) *Alabama* v. *United States,* 279 U. S. 229, 231; *United Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326; *National Accounting Co.* v. *Dorman,* 295 U. S. 718. (2) *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230, 240, 241; *Mutual Film Corp.* v. *Kansas,* 236 U. S. 248, 258. *Mr. Henry Pearlman* for appellant. *Mr. Henry Epstein* for appellees. Reported below: 17 F. Supp. 259.

No. 100. PURE OIL CO. *v.* OKLAHOMA TAX COMMISSION. Appeal from the Supreme Court of Oklahoma. Decided October 11, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 372, 373; *Hicklin* v. *Coney,* 290 U. S. 169, 174–177; *Aero Transit Co.* v. *Georgia Commission,* 295 U. S. 285, 290, 291; *Evans Terry Co.* v. *Mississippi,* 296 U. S. 538. MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case. *Mr. Alvin Richards* for appellant. No appearance for appellee. Reported below: 179 Okla. 479; 66 P. (2d) 1097.

No. 120. WALLS *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina;

No. 376. DALLAO *v.* LOUISIANA; and

No. 377. UGARTE *v.* LOUISIANA. Appeals from the Supreme Court of Louisiana. Decided October 11, 1937. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c), Judicial Code, as amended, 43 Stat. 936, 938, certiorari is denied. The motions for leave to proceed further herein *in forma pauperis* are denied. *Tommie Walls, pro se. Mr. Henry P. Viering* for appellant in No. 376. *Mr. Loys Charbonnet* for appellant in No. 377. No appearance for appellees. Reported below: No. 120, 211 N. C. 487; 191 S. E. 232; Nos. 376 and 377, 187 La. 392; 175 So. 4.

No. 150. WITZELBERG *v.* CINCINNATI ET AL. Appeal from the Supreme Court of Ohio. Decided October 11, 1937. *Per Curiam:* The motion of the appellees to dis-

miss the appeal is granted and the appeal is dismissed (1) for the want of a properly presented federal question. *Clarke* v. *McDade,* 165 U. S. 168, 172; *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U. S. 191, 193; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 343; (2) for the want of a substantial federal question, *Ballard* v. *Hunter,* 204 U. S. 241, 262; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 283. *Mr. Walter M. Schoenle* for appellant. *Mr. John D. Ellis* for appellees. Reported below: 132 Ohio St. 216; 6 N. E. (2d) 2.

No. 159. COLEMAN *v.* CITY OF GRIFFIN. Appeal from the Court of Appeals of Georgia. Decided October 11, 1937. *Per Curiam:* The appeal herein is dismissed (1) for the want of a substantial federal question, *Reynolds* v. *United States,* 98 U. S. 145, 166, 167; *Davis* v. *Beason,* 133 U. S. 333, 342, 343; (2) for the want of a properly presented federal question, *Erie R. Co.* v. *Purdy,* 185 U. S. 148, 154; *Herndon* v. *Georgia,* 295 U. S. 441, 443. *Mr. O. R. Moyle* for appellant. No appearance for appellee. Reported below: 55 Ga. App. 423; 189 S. E. 427.

No. 205. MYERS, ADMINISTRATRIX, *v.* ATCHISON, T. & S. F. RY. CO. Appeal from the Supreme Court of Oklahoma; and

No. 341. COUCHE *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Decided October 11, 1937. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c), Judicial Code, as amended, 43 Stat. 936, 938, certiorari is denied. *Mr. R. R. Bell* for appellant in No.

205. *Mr. Alex W. Swords* for appellant in No. 341. No appearance for appellees. Reported below: No. 205, 179 Okla. 637; 69 P. (2d) 62; No. 341, 187 La. 392; 175 So. 4.

No. 210. NOORMAN *v.* DEPARTMENT OF PUBLIC WORKS & BUILDINGS ET AL. Appeal from the Supreme Court of Illinois. Decided October 11, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Iowa Central R. Co.* v. *Iowa,* 160 U. S. 389, 393; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369, 370; *Kammerer* v. *Kroeger,* 299 U. S. 302, 304. *Mr. Howard F. Bishop* for appellant. *Mr. Otto Kerner* for appellees. Reported below: 366 Ill. 216; 8 N. E. (2d) 637.

No. 254. DIOCESE OF OLYMPIA, INC., *v.* PEMBERTON, SUPERVISOR, ET AL. Appeal from the Supreme Court of Washington. Decided October 11, 1937. *Per Curiam:* The motion for leave to file a supplemental statement as to jurisdiction is granted. The appeal herein is dismissed for the want of a substantial federal question. *Stebbins* v. *Riley,* 268 U. S. 137, 144, 145. *Mr. Ivan L. Hyland* for appellant. No appearance for appellees. Reported below: 189 Wash. 510; 66 P. (2d) 350.

No. 267. VILAS *v.* IOWA STATE BOARD OF ASSESSMENT AND REVIEW ET AL. Appeal from the Supreme Court of Iowa. Decided October 11, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 283, 284; *Zucht* v. *King,* 260 U. S. 174, 176; *Roe* v. *Kansas,* 278 U. S. 191, 192; *Texas & Pacific Ry. Co.* v. *Texas,* 296 U. S. 552. *Mr. Charles E. Pendleton* for appellant. *Mr. Clair E. Hamilton* for appellees. Reported below: 223 Iowa —; 273 N. W. 338.

No. 276. ELKINS ET AL. *v.* LAND TITLE BANK & TRUST CO. ET AL.; and

No. 277. DE GUIGNE ET AL. *v.* LAND TITLE BANK & TRUST CO. ET AL. Appeals from the Supreme Court of Pennsylvania. Decided October 11, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeals is granted and the appeals are dismissed (1) for the want of a properly presented federal question, *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Mississippi Central R. Co.* v. *Aultman,* 296 U. S. 537; and (2) for the reason that the judgments sought herein to be reviewed are based upon a non-federal ground adequate to support them, *Henderson Bridge Co.* v. *Henderson City,* 141 U. S. 679, 688; *McCoy* v. *Shaw,* 277 U. S. 302, 303; *Southern Nebraska Power Co.* v. *Nebraska,* 299 U. S. 520. *Mr. Frank G. Raichle* for appellants. *Messrs. Robert Brigham* and *W. W. Montgomery, Jr.,* for appellees. Reported below: 325 Pa. 373; 190 Atl. 650.

No. 296. POTTER, ADMINISTRATRIX, *v.* YOUNG ET AL. Appeal from the Supreme Court of Arkansas. Decided October 11, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Mississippi Central R. Co.* v. *Aultman,* 296 U. S. 537. *Mr. Osborne W. Garvin* for appellant. *Mr. Thomas S. Buzbee* for appellees. Reported below: 193 Ark. 957; 104 S. W. (2d) 802.

No. 321. JOHNSON, TREASURER OF CALIFORNIA, ET AL. *v.* M. G. WEST CO. Appeal from the District Court of Appeal, 3d Appellate District, of California. Decided October 11, 1937. *Per Curiam:* The motion of the appellee to

dismiss the appeal is granted and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. The petition for certiorari is denied. *Messrs. U. S. Webb* and *H. H. Linney* for appellants. *Mr. Richard W. Young* for appellee. Reported below: 20 Cal. App. (2d) 95; 66 P. (2d) 1211.

No. 373. CARLSON, ADMINISTRATOR, *v.* KESLER ET AL. Appeal from the Supreme Court of Indiana. Decided October 11, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by § 237 (c), Judicial Code, as amended, 43 Stat. 936, 938, certiorari is denied. *Mr. Howard F. Bishop* for appellant. *Mr. Fred H. Bowers* for appellees. Reported below: 103 Ind. App. 350; 198 N. E. 451; 199 *id.* 889.

No. 202, October Term 1935. STONE ET AL., TRUSTEES, *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE. October 11, 1937. It is ordered that the first complete sentence on page 2 of the opinion handed down May 24, 1937, be recast to read as follows:

"A deficiency against the trustees was assessed by the Commissioner before, and was paid by them, under protest, from income of the trust, after collection from the beneficiary had been barred by the statute of limitations."

It is further ordered that the following words be inserted between the word "But" and the word "it" in the eleventh line from the bottom of page 5 of the opinion:

"the demand made upon the trustees was not barred by limitation and".

The petition for rehearing is denied.

Reported as amended, 301 U. S. 532.

No. —, original. Ex parte Henry A. Ilse;

No. —, original. Ex parte John Worster, Jr.; and

No. —, original. Ex parte Atwell Curtis. October 11, 1937. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Victor J. Evans. October 11, 1937. Motion for leave to file petition for writ of mandamus denied.

No. 7, original. Kentucky *v.* Indiana et al. October 11, 1937. Upon consideration of the Report of the State of Indiana, submitted September 1, 1937, in accordance with clause 5 of the decree entered herein on May 19, 1930, [281 U. S. 700] which is received and ordered filed, wherein it is stated that the State of Indiana, through its Highway Commission, has complied with said decree and application is made to be relieved of the duty of filing further reports, and the Commonwealth of Kentucky, by its Attorney General, having consented to the entry of an order granting that application,

It is ordered that the application of the State of Indiana be, and the same is hereby, granted, and that the State of Indiana and its Highway Commission be, and they are hereby, relieved from the requirement of making any further reports herein under clause 5 of said decree.

It is further ordered that this cause be continued and that either party hereto may apply to this Court for any further relief or order consistent with the issues herein.

Messrs. Clifford E. Smith, J. W. Cammack, and *M. B. Holifield* for complainant. *Messrs. Thomas P. Littlepage* and *F. H. Hatfield* for defendants.

No. 303. ATKINSON ET AL. *v.* STATE TAX COMM'N ET AL. October 11, 1937. The Clerk is directed to give notice to the Attorney General of the United States who is requested to present the views of the Government upon the questions (1) as to jurisdiction over the area in which the work of the contractors was performed and (2) whether the state tax imposes a burden upon the Government. Brief may be filed by the Government on or before December 1, 1937 with leave to the respective parties to file briefs in reply on or before December 31, 1937. Reported below: 156 Ore. 461; 67 P. (2d) 161.

No. 849 (October Term 1936). OHIO EX REL. GREEN *v.* KING ET AL. October 11, 1937. The motion for leave to file a third petition for rehearing is denied. *Mr. Carl Green, pro se.* No appearance for respondents. Reported below: 132 Ohio St. 139; 5 N. E. (2d) 407.

No. 423. HANFGARN *v.* MARK. Appeal from the Supreme Court of New York. Decided October 18, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Second Employers' Liability Cases,* 223 U. S. 1, 50; *New York Central R. Co.* v. *White,* 243 U. S. 188, 198; *Silver* v. *Silver,* 280 U. S. 117, 122; *Fearon* v. *Treanor,* 301 U. S. 667. *Mr. A. H. DeYampert* for appellant. No appearance for appellee. Reported below: 274 N. Y. 22; 8 N. E. (2d) 47; 159 Misc. 122; 286 N. Y. S. 335; 249 App. Div. 776; 292 N. Y. S. 1012.

No. 426. J. Bacon & Sons *v.* Martin, Commissioner of Revenue. Appeal from the Court of Appeals of Kentucky. Decided October 18, 1937. *Per Curiam:* The appeal herein is dismissed as it does not appear from the record that there is a final judgment. *Haseltine* v. *Central Bank of Springfield (No. 1)*, 183 U. S. 130, 131; *McComb, Executor,* v. *Commissioners,* 91 U. S. 1; *Moore* v. *Robbins,* 18 Wall. 588; *McGourkey* v. *Toledo & Ohio Central Ry. Co.,* 146 U. S. 536, 545; *Union Mutual Life Ins. Co.* v. *Kirchoff,* 160 U. S. 374, 378; *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339, 345, 346; *American Bakeries Co.* v. *Huntsville,* 299 U. S. 514. *Mr. Charles I. Dawson* for appellant. No appearance for appellee. Reported below: 268 Ky. 612; 105 S. W. (2d) 569.

No. 440. Morris *v.* Alabama. Appeal from the Supreme Court of Alabama. Decided October 18, 1937. *Per Curiam:* The appeal herein is dismissed (1) for the want of a substantial federal question, *Missouri* v. *Lewis,* 101 U. S. 22, 30, 31; *Gardner* v. *Michigan,* 199 U. S. 325, 333, 334; *Fort Smith Light Co.* v. *Paving District,* 274 U. S. 387, 391; *Ohio* v. *Akron Park District,* 281 U. S. 74, 81; (2) for the want of a properly presented federal question, *Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 643; *New York* v. *Kleinert,* 268 U. S. 646, 650; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700. The motion for leave to proceed further *in forma pauperis* is denied. *Samuel J. Morris, pro se.* No appearance for appellee. Reported below: 234 Ala. 520; 175 So. 283.

No. 4. Phillips Pipe Line Co. *v.* Missouri. Appeal from the Supreme Court of Missouri. Argued October 14, 1937. Decided October 18, 1937. *Per Curiam:* The judgment is affirmed. *East Ohio Gas Co.* v. *Tax Commissioner,* 283 U. S. 465, 470, 471; *Southern Gas Corp.* v.

Alabama, 301 U. S. 148, 154. MR. JUSTICE ROBERTS took no part in the consideration and decision of this case. *Mr. H. P. Robinson,* with whom *Messrs. Rayburn L. Foster* and *R. H. Hudson* were on the brief, for appellant. *Messrs. Charles M. Howell, Jr.,* and *Harry G. Waltner, Jr.,* for appellee. Reported below: 339 Mo. 459; 97 S. W. (2d) 109.

No. 12. ANDERSON, RECEIVER, *v.* ATHERTON, ADMINISTRATOR. Certiorari, 300 U. S. 652, to the Circuit Court of Appeals for the Sixth Circuit. Argued October 15, 1937. Decided October 18, 1937. *Per Curiam:* The Court is of the opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross appeal, the question whether common law liability for negligence would support the decree was not before the court for review. *United States* v. *American Express Co.,* 265 U. S. 425, 435, 436; *Langnes* v. *Green,* 282 U. S. 531, 538, 539; *Public Service Commission* v. *Havemeyer,* 296 U. S. 506, 509; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 330; *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, 191. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for the determination of that question. *Messrs. George P. Barse* and *Eugene P. Locke,* with whom *Messrs. E. B. Stroud, Maurice E. Purnell, Arthur Peter,* and *John G. Heyburn* were on the brief, for petitioner. *Mr. John C. Doolan,* with whom *Messrs. Newton D. Baker, Howard F. Burns, William W. Crawford, Allen P. Dodd, Churchill Humphrey, T. Kennedy Helm, Graddy Cary, David R. Castleman, Charles G. Middleton, Huston Quin, Henry E. McElwain, Jr., Thomas A. Barker,* and *Henry J. Tilford* were on the brief, for respondents. *Messrs. T. Kennedy Helm, Edward A. Dodd,* and *Henry J. Tilford* were on a brief for respondents Dr. Oscar E. Block et al. Reported below: 86 F. (2d) 518.

No. —. Ex parte Clarence M. Brummett. October 18, 1937. The application herein is denied.

No. —. Ex parte Sophy Callahan. October 18, 1937. The application herein is denied.

No. 144. Heiner *v.* A. W. Mellon. October 18, 1937. Paul Mellon, David K. E. Bruce, and Donald D. Shepard, Executors of the Estate of A. W. Mellon, substituted as parties respondent in place of A. W. Mellon, deceased, on motion of *Mr. William Wallace Booth* for the respondents. Reported below: 89 F. (2d) 141.

No. 434. South Bend *v.* DeHaven, Treasurer, et al. Appeal from the Supreme Court of Indiana. Decided October 25, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 643; *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Collins* v. *Streitz,* 298 U. S. 640. (2) *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *City of Holton* v. *Kansas State Bank,* 300 U. S. 641. *Messrs. Hawley Burke, Edwin W. Hunter,* and *Harry S. Taylor* for appellant. *Mr. Urban C. Stover* for appellees. Reported below: 212 Ind. —; 7 N. E. (2d) 184.

No. 475. Mississippi Power & Light Co. et al. *v.* Lowe et al. Appeal from the Supreme Court of Mississippi. Decided October 25, 1937. *Per Curiam:* The

appeal herein is dismissed for the want of a substantial federal question. *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30, 36, 37; *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501; *Wisconsin* v. *Zimmerman,* 299 U. S. 504. *Messrs. Marcellus Green, Garner W. Green,* and *Forrest B. Jackson* for appellants. No apearance for appellees. Reported below: 179 Miss. 377; 175 So. 196.

No. 477. PHILLIPS PETROLEUM CO. *v.* IOWA ET AL. Appeal from the Supreme Court of Iowa. Decided October 25, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a substantial federal question. *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, 93, 94; *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 175; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 582, 583. MR. JUSTICE ROBERTS took no part in the consideration or decision of this case. *Messrs. Donald Evans* and *William F. Riley* for appellant. *Messrs. Clair E. Hamilton* and *Leon W. Powers* for appellees. Reported below: See 222 Iowa 1209; 271 N. W. 185, 192.

No. 17. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* NEILL ET AL. Certiorari, 301 U. S. 674, to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas. Argued October 19, 20, 1937. Decided October 25, 1937. *Per Curiam:* As it appears, upon hearing argument, that the only substantial question involved is one of practice under the laws of the State, the writ of certiorari is dismissed. *Mr. Harper Macfarlane,* with whom *Mr. W. L. Matthews* was on the brief, for petitioners. *Mr. H. C. Carter* for respondents. Reported below: 97 S. W. (2d) 279 (Tex. Civ. App.); 100 S. W. (2d) 348 (Tex. Sup.).

No. 437. HINDERLIDER, STATE ENGINEER, ET AL. *v.* LA-PLATA RIVER & CHERRY CREEK DITCH CO. Appeal from the Supreme Court of Colorado. October 25, 1937. Further consideration of the question of the jurisdiction of this Court and of the motion to dismiss is postponed to the hearing of the case on the merits. The Court directs the attention of the Attorney General of the United States to this case, in which the validity of a compact between the States of Colorado and New Mexico of November 27, 1922, approved by Congress on January 29, 1925, is attacked upon the ground that the compact constitutes an unconstitutional interference with the alleged rights of the plaintiff; and the Court invites the Attorney General to submit his views upon the question whether the Act of August 24, 1937, c. 754, 50 Stat. 751, is applicable. *Messrs. Byron G. Rogers, Shrader P. Howell, Jean S. Breitenstein, Ralph L. Carr,* and *R. F. Camalier* for appellants. *Messrs. Reese McCloskey* and *Charles J. Beise* for appellee. Reported below: 101 Colo. 73; 70 P. (2d) 849.

No. 491. REYNOLDS METALS CO. ET AL. *v.* MARTIN ET AL. Appeal from the Court of Appeals of Kentucky. Decided November 8, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 122, 123; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 40; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537; *Union Building Corp.* v. *Conway,* 299 U. S. 515. *Messrs. Charles I. Dawson* and *Edward P. Humphrey* for appellants. No appearance for appellees. Reported below: 269 Ky. 378; 107 S. W. (2d) 251.

No. 509. EUBANK *v.* OHIO. Appeal from the Supreme Court of Ohio. Decided November 8, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Smith* v. *Alabama,* 124 U. S. 465, 480,

482; *Dent* v. *West Virginia,* 129 U. S. 114, 121, 122; *Smith* v. *Texas,* 233 U. S. 630, 636, 637; *Graves* v. *Minnesota,* 272 U. S. 425, 427. *Mr. U. G. Denman* for appellant. *Mr. Herbert S. Duffy* for appellee. Reported below: 132 Ohio St. 434; 8 N. E. (2d) 247; 56 Ohio App. 1; 9 N. E. (2d) 1007.

No. 510. KEACH ET AL. *v.* MCDONALD ET AL. Appeal from the Supreme Court of Kansas. Decided November 8, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 643; *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Collins* v. *Streitz,* 298 U. S. 640; (2) *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393; *French* v. *Taylor,* 199 U. S. 274, 277, 278; *Hebert* v. *Louisiana,* 272 U. S. 312, 316. *Messrs. C. L. Kagey, Hal M. Black,* and *L. M. Kagey* for appellants. *Mr. Charles G. Yankey* for appellees. Reported below: 146 Kan. 121; 68 P. (2d) 1083.

No. 22. MAYER *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 301 U. S. 676, to the Circuit Court of Appeals for the Seventh Circuit. Argued October 19, 1937. Decided November 8, 1937. *Per Curiam:* The judgment is reversed on the authority of *Palmer* v. *Helvering, ante,* p. 63. *Mr. Llewellyn A. Luce* for petitioner. *Assistant Attorney General Morris,* with whom *Solicitor General Reed* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for respondent. Reported below: 86 F. (2d) 593.

No. 13. UNITED GAS PUBLIC SERVICE CO. *v.* TEXAS ET AL. November 8, 1937. Reargument is ordered and the case is set for hearing on Monday, December 13, 1937.

Without restricting argument in other respects, the Court especially desires to hear the parties on the state of the evidence as to the effect of the application of the Commission's rate to the years 1932 and 1933, that is, as to the revenues and expenses for those years on that basis, and as to the effect upon the rights of the appellant, with respect to those years, of the bond given on its appeal to the Commission. *Messrs. John P. Bullington* and *F. G. Coates* for appellant. *Messrs. William McCraw, Alfred M. Scott,* and *Edward H. Lange* for appellees. See 301 U. S. 667. Reported below: 89 S. W. (2d) 1094 (Tex. Civ. App.).

No. 33. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BASHFORD. November 8, 1937. It is ordered that this case be restored to the docket and assigned for reargument. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs Sewall Key* and *Maurice J. Mahoney* for petitioner. *Messrs. Walter G. Moyle, Charles C. Gammons,* and *Ernest L. Wilkinson* for respondent. Reported below: 87 F. (2d) 827.

No. —, original. EX PARTE CHARLES ELMER PHILLIPS. November 8, 1937. The motion for leave to file petition for writ of habeas corpus and the application for bail are denied.

No. —, original. EX PARTE CHARLES W. ATKINS;
No. —, original. EX PARTE CHARLES LEFKOWITZ;
No. —, original. EX PARTE RALPH MARK;
No. —, original. EX PARTE SAMUEL LESSER; and
No. —, original. EX PARTE NAT J. HUMPHRIES. November 8, 1937. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Joseph E. Jones. November 8, 1937. The motion for leave to file a petition for writ of mandamus is denied.

No. 849 (October Term, 1936). Ohio ex rel. Green *v.* King et al. November 8, 1937. The motion for leave to file a fourth petition for rehearing is denied. 301 U. S. 681.

No. 229. Duke *v.* United States. November 8, 1937. Motion of petitioner to stay the order denying petition for writ of certiorari and the order denying petition for rehearing thereof denied. *Mr. Jesse C. Duke, pro se.* Reported below: 90 F. (2d) 840.

No. 28. Texas et al. *v.* Donoghue, Trustee. November 10, 1937. David Donoghue, Trustee, under an order to liquidate, substituted as the party respondent on motion of *Mr. Robert W. Kellough* in that behalf. Reported below: 88 F. (2d) 48.

No. 429. Cramer, Administrator, *v.* Phoenix Mutual Life Ins. Co. et al.;

No. 430. Coburn et al. *v.* Same;

No. 431. Cramer, Administrator, *v.* Aetna Life Ins. Co. et al.; and

No. 432. Coburn et al. *v.* Same. November 12, 1937. Orders denying petition for writs of certiorari withheld on motion of *Mr. Richard S. Doyle* in behalf of counsel for the petitioners. Reported below: 91 F. (2d) 141.

No. —, original. Ex parte Robert G. Taylor et al. November 15, 1937. Motion for leave to file brief denied.

No. —, original. EX PARTE JESSE C. DUKE. November 15, 1937. The motion for leave to file a petition for writ of mandamus is denied.

No. 229. DUKE *v.* UNITED STATES. November 15, 1937. Motion for leave to file affidavit as to bias and prejudice. *Per Curiam:* Upon consideration of the affidavit attached to the motion, the motion is denied. Reported below: 90 F. (2d) 840.

No. 229. DUKE *v.* UNITED STATES. November 15, 1937. The petition to set aside the orders of the Court denying petition for writ of certiorari and petition for rehearing is denied. The motion for reconsideration of the motion to stay the order denying petition for writ of certiorari and the order denying petition for rehearing is denied. Reported below: 90 F. (2d) 840.

Nos. 353 and 354. RYAN ET AL. *v.* NEWFIELD; and

No. 355. FLORIDA TEX OIL CO. ET AL. *v.* BALLENTINE. November 15, 1937. The motion for leave to file a second petition for rehearing and suggestion of disqualification is denied.

No. 31. VOGT, SHERIFF, *v.* MURPHY. November 17, 1937. Ennis J. Kenney, present Sheriff of Kenton County, substituted as the party petitioner in place of Louis Vogt, resigned, on motion of *Mr. D. M. Outcalt* for the petitioner. See 301 U. S. 677.

No. 45. PHILLIPS-JONES CORP. ET AL. *v.* PARMLEY ET AL. November 19, 1937. Lottie E. Parmley, Executrix of the Estate of C. S. Parmley, substituted as a party

respondent in place of C. S. Parmley, deceased, on motion of *Mr. Robert T. McCracken* for the petitioners. Reported below: 88 F. (2d) 958.

No. 35. NATIONAL CITY BANK *v.* PHILIPPINE ISLANDS. Certiorari, 301 U. S. 677, to the Supreme Court of the Philippines. Argued November 16, 1937. Decided November 22, 1937. *Per Curiam:* The judgment of the Supreme Court of the Philippines is reversed and the judgment of the Court of First Instance of Manila, dated the 24th day of July 1934, is affirmed upon the authority of *First National Bank* v. *California,* 262 U. S. 366; *Domenech* v. *National City Bank,* 294 U. S. 199, 204, 205; and *Posadas* v. *National City Bank,* 296 U. S. 497, 499, 500. *Mr. Carl A. Mead* for petitioner. *Mr. Raymond A. Walsh,* with whom *Messrs. Harry B. Hawes* and *Bon Geaslin* were on the brief, for respondent.

No. 565. TOOLE *v.* MINERS SAVINGS BANK. Appeal from the Supreme Court of Pennsylvania. Decided November 22, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 643; *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Collins* v. *Streitz,* 298 U. S. 640. *Mr. W. L. Pace* for appellant. No appearance for appellee. Reported below: 326 Pa. 367; 192 Atl. 246.

No. 268. EMERY BIRD THAYER DRY GOODS CO. ET AL. *v.* WILLIAMS ET AL.; and

No. 269. WILLIAMS ET AL. *v.* EMERY BIRD THAYER DRY GOODS CO. ET AL. On certificate from the Circuit Court of Appeals for the Eighth Circuit. Decided No-

vember 22, 1937. *Per Curiam:* The motion to bring up the entire record and cause is denied. Upon examination of the certificate, the certificate is dismissed. *Jewell* v. *Knight,* 123 U. S. 426, 433; *Baltimore & O. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216, 221; *Biddle* v. *Luvisch,* 266 U. S. 173; *Smith* v. *Ajax Pipe Line Co.,* 298 U. S. 641; *Dixie Terminal Co.* v. *United States,* 298 U. S. 645. *Messrs. Armwell L. Cooper* and *Frederick H. Wood* for Emery Bird Thayer Dry Goods Co. et al., and *Messrs. Henry M. Channing* and *Barton Corneau* for Moses Williams et al. Reported below: 15 F. Supp. 938.

No. 31. KENNEY, SHERIFF, *v.* MURPHY. Certiorari, 301 U. S. 677 (No. 909), to the Circuit Court of Kenton County, Kentucky. Argued November 17, 1937. Decided November 22, 1937. *Per Curiam:* After hearing argument the Court is of the opinion that the motion of the respondent to dismiss the writ of certiorari should be granted, and the writ is accordingly dismissed for the want of jurisdiction. *McKnight* v. *James,* 155 U. S. 685; *Lambert* v. *Barrett,* 157 U. S. 697, 699, 700; *Weldington* v. *Sloan,* 54 Ky. 147; *Broadwell* v. *Commonwealth,* 98 Ky. 15; *Proffer* v. *Stewart,* 259 Ky. 445. *Mr. Charles I. Dawson,* with whom *Messrs. S. H. Brown* and *Orie S. Ware* were on the brief, for respondent. *Mr. D. M. Outcalt,* with whom *Messrs. Simon L. Leis* and *Carson Hoy* were on the brief, for petitioner.

No. 40. AETNA INSURANCE CO. *v.* ILLINOIS CENTRAL R. CO. Certiorari, 301 U. S. 679, to the Supreme Court of Illinois. Argued November 18, 1937. Decided November 22, 1937. *Per Curiam:* After hearing argument the Court is of the opinion that the decision of the state court rests upon a non-federal ground adequate to support it. *Hen-*

derson Bridge Co. v. *Henderson City,* 141 U. S. 679, 688; *Enterprise Irrig. District* v. *Canal Co.,* 243 U. S. 157, 164; *McCoy* v. *Shaw,* 277 U. S. 302, 303; *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210. The writ of certiorari is dismissed. *Mr. Melvin L. Griffith,* with whom *Mr. George M. Stevens* was on the brief, for petitioner. *Messrs. John W. Freels, Edward C. Craig,* and *Charles A. Helsell* were on the brief for respondent. Reported below: 365 Ill. 303; 6 N. E. (2d) 189.

No. 13, original. Ex parte Heymann et al. Certiorari, *post,* p. 663, to the Circuit Court of Appeals for the Seventh Circuit. Argued November 11, 12, 1937. Decided November 22, 1937. *Per Curiam:* After hearing argument the Court is of the opinion that it does not appear from the record that the Circuit Court of Appeals abused its discretion in refusing leave to appeal. The writ of certiorari is accordingly dismissed. *Mr. Walter E. Wiles,* with whom *Mr. John M. Lee* was on the brief, for petitioners. *Mr. Irving H. Flamm,* with whom *Mr. Meyer Abrams* was on the brief, for respondents. Reported below: 92 F. (2d) 822.

No. —. Ex parte Paysoff Tinkoff. Petition to extend time to file petition for certiorari. Decided November 22, 1937. *Per Curiam:* The petition is denied. *Finn* v. *Railroad Commission,* 286 U. S. 559. Reported below: 86 F. (2d) 868.

No. —, original. Ex parte Floyd Scrum. November 22, 1937. The motion for leave to file a petition for writ of habeas corpus is denied, without prejudice to appropriate application to the United States District Court for the Northern District of Georgia.

No. —, original. Ex parte John J. Coleman. November 22, 1937. The motion for leave to file petition for writ of habeas corpus is denied.

No. —, original. Ex parte Robert Gray Taylor et al. November 22, 1937. The motion for leave to file brief is denied.

No. —, original. Ex parte Victor J. Evans. November 6, 1937. The motion for leave to file petition for writ of habeas corpus is denied.

No. —. Commercial Telegraphers' Union *v.* Madden et al. December 6, 1937. The application for stay pending determination of petition for writ of certiorari is denied.

No. 396. Kellogg Company *v.* National Biscuit Co. December 6, 1937. The petition to stay injunction is denied. *Messrs. W. H. Crichton-Clarke, Edward S. Rogers,* and *Robert T. McCracken* for petitioner. *Messrs. Thomas G. Haight, David A. Reed, Drury W. Cooper,* and *Charles A. Vilas* for respondent. Reported below: 91 F. (2d) 150.

No. 21. Groman *v.* Commissioner of Internal Revenue. December 6, 1937. The opinion filed November 8, 1937, is amended by striking from the second paragraph on page 5 thereof the sentence "Glidden transferred nothing to them.", and by striking from the next sentence but one the words "and prior preference stock,". The petition for rehearing is denied. Reported as amended, *ante,* p. 82.

No. 544. HORNBLOWER ET AL. *v.* MCGRAY. Appeal from the Superior Court of Massachusetts. Decided December 13, 1937. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. *First National Bank* v. *Missouri,* 263 U. S. 640, 656; *Lewis* v. *Fidelity Co.,* 292 U. S. 559, 566; *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 219. *Messrs. Edward C. Park* and *Lothrop Withington* for appellants. *Mr. Milton Gordon* for appellee. Reported below: 10 N. E. (2d) 501.

No. 569. BARNETT *v.* ROGERS, SHERIFF. Appeal from the Supreme Court of Oklahoma. Decided December 13, 1937. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Brooks* v. *Missouri,* 124 U. S. 394, 400; *John* v. *Paullin,* 231 U. S. 583, 585; *Nevada-California-Oregon Ry.* v. *Burres,* 244 U. S. 103, 105; *Central Union Co.* v. *Edwardsville,* 269 U. S. 190, 195; *Kammerer* v. *Kroeger,* 299 U. S. 302. *Mr. J. D. Lydick* for appellant. No appearance for appellee. Reported below: 180 Okla. 208; 69 P. (2d) 643.

No. 590. EHLERS *v.* NEBRASKA. Appeal from the Supreme Court of Nebraska. Decided December 13, 1937. *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, as required by § 237 (c), Judicial Code, as amended, 43 Stat. 936, 938, certiorari is denied. *Mr. Eugene D. O'Sullivan* for appellant. No appearance for appellee. Reported below: 133 Neb. 241; 274 N. W. 570.

No. 610. LEOLES *v.* LANDERS ET AL. Appeal from the Supreme Court of Georgia. Decided December 13, 1937. *Per Curiam:* The motion of the appellees to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. *Coale* v. *Pearson,* 290 U. S. 597; *Hamilton* v. *Regents,* 293 U. S. 245, 261, 262. *Messrs. O. R. Moyle* and *Martin Conboy* for appellant. *Mr. J. C. Murphy* for appellees. Reported below: 184 Ga. 580; 192 S. E. 218.

No. 620. DUTTON *v.* CALIFORNIA. Appeal from the Supreme Court of California. Decided December 13, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Carlesi* v. *New York,* 233 U. S. 51; *Moore* v. *Missouri,* 159 U. S. 673, 678; *McDonald* v. *Massachusetts,* 180 U. S. 311, 312, 313; *Graham* v. *West Virginia,* 224 U. S. 616, 623. The motion for leave to preceed further *in forma pauperis* is denied. *Mr. Charles Dutton, pro se.* No appearance for appellee. Reported below: 9 Cal. (2d) 505; 71 P. (2d) 218.

No. 414. LEADER ET AL. *v.* APEX HOSIERY CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. Decided December 13, 1937. *Per Curiam:* Upon consideration of the return of the petitioners to the rule to show cause, the petition for writ of certiorari is granted, the decree of the Circuit Court of Appeals reversed, and the cause is remanded to the District Court with directions to vacate its decree and to dismiss the bill of complaint upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U. S. 216, 217, 218; *Alejandrino* v. *Quezon,* 271 U. S. 528, 535, 536; *Bracken* v. *Securities & Exchange Comm'n,* 299 U. S. 504. *Messrs. Samuel L. Einhorn* and *Nathan Ziserman* for petitioners. *Mr. Stanley Folz* for respondent. Reported below: 90 F. (2d) 155.

No. —, original. DAVIDSON *v.* CALIFORNIA. December 13, 1937. The motion for leave to file the Bill of Complaint herein is denied. The motion for leave to proceed *in forma pauperis* is denied.

No. —, original. MISSOURI *v.* IOWA. December 13, 1937. The motion for leave to file the Bill of Complaint herein is granted and process is ordered to issue returnable on Monday, February 14, 1938. *Mr. Roy McKittrick,* Attorney General of Missouri, *Mr. Frank W. Hayes,* Assistant Attorney General, *Mr. M. E. Casey,* and *Ruth L. Waltner* for complainant.

No. —, original. EX PARTE LLOYD RUBIN. December 13, 1937. The motion for leave to file petition for writ of habeas corpus is denied.

No. 660 (October Term, 1936). LINDSEY ET AL. *v.* WASHINGTON. December 13, 1937. The motion to recall the mandate is denied, without prejudice to appropriate application to the proper state court. See s. c. 301 U. S. 397.

No. 63. UNITED STATES ET AL. *v.* GRIFFIN ET AL., RECEIVERS. Appeal from the District Court of the United States for the Southern District of Georgia. December 13, 1937. The Court is of the opinion that it has jurisdiction of the appeal. Reargument is ordered, and the cause is assigned for argument upon the merits. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Elmer B. Collins, Daniel W. Knowlton,* and *Edward M. Reidy* for appellants. *Messrs. Gregory Hankin, Moultrie Hitt,* and *G. Kibby Munson* for appellees.

No. 616. West Brothers Brick Co. *v.* Alexandria. Appeal from the Supreme Court of Appeals of Virginia. Decided December 20, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Euclid* v. *Ambler Co.,* 272 U. S. 365, 387, 388; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 327, 328; *Lewis* v. *Mayor,* 290 U. S. 585. *Mr. John S. Barbour* for appellant. *Messrs. Thomas B. Gay* and *Lewis F. Powell, Jr.,* for appellee. Reported below: 169 Va. 271; 192 S. E. 881.

No. 39. Woodring, Secretary of War, et al. *v.* Clarksburg-Columbus Short Route Bridge Co. Certiorari, 301 U. S. 679, to the Court of Appeals for the District of Columbia. Decided December 20, 1937. *Per Curiam:* The motion of the petitioners to reverse the judgment and remand the cause to the United States District Court for the District of Columbia, with instructions to dismiss the bill, is granted, and the judgment of the Court of Appeals is reversed, and the cause remanded to the District Court with instructions to dismiss the bill of complaint upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U. S. 216, 217, 218; *Alejandrino* v. *Quezon,* 271 U. S. 528, 535, 536; *Bracken* v. *Securities & Exchange Comm'n,* 299 U. S. 504. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. J. Frank Staley* and *Paul A. Sweeney* for petitioners. *Mr. George D. Horning, Jr.,* for respondent. Reported below: 67 App. D. C. 44; 89 F. (2d) 788.

No. —. Ex parte Basil H. Pollitt. December 20, 1937. Applications denied.

No. 11, original. Texas *v.* New Mexico et al. December 20, 1937. Upon consideration of the motion of

the complainant State, presented by Charles Warren, Special Master herein, to defer hearings before the Special Master, and of the communication of the Special Assistant Attorney General of the State of New Mexico stating that the State of New Mexico and the attorneys for the Middle Rio Grande Conservancy District agreed to a continuance, it is ordered that further hearings before the Special Master be deferred until April 1, 1938, or such date thereafter as the Special Master shall determine. *Messrs. Richard F. Burges, William McCraw,* and *H. Grady Chandler* for complainant. *Messrs. Frank H. Patton, A. T. Hannett, Pearce C. Rodey,* and *Richard H. Hanna* for defendants.

No. 622. SPEECE *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. Decided January 3, 1938. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended, 43 Stat. 936, 938, certiorari is denied. *Mr. Jacob G. Grossberg* for appellant. *Mr. Otto Kerner* for appellee. Reported below: 367 Ill. 76; 10 N. E. (2d) 379.

No. —, original. EX PARTE FLORENCE F. GREAVES STONE ET AL. January 3, 1938. The motion for leave to file petition for writ of mandamus is denied.

No. —, original. EX PARTE LOUIS BERMAN. January 3, 1938. The motion for leave to file petition for writ of habeas corpus is denied.

No. 621. CHASE SECURITIES CORP. *v.* HUSBAND, COMMISSIONER OF BANKS, ET AL. Appeal from the Superior Court of Massachusetts. Decided January 10, 1938. *Per Curiam:* The motion for leave to file brief in opposition to the motion to dismiss or affirm is granted. The motion of the appellees to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *First National Bank* v. *Missouri,* 263 U. S. 640, 656; *Lewis* v. *Fidelity Co.,* 292 U. S. 559, 566; *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 219; *Hornblower* v. *McGray, ante,* p. 655. (2) *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 357; *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 363; *Union Dry Goods Co.* v. *Georgia P. S. Corp.,* 248 U. S. 372, 375, 376; *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 437, 438. *Messrs. John L. Hall, Richard Wait,* and *Marcien Jenckes* for appellant. *Mr. Joseph B. Abrams* for appellees. Reported below: 10 N. E. (2d) 472.

No. —, original. EX PARTE MAURO PIERGIOVANNI. January 10, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. EX PARTE ELMER O'NEILL. January 10, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. EX PARTE RALPH MARK. January 10, 1938. Motion for leave to file petition for writ of mandamus denied.

No. 1, original. GEORGIA *v.* TENNESSEE COPPER CO. ET AL. January 10, 1938. The joint motion to dismiss the Bill of Complaint is granted. Decree to be settled on notice. *Messrs. John C. Hart, Ligon Johnson, H. A. Hall,*

Thomas S. Felder, and *J. A. Drake* for complainant. *Messrs. Martin A. Vogel, Howard Cornick, John A. Franz, James G. Parks, Joseph B. Wright, J. A. Fowler, C. M. Seymour, W. B. Miller, John D. Little, A. G. Powell, Marion Smith, Max F. Goldstein,* and *William Butt* for defendants.

No. 437. Hinderlider, State Engineer, et al. *v.* LaPlata River & Cherry Creek Ditch Co. January 10, 1938. Upon consideration of the memorandum of the Attorney General of the United States, filed at the request of the Court embodied in the order of October 25, 1937, and in view of the Act of August 24, 1937, c. 754, 50 Stat. 751, the Court hereby certifies to the Attorney General of the United States that the constitutionality of a compact, affecting the public interest, between the States of Colorado and New Mexico of November 27, 1922, approved by Congress on January 29, 1925, is drawn in question in this cause. Reported below: 101 Colo. 73; 70 P. (2d) 849.

No. 14. Federal Trade Commission *v.* Standard Education Society et al. January 10, 1938. The motion of the respondents to amend the opinion (*ante,* p. 112) is denied.

No. 334. Rainier National Park Co. *v.* Martin, Governor. Appeal from the District Court of the United States for the Western District of Washington. Argued January 11, 12, 1938. Decided January 17, 1938. *Per Curiam:* Judgment affirmed. *Mid-Northern Co.* v. *Montana,* 268 U. S. 45. *Mr. F. D. Metzger,* with whom *Mr. Edgar N. Eisenhower* was on the brief, for appellant. *Mr. R. G. Sharpe* for appellee. Reported below: 18 F. Supp. 481.

No. —, original. Ex parte Charles Lefkowitz. January 17, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte J. R. Palmer. January 17, 1938. Motion for leave to file petition for writ of habeas corpus denied.

No. 12, original. Texas *v.* Florida et al. January 17, 1938. Upon consideration of the motion of Mabel Harlow Green that the bill of complaint in this cause be dismissed as to her, and of the stipulation of the parties to the cause, attached thereto, consenting to the granting of such relief, the motion is granted and the bill of complaint is dismissed as to the said Mabel Harlow Green, without costs as to her.

No. 476. Reardanz *v.* Connecticut Mutual Life Ins. Co. et al. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit dismissed for failure to comply with the rules. *Mr. Samuel E. Cook* for petitioner. No appearance for respondents. Reported below: 91 F. (2d) 410.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 4, 1937, THROUGH JANUARY 17, 1938.

No. —, original. Ex parte L. H. Heymann et al. October 11, 1937. Motion for leave to file petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. The petition for writ of certiorari is also granted. *Messrs. John M. Lee* and *Walter E. Wiles* for petitioners. *Messrs. Irving H. Flamm* and *Myer Abrams* for respondents. Reported below: 92 F. (2d) 822.

No. 378. Maty, Administratrix, *v.* Grasselli Chemical Co. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. October 11, 1937. Motion for consideration of the petition for writ of certiorari on typewritten petition and record, and petition for writ of certiorari, granted. The Clerk is directed to print the record and petition for writ of certiorari. *Messrs. Charles L. Guerin, Thomas F. Gain,* and *Francis Shunk Brown* for petitioner. *Messrs. Louis Rudner* and *Carl E. Geuther* for respondent. Reported below: 89 F. (2d) 456.

No. 121. Lonergan *v.* United States. October 11, 1937. 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,* granted. *Mr. Pierce Lonergan, pro se. Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, J. Albert Woll,* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 591.

No. 41. STANDARD ACCIDENT INSURANCE CO. *v.* UNITED STATES FOR THE USE AND BENEFIT OF POWELL ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. George W. Wylie* for petitioner. *Messrs. Peter O. Knight* and *C. Fred Thompson* for respondents. Reported below: 89 F. (2d) 658.

No. 48. UNITED STATES *v.* ANDREWS, EXECUTRIX. October 11, 1937. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Reed* for the United States. *Mr. Fred R. Seibert* for respondent. Reported below: 17 F. Supp. 980.

No. 55. BIDDLE *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Forrest Hyde, William R. Perkins,* and *William R. Spofford* for petitioner. *Solicitor General Reed* for respondent. Reported below: 86 F. (2d) 718.

No. 57. LANASA FRUIT STEAMSHIP & IMPORTING CO. *v.* UNIVERSAL INSURANCE CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. George Forbes* and *Henry L. Wortche* for petitioner. *Messrs. D. Roger Englar* and *Frank B. Ober* for respondent. Reported below: 89 F. (2d) 545.

No. 72. CROWN CORK & SEAL CO. *v.* FERDINAND GUTMANN CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. *Messrs. John J. Darby* and *Thomas G. Haight* for petitioner. *Mr. William E. Warland* for respondent. Reported below: 86 F. (2d) 698.

No. 90. McCart et al. *v.* Indianapolis Water Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Urban C. Stover, Floyd J. Mattice, Edward H. Knight,* and *James E. Deery* for petitioners. *Messrs. William L. Ransom, G. R. Redding,* and *Joseph J. Daniels* for respondent. Reported below: 89 F. (2d) 522.

No. 106. Minnesota Tea Co. *v.* Helvering, Commissioner of Internal Revenue. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. James E. Nye* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 89 F. (2d) 711.

No. 123. Adams, Receiver, et al. *v.* Nagle et al.; and

No. 124. Adams, Receiver, *v.* Tobias et al. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Brice Clagett, Charles E. Wainwright, Charles W. Matten,* and *George P. Barse* for petitioners. *Messrs. Edward W. Madeira* and *Samuel B. Schofield* for respondents. Reported below: 88 F. (2d) 936.

No. 128. Helvering, Commissioner of Internal Revenue, *v.* Therrell. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the

Fifth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Harry M. Voorhis* for respondent. Reported below: 88 F. (2d) 869.

No. 129. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TUNNICLIFFE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Harry M. Voorhis* for respondent. Reported below: 88 F. (2d) 873.

No. 138. UNITED STATES *v.* McGOWAN ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for the United States. *Mr. George A. Montrose* for respondents. Reported below: 89 F. (2d) 201.

No. 140. CREEK NATION *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Paul M. Neibell* and *W. W. Spalding* for petitioner. *Solicitor General Reed* and *Assistant Attorney General McFarland* for the United States. Reported below: 84 Ct. Cls. 12. See also 295 U. S. 103.

No. 143. UNITED STATES *v.* STEVENS, ADMINISTRATRIX, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for the United States. *Messrs. Charles B. Rugg* and *Warren F. Farr* for petitioners. Reported below: 89 F. (2d) 151.

No. 146. UNITED STATES *v.* RAYNOR; and

No. 147. SAME *v.* FOWLER. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for the United States. *Messrs. George R. Jeffrey, John Elliott Byrne,* and *W. H. F. Millar* for respondents. Reported below: 89 F. (2d) 469.

No. 167. BLACKTON *v.* GORDON. October 11, 1937. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey granted. *Mr. Clement K. Corbin* for petitioner. *Mr. John W. Ockford* for respondent. Reported below: 117 N. J. L. 40; 186 Atl. 689; 118 N. J. L. 159; 191 Atl. 761.

No. 181. MYERS ET AL. *v.* BETHLEHEM SHIPBUILDING CORP.; and

No. 182. MYERS ET AL. *v.* MACKENZIE ET AL. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* and *Mr. Charles Fahy* for petitioners. *Messrs. Frederick H. Wood, John L. Hall, Claude R. Branch,* and *E. Fontaine Brown* for respondents in No. 181. *Messrs. B. A. Brickley, Alexander G. Gould,* and *Oliver R. Waite* for respondents in No. 182. Reported below: 88 F. (2d) 154.

No. 189. FOSTER ET AL., EXECUTORS, *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Hugh C. Bickford, William P. McCool, R. Kemp Slaughter,* and *C. Clifton Owens* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 84 Ct. Cls. 193; 17 F. Supp. 191.

No. 190. NARDONE ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Louis Halle, Joseph P. Nolan,* and *Thomas O'R. Gallagher* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 90 F. (2d) 630.

No. 197. ADAM *v.* SAENGER ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, granted. *Mr. M. G. Adams* for petitioner. *Mr. Oliver J. Todd* for respondents. Reported below: 101 S. W. (2d) 1046.

No. 215. TAX COMMISSIONER *v.* WILBUR ET AL., CO-TRUSTEES. October 11, 1937. Petition for writ of certiorari to the Court of Appeals of Cuyahoga County, Ohio, granted. *Messrs. Herbert S. Duffy, A. F. O'Neil, Will P. Stephenson,* and *W. H. Middleton, Jr.,* for petitioner. *Messrs. Harold T. Clark, Atlee Pomerene,* and *Edwin H. Chaney* for respondents.

No. 218. MUNRO *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. George Clinton, Jr.,* and *Alger A. Williams* for petitioner. *Solicitor General Reed,* and *Messrs. Julius C. Martin, Wilber C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for the United States. Reported below: 89 F. (2d) 614.

No. 231. UNITED STATES *v.* ESNAULT-PELTERIE. October 11, 1937. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Reed* for the United

States. *Messrs. Eugene V. Myers, R. Keith Kane, Edwin J. Pringle,* and *George J. Bean* for respondent. Reported below: 84 Ct. Cls. 625, 638.

No. 242. Compania Espanola de Navegacion Maritima, S. A. *v.* The Navemar et al. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. T. Catesby Jones, D. Roger Englar, Oscar R. Houston,* and *James W. Ryan* for petitioner. *Messrs. Charles W. Hagen, Anthony V. Lynch, Jr.,* and *Horace T. Atkins,* for respondents. Reported below: 90 F. (2d) 673.

No. 274. Saint Paul Mercury Indemnity Co. *v.* Red Cab Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Burke G. Slaymaker* for petitioner. *Mr. William E. Reiley* for respondent. Reported below: 90 F. (2d) 229.

No. 293. Lauf et al. *v.* E. G. Shinner & Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Morris Fromkin* for petitioners. *Mr. Walter L. Gold* for respondent. Reported below: 90 F. (2d) 250.

No. 300. St. Louis, B. & M. Ry. Co. et al. *v.* Brownsville Navigation District et al. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. H. Tallichet, Robert H. Kelley,* and *John P. Bullington* for petitioners. *Messrs. A. B. Cole, A. L. Reed,* and *Carl B. Callaway* for respondents. Reported below: 91 F. (2d) 502.

No. 301. GUARANTY TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John W. Davis, Montgomery B. Angell,* and *Weston Vernon, Jr.,* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 89 F. (2d) 692.

No. 324. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MITCHELL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Mr. William Wallace* for respondent. Reported below: 89 F. (2d) 873.

No. 323. NEW YORK LIFE INSURANCE CO. *v.* GAMER, EXECUTRIX. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. M. S. Gunn* and *J. A. Poore* for petitioner. *Messrs. Francis P. Kelly* and *William Meyer* for respondent. Reported below: 90 F. (2d) 817.

No. 342. MCCOLLUM, TRUSTEE IN BANKRUPTCY, *v.* HAMILTON NATIONAL BANK. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Tennessee granted. *Messrs. J. W. Thompson* and *Joseph B. Roberts* for petitioner. *Mr. J. B. Sizer* for respondent.

No. 346. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BOWERS, ADMINISTRATRIX. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor*

General Reed for petitioner. *Messrs. Jay E. Darlington* and *William N. Haddad* for respondent. Reported below: 90 F. (2d) 790.

No. 349. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BULLARD, EXECUTOR. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Samuel S. Holmes, Lorentz B. Knouff,* and *William D. Mitchell* for respondent. Reported below: 90 F. (2d) 144.

No. 352. UNITED STATES *v.* ILLINOIS CENTRAL R. Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Reed* for the United States. Messrs. *Arthur A. Moreno, Selim B. Lemle, Charles N. Burch, H. D. Minor,* and *Clinton H. McKay* for respondent. Reported below: 90 F. (2d) 213.

No. 367. ERIE RAILROAD CO. *v.* TOMPKINS. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Harold W. Bissell, William C. Cannon,* and *Theodore Kiendl* for petitioner. *Mr. Alexander L. Strouse* for respondent. Reported below: 90 F. (2d) 603.

No. 262. UNITED STATES *v.* GARBUTT OIL CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for the United States. *Messrs. John B. Milliken* and *Llewellyn A. Luce* for respondent. Reported below: 89 F. (2d) 749.

No. 108. CHRISTOPHER, EXECUTOR, ET AL. *v.* BRUSSELBACK ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE BRANDEIS took no part in the consideration and decision of this application. *Messrs. Wellmore B. Turner, Roy G. Fitzgerald, Robert E. Cowden, Howard P. Williamson, Joseph W. Sharts, Eugene G. Kennedy, Irvin G. Bieser, F. N. R. Redfern,* and *James E. Thomas* for petitioners. *Messrs. J. Arthur Miller* and *George R. Murray* for respondents. Reported below: 87 F. (2d) 761.

No. 287. MCLOUGHLIN *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed* for respondent. Reported below: 89 F. (2d) 699.

No. 144. HEINER, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* A. W. MELLON; and

No. 145. SAME *v.* JENNIE KING MELLON ET AL. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration and decision of this application. *Solicitor General Reed* for petitioner. *Messrs. William Wallace Booth, John G. Frazer,* and *Donald D. Shepard* for respondents. Reported below: 89 F. (2d) 141.

No. 198. UNITED STATES *v.* MACHEN. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Reed* for the United States. *Mr. H. Vernon Eney* for respondent. Reported below: 87 F. (2d) 594.

No. 305. NEWPORT NEWS SHIPBUILDING & DRY DOCK Co. *v.* SCHAUFFLER ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Fred H. Skinner, H. H. Rumble,* and *John Marshall* for petitioner. *Solicitor General Reed,* and *Messrs. A. H. Feller* and *Charles Fahy* for respondents. Reported below: 91 F. (2d) 730.

No. 199. UNITED STATES *v.* JACKSON. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the first question presented by the petition. *Solicitor General Reed* for the United States. *Messrs. Warren E. Miller* and *R. K. Wise* for respondent. Reported below: 89 F. (2d) 572.

No. 208. LEITCH MANUFACTURING Co. *v.* BARBER COMPANY. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Samuel Ostrolenk* for petitioner. *Messrs. Frank S. Busser* and *George J. Harding* for respondent. Reported below: 89 F. (2d) 960.

No. 202. HARRY FLEISHER *v.* UNITED STATES;

No. 203. SAM FLEISHER *v.* SAME; and

No. 204. STEIN *v.* SAME. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted, limited to the question whether the first count of the indictment states an offense under federal law. *Messrs. Isidore G. Stone, Alfred A. May,* and *Arthur H. Ratner* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 91 F. (2d) 404.

32094°—38——43

No. 357. GENERAL TALKING PICTURES CORP. *v.* WESTERN ELECTRIC CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Samuel E. Darby, Jr.,* for petitioner. *Messrs. Merrell E. Clark* and *Henry R. Ashton* for respondents. Reported below: 91 F. (2d) 922.

No. 319. MOOKINI ET AL. *v.* UNITED STATES. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. O. P. Soares* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 92 F. (2d) 126.

No. 362. CENTURY INDEMNITY CO. *v.* NELSON. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Oliver Dibble* and *Jewel Alexander* for petitioner. *Mr. Joe G. Sweet* for respondent. Reported below: 90 F. (2d) 644.

No. 365. ADAIR *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. William Lemke* and *Harold M. Sawyer* for petitioner. *Messrs. William C. Day* and *Hugo A. Steinmeyer* for respondent. Reported below: 90 F. (2d) 750.

No. 375. HASSETT *v.* WELCH ET AL., EXECUTORS. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted.

Solicitor General Reed for petitioner. *Messrs Henry Hixon Meyer, Edward C. Thayer, John L. Hall,* and *Claude R. Branch* for respondents. Reported below: 90 F. (2d) 833.

No. 374. TICONIC NATIONAL BANK ET AL. *v.* SPRAGUE ET AL. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted, limited to the question as to the allowance of interest. *Messrs. George P. Barse, F. Harold Dubord,* and *Trevor V. Roberts* for petitioners. *Mr. Harvey D. Eaton* for respondents. Reported below: 87 F. (2d) 365.

No. 387. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BANKLINE OIL CO.; and

No. 388. BANKLINE OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 25, 1937. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for the Commissioner. *Mr. A. L. Weil* for the Bankline Oil Co. Reported below: 90 F. (2d) 899.

No. 397. DUKE POWER CO. ET AL. *v.* GREENWOOD COUNTY ET AL. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Newton D. Baker, W. S. O'B. Robinson, Jr., R. T. Jackson, W. R. Perkins, H. J. Haynesworth, J. H. Marion,* and *W. B. McGuire, Jr.,* for petitioners. *Solicitor General Reed* for respondent Ickes. *Messrs. W. H. Nicholson* and *D. W. Robinson, Jr.,* for respondents Greenwood County and its Finance Board. Reported below: 91 F. (2d) 665.

No. 406. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* O'DONNELL. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Thomas R. Dempsey* and *A. Calder Mackay* for respondent. Reported below: 90 F. (2d) 907.

No. 413. NATIONAL LABOR RELATIONS BOARD *v.* PENNSYLVANIA GREYHOUND LINES, INC., ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* and *Mr. Charles Fahy* for petitioner. *Messrs. Ivan Bowen, Charles H. Young,* and *Mortimer H. Boutelle* for respondents. Reported below: 91 F (2d) 178.

No. 445. UNITED STATES *v.* PATRYAS. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for the United States. *Messrs. Warren E. Miller* and *Stephen A. Cross* for respondent. Reported below: 90 F. (2d) 715.

No. 453. GENERAL ELECTRIC CO. *v.* WABASH APPLIANCE CORP. ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Merrell E. Clark* and *Hubert Howson* for petitioner. *Messrs. Samuel E. Darby, Jr.,* and *Paul Kolisch* for respondents. Reported below: 91 F. (2d) 904.

No. 455. DEITRICK, RECEIVER, ET AL. *v.* STANDARD SURETY & CASUALTY CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Robert E. Goodwin,*

George P. Barse, and *James Louis Robertson* for petitioners. *Mr. Frank N. Stewart* for respondent. Reported below: 90 F. (2d) 862.

No. 487. UNITED STATES *v.* O'DONNELL ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for the United States. *Messrs. William Stanley* and *Gordon Lawson* for respondents. Reported below: 91 F. (2d) 14.

No. 446. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ELBE OIL LAND DEVELOPMENT CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. George T. Altman* for respondent. Reported below: 91 F. (2d) 127.

No. 484. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MARSHALL, ADMINISTRATOR. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. William D. Mitchell, James Lenox Banks, Jr.,* and *George H. Craven* for respondent. Reported below: 91 F. (2d) 1010.

No. 505. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ELKINS. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for petitioner. *Mr. William R. Spofford* for respondent. Reported below: 91 F. (2d) 534.

No. 163. BRADY *v.* TERMINAL RAILROAD ASSN. November 8, 1937. It appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that Court cited by petitioner in his petition for rehearing, the petition is granted, the order denying a writ of certiorari [*post*, p. 688] is vacated and the writ of certiorari is granted. *Messrs. Mark D. Eagleton* and *Merritt U. Hayden* for petitioner. *Messrs. Thomas M. Pierce* and *J. L. Howell* for respondent. Reported below: 340 Mo. 841; 102 S. W. (2d) 903.

No. 499. UNITED STATES *v.* WURTS. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for the United States. *Mr. Russell Duane* for respondent. Reported below: 91 F. (2d) 547.

No. 256. INDIANA EX REL. ANDERSON *v.* BRAND, TRUSTEE. November 15, 1937. Petition for writ of certiorari to the Supreme Court of Indiana granted. *Mr. Thomas F. O'Mara* for petitioner. *Mr. George C. Gertman* for respondent. Reported below: 5 N. E. (2d) 531; see also, 213 Ind. —.

No. 469. FOSTER, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the question whether the total value of the property held by the decedent and petitioner as joint tenants, as decided by the Circuit Court of Appeals, or only one half thereof, should be included in the gross estate of the decedent for the purpose of the federal estate tax. *Mr. Philip G. Sheehy* for petitioner. *Solicitor General Reed, Assistant Attor-*

ney General Morris, and *Messrs. Sewall Key, Norman D. Keller,* and *Lee A. Jackson* for respondent. Reported below: 90 F. (2d) 486.

No. 511. NEW NEGRO ALLIANCE ET AL. *v.* SANITARY GROCERY CO., INC. November 22, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Mr. B. V. Lawson, Jr.,* for petitioners. *Messrs. A. Coulter Wells* and *William E. Carey, Jr.,* for respondent. Reported below: 67 App. D. C. 359; 92 F. (2d) 510.

No. 504. NATIONAL LABOR RELATIONS BOARD *v.* PACIFIC GREYHOUND LINES, INC. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* and *Mr. Charles Fahy* for petitioner. *Messrs. Ivan Bowen* and *M. H. Boutelle* for respondent. Reported below: 91 F. (2d) 458.

No. 519. STATE FARM MUTUAL AUTOMOBILE INS. CO. *v.* COUGHRAN. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Sidney L. Graham* for petitioner. *Mr. John F. Gilbert* for respondent. Reported below: 92 F. (2d) 239.

No. 528. PACIFIC NATIONAL CO. *v.* WELCH, FORMER COLLECTOR OF INTERNAL REVENUE. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Melvin D. Wilson* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 91 F. (2d) 590.

No. 563. UNITED STATES *v.* HENDLER, TRANSFEREE. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Reed* for the United States. *Mr. Randolph Barton, Jr.,* for respondent. Reported below: 91 F. (2d) 680.

No. 536. SANTA CRUZ FRUIT PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. Paul St. Sure* for petitioner. *Solicitor General Reed,* and *Messrs. Robert L. Stern, Charles Fahy,* and *Philip Levy* for respondent. Reported below: 91 F. (2d) 790.

No. 597. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FREEDMAN. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for petitioner. *Mr. John W. Townsend* for respondent. Reported below: 92 F. (2d) 150.

No. 414. LEADER ET AL. *v.* APEX HOSIERY CO. See *ante,* p. 656.

No. 558. SHARP ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. December 13, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles C. Norris, Jr.,* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Carlton Fox* for respondent. Reported below: 91 F. (2d) 802.

No. 566. GUARANTY TRUST CO. *v.* UNITED STATES. December 13, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. John W. Davis* for petitioner. *Solicitor General Reed* and *Assistant Attorney General Whitaker* for the United States. Reported below: 91 F. (2d) 989.

No. 594. CALMAR STEAMSHIP CORP. *v.* TAYLOR. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frank A. Bull* for petitioner. *Messrs. Abraham E. Freedman* and *Howard M. Long* for respondent. Reported below: 92 F. (2d) 84.

No. 596. RUHLIN ET AL. *v.* NEW YORK LIFE INS. CO. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Charles J. Margiotti* and *Charles H. Sachs* for petitioners. *Messrs. Louis H. Cooke* and *William H. Eckert* for respondent. Reported below: 93 F. (2d) 416.

No. 636. ELECTRIC BOND & SHARE CO. ET AL. *v.* SECURITIES AND EXCHANGE COMM'N ET AL. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Thomas D. Thacher* and *John F. MacLane* for petitioners. *Solicitor General Reed* for respondents. Reported below: 92 F. (2d) 580.

No. 600. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MOUNTAIN PRODUCERS CORP. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor Gen-*

eral Reed for petitioner. *Messrs. Harold D. Roberts* and *Randolph E. Paul* for respondent. Reported below: 92 F. (2d) 78.

No. 608. LINCOLN ENGINEERING CO. *v.* STEWART-WARNER CORP. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Leonard L. Kalish* and *Delos G. Haynes* for petitioner. *Mr. Lynn A. Williams* for respondent. Reported below: 91 F. (2d) 757.

No. 633. BRAINARD *v.* COMMISSIONER OF INTERNAL REVENUE. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. John E. Hughes* for petitioner. *Solicitor General Reed* for respondent. Reported below: 91 F. (2d) 880.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 4, 1937, THROUGH JANUARY 17, 1938.

No. 120. WALLS *v.* NORTH CAROLINA;
No. 376. DALLAO *v.* LOUISIANA; and
No. 377. UGARTE *v.* LOUISIANA. See *ante*, p. 635.

No. 205. MYERS, ADMINISTRATRIX, *v.* ATCHISON, T. & S. F. RY. CO.; and
No. 341. COUCHE *v.* LOUISIANA. See *ante*, p. 636.

No. 373. CARLSON, ADMINISTRATOR, *v.* KESLER ET AL. See *ante*, p. 639.

No. 321. JOHNSON, TREASURER OF CALIFORNIA, ET AL. *v.* M. G. WEST CO. See *ante*, p. 638.

No. 60. McDONALD *v.* THE FLORIDIAN ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit; and

No. 360. DiSTASIO *v.* MASSACHUSETTS. Petition for writ of certiorari to the Superior Court in and for the County of Middlesex, Massachusetts. October 11, 1937. The motions for leave to proceed on typewritten petitions and records are denied for the reason that the Court, upon examination of the papers herein submitted finds no grounds upon which writs of certiorari should be issued. The petitions for writs of certiorari are therefore also denied. *Mr. John P. Hannon* for petitioners, and *Messrs. Wallace McCamant* and *W. Lair Thompson* for respondents, in No. 60. *Mr. Frank DiStasio, pro se,* and *Mr. James J. Ronan* for respondent, in No. 360. Reported below: No. 60, 88 F. (2d) 289; No. 360, 8 N. E. (2d) 923.

No. 212. DEMAROIS *v.* FARREL, U. S. MARSHAL, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied for the reason that the Court, upon examination of the papers herein submitted, finds that the application for a writ of certiorari was not made within the time provided by law. Act of February 13, 1925, § 8 (a), 43 Stat. 936, 940. *Alfred Demarois, pro se.* No appearance for respondents. Reported below: 87 F. (2d) 957.

No. 110. COMBS, ADMINISTRATOR, *v.* RICHFORD SAVINGS BANK & TRUST CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Birney F. Combs, pro se.* No appearance for respondents. Reported below: 88 F. (2d) 417.

No. 112. MAUK *v.* UNITED STATES. October 11, 1937. 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. Calvin S. Mauk* for petitioner. No appearance for the United States. Reported below: 88 F. (2d) 557.

No. 149. POROBILO ET AL. *v.* TALIANCICH ET AL. October 11, 1937. 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. M. A. Grace* for petitioners. No appearance for respondents. Reported below: 89 F. (2d) 341.

No. 158. IHLE, TRUSTEE, *v.* BARBE. October 11, 1937. Petition for writ of certiorari to the First Circuit Court of Appeals of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. A. J. Ihle, pro se.* Reported below: 167 So. 875; 172 So. 401.

No. 169. DORN *v.* INDUSTRIAL ACCIDENT COMM'N. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 4th Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Pascal Dorn, pro se. Mr. Everett A. Corten* for respondent.

No. 179. STEWART ET AL. *v.* WALL, ADMINISTRATOR, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Bernie Ray Stewart* for petitioners. No appearance for respondents. Reported below: 87 F. (2d) 598.

No. 229. DUKE *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jesse C. Duke, pro se.* No appearance for the United States. Reported below: 90 F. (2d) 840.

No. 237. BERNHARDT, ADMINISTRATOR, *v.* CHICAGO, B. & Q. R. Co. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles E. Foster* for petitioner. *Messrs. J. C. James* and *Bruce Scott* for respondents. Reported below: 132 Neb. 346; 272 N. W. 209.

No. 239. BARTON *v.* GEHMAN. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioner. No appearance for respondent. Reported below: 91 F. (2d) 548.

No. 240. LYNCH *v.* KEMP. October 11, 1937. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. H. L. Lynch, pro se.* No appearance for respondent. Reported below: 8 Cal. (2d) 457; 65 P. (2d) 1316.

No. 244. LONGENECKER ET AL. *v.* PENNSYLVANIA JOINT STOCK LAND BANK. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioners. *Mr. George B. Johnson* for respondent.

No. 245. COBLE ET AL. *v.* FEDERAL LAND BANK. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioners. No appearance for respondent.

No. 246. BEAMESDERFER *v.* FIRST NATIONAL BANK & TRUST CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioner. No appearance for respondent. Reported below: 91 F. (2d) 491.

No. 247. HOSSLER ET AL. *v.* PENNSYLVANIA JOINT STOCK LAND BANK. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioners. *Mr. George B. Johnson* for respondent.

No. 248. SHREINER ET AL. *v.* FARMERS' TRUST CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob Halper* for petitioners. No appearance for respondent. Reported below: 91 F. (2d) 606.

No. 338. LANG *v.* WOOD ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Percy Lang, pro se.* No appearance for respondents. Reported below: 67 App. D. C. 287; 92 F. (2d) 211.

No. 345. ANDERSON *v.* ODISHO. October 11, 1937. 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. Charles Anderson, pro se.* No appearance for respondent. Reported below: 90 F. (2d) 299.

No. 385. SPRUILL *v.* SERVEN. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondent. Reported below: 67 App. D. C. 39; 89 F. (2d) 511.

No. 393. SAVARESE *v.* NEW YORK. October 11, 1937. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob W. Friedman* for petitioner. *Messrs. William F. X. Geoghan* and *Henry J. Walsh* for respondent. Reported below: 251 App. Div. 842; 297 N. Y. S. 794.

No. 74. SHAFFER, TRUSTEE, *v.* SUPERIOR COURT ET AL. October 11, 1937. The motion to strike the brief of respondent is denied. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Fred E. Stivers* for petitioner. *Mr. Calvin S. Mauk* for respondents.

No. 111. HOME OWNERS' LOAN CORP. *v.* CENTRAL MARKET, INC. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Nebraska denied as it does not appear from the record that there is a final judgment. *Messrs. Neal L. Thompson, Horace Russell,*

E. K. Neumann, and *Hawthorne Arey* for petitioner. No appearance for respondent. Reported below: 132 Neb. 380; 272 N. W. 244.

No. 398. SAXE *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied on the ground that the application has been made prior to judgment of the Circuit Court of Appeals. *Mr. Thomas D. Thacher* for petitioner. *Solicitor General Reed* for respondent. Reported below: 19 F. Supp. 21.

No. 163. BRADY *v.* TERMINAL RAILROAD ASSN. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Missouri denied as it does not appear from the record that there is a final judgment. *Messrs. Mark D. Eagleton* and *Merritt U. Hayden* for petitioner. *Messrs. Thomas M. Pierce* and *J. L. Howell* for respondent. Reported below: 340 Mo. 841; 102 S. W. (2d) 903. [For later order granting certiorari, see *ante,* p. 678.]

No. 226. LAVIGNE *v.* CHICAGO, M., ST. P. & P. R. Co. October 11, 1937. Petition for writ of certiorari to the Appellate Court, 1st District, of Illinois denied. MR. JUSTICE BRANDEIS took no part in the consideration and decision of this application. *Mr. Joseph D. Ryan* for petitioner. *Messrs. Carl S. Jefferson* and *O. W. Dynes* for respondent. Reported below: 287 Ill. App. 253, 268; 4 N. E. (2d) 785.

No. 285. ROLAND ET AL. *v.* ALBRIGHT ET AL. October 11, 1937. The motion to strike the brief of respondent in this case is denied. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Robert*

P. Shick for petitioners. *Mr. William McK. Rutter* for respondents. Reported below: 325 Pa. 431; 190 Atl. 885.

No. 289. HENDRICKSON, TRUSTEE, *v.* CHASE NATIONAL BANK. October 11, 1937. The motion to substitute Emanuel Weitz, present trustee of Archibald M. Henry, Bankrupt, as the party petitioner herein in place of Charles E. Hendrickson, deceased, is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Saul Nemser* for petitioner. *Mr. Paul D. Miller* for respondent. Reported below: 89 F. (2d) 997.

No. 44. GILLONS ET AL. *v.* SHELL COMPANY. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John L. McNab* and *Raymond I. Blakeslee* for petitioners. *Mr. Charles M. Fryer* for respondent. Reported below: 86 F. (2d) 600.

No. 46. RAMSEY *v.* CALIFORNIA. October 11, 1937. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Melvin M. Belli* for petitioner. No appearance for respondent.

No. 47. EIDE *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Alvin Gerlack* for petitioner. *Solicitor General Reed,* and *Messrs. Julius C. Martin, Wilbur C. Pickett,* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 682.

No. 49. UNITED STATES *v.* BRIGGS & TURIVAS. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Mr. Albert L. Hopkins* for respondent. Reported below: 83 Ct. Cls. 664.

No. 50. LINK ET AL. *v.* ILLINOIS. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Bernhardt Frank* for petitioners. *Mr. Otto Kerner* for respondent. Reported below: 365 Ill. 266; 6 N. E. (2d) 201.

No. 51. MADDOCK ET AL. *v.* HAINES ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Carl V. Wisner* for petitioners. *Messrs. David K. Tone* and *Morse Ives* for respondents. Reported below: 88 F. (2d) 350.

No. 52. HEFFELFINGER *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. C. Remele* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. J. Louis Monarch* and *Louise Foster* for respondent. Reported below: 87 F. (2d) 991.

No. 53. READING COMPANY *v.* THORNE NEALE & Co.; and

No. 54. SAME *v.* BOUCHARD TRANSPORTATION Co. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Paul Speer* and *Horace L. Cheyney* for petitioner.

Mr. Earl Appleman for respondent in No. 53. *Mr. Frank C. Mason* for respondent in No. 54. Reported below: 87 F. (2d) 694.

No. 56. REEKE-NASH MOTORS CO. *v.* SWAN CARBURETOR CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles Neave, J. L. Stackpole,* and *Merrell E. Clark* for petitioner. *Mr. F. O. Richey* for respondent. Reported below: 88 F. (2d) 876.

No. 350. GENERAL MOTORS CORP. *v.* SWAN CARBURETOR CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John M. Zane* and *Drury W. Cooper* for petitioner. *Messrs. W. H. Boyd* and *F. O. Richey* for respondent. Reported below: 88 F. (2d) 876.

No. 58. STAR STATIONERY CO. *v.* ROGERS, RECEIVER. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Milton E. Mermelstein* for petitioner. No appearance for respondent. Reported below: 88 F. (2d) 482.

No. 64. HIGHLANDS EVANSTON-LINCOLNWOOD SUBDIVISION ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Franz W. Castle, Emmett J. McCarthy, Howard R. Brintlinger,* and *Robert F. Carey* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 88 F. (2d) 355.

No. 194. SOLOMON ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Orville A. Park* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 89 F. (2d) 569.

No. 65. ELLIOTT ET AL. *v.* UNIVERSITY OF ILLINOIS ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. James H. Christensen* for petitioners. *Messrs. Otto Kerner, George T. Buckingham,* and *Don Kenneth Jones* for respondents. Reported below: 365 Ill. 338; 6 N. E. (2d) 647.

No. 66. WALKER *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hal Lindsay* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 88 F. (2d) 170.

No. 67. POTOMAC ELECTRIC POWER CO. *v.* HAZEN ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. S. R. Bowen* and *H. W. Kelly* for petitioner. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondents. Reported below: 67 App. D. C. 161; 90 F. (2d) 406.

No. 69. GEORGIA POWER CO. *v.* TENNESSEE VALLEY AUTHORITY; and

No. 70. SAME *v.* UNDERWOOD, U. S. DISTRICT JUDGE. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Newton D. Baker, Raymond T. Jackson, Dan MacDonald,* and *Walter T. Colquitt* for petitioner. *Solicitor General Reed* and *Messrs. James Lawrence Fly, John Lord O'Brian,* and *William C. Fitts, Jr.,* for respondent. Reported below: 89 F. (2d) 218.

No. 71. GOLDBERG *v.* GOLDBERG ET AL. October 11, 1937. Petition for writ of certiorari to the Appellate Court, 2nd District, of Illinois, denied. *Messrs. Meyer Abrams* and *Max Shulman* for petitioner. *Mr. Edward J. McArdle, Jr.,* for respondents. Reported below: 288 Ill. App. 203; 5 N. E. (2d) 863.

No. 73. BENNELL REALTY CO. *v.* E. G. SHINNER & CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Benjamin F. Saltzstein* and *Joseph P. Brazy* for petitioner. *Messrs. W. L. Gold* and *Morris Karon* for respondent. Reported below: 87 F. (2d) 824.

No. 75. C. S. DUDLEY & CO. *v.* MISSOURI EX REL. MCKITTRICK, ATTORNEY GENERAL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Charles P. Williams* and *Charles M. Polk* for petitioner. *Mr. Stanley P. Clay* for respondent. Reported below: 340 Mo. 852.

No. 76. G. B. WILKINSON ESTATE, INC., ET AL. *v.* YOUNT-LEE OIL CO.; and

No. 77. C. H. WILKINSON *v.* SAME. October 11, 1937. Petition for writs of certiorari to the Circuit Court of

Appeals for the Fifth Circuit denied. *Mr. Oliver J. Todd* for petitioners in No. 76. *Mr. J. J. Collins* for petitioner in No. 77. *Messrs. Beeman Strong, Will E. Orgain,* and *Thomas B. Greenwood* for respondent. Reported below: 87 F. (2d) 572, 577.

No. 78. GRADY *v.* GARLAND ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Mr. Randolph M. Garland* for respondents. Reported below: 67 App. D. C. 73; 89 F. (2d) 817.

No. 79. REINHARTS, INC. *v.* CATERPILLAR TRACTOR CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George L. Wilkinson, Charles L. Byron,* and *Alfred Sutro* for petitioner. *Mr. Charles M. Fryer* for respondent. Reported below: 85 F. (2d) 628.

No. 80. CITIZENS WATER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. LaMonte Cowles* and *Preston B. Kavanagh* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 87 F. (2d) 874.

No. 81. BONWIT *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur B. Hyman* for peti-

tioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 87 F. (2d) 764.

No. 82. MOORE, TRUSTEE IN BANKRUPTCY, *v.* JAHNS ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas S. Tobin* for petitioner. *Mr. S. M. Haskins* for respondents. Reported below: 90 F. (2d) 8.

No. 83. COURTRIGHT ET AL., ADMINISTRATRICES, *v.* LEGISLATIVE STATUTORY COMMISSION ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Albert S. Frost* for petitioners. *Messrs. Wilbur F. Denious, Byron G. Rogers,* and *Hudson Moore* for respondents. Reported below: 100 Colo. 82; 65 P. (2d) 710.

No. 88. ANDERSON ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. R. C. Fulbright* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 561; 15 F. Supp. 225.

No. 89. GARROW *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. William J. Hughes, Jr.,* and *William E. Leahy* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Charles D. Lawrence* for the United States. Reported below: 24 C. C. P. A. (Customs) 410; 88 F. (2d) 318.

No. 91. KUPTZ ET AL. *v.* RALPH SOLLITT & SONS CONSTRUCTION CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Davis* for petitioners. *Mr. Allen Wight* for respondent. Reported below: 88 F. (2d) 532.

No. 92. THOMAS J. EMERY MEMORIAL *v.* CINCINNATI UNDERWRITERS AGENCY CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert A. Taft* for petitioner. *Messrs. John Weld Peck* and *Frank H. Shaffer, Jr.*, for respondent. Reported below: 88 F. (2d) 506.

No. 93. TINIUS OLSEN TESTING MACHINE CO. ET AL. *v.* BALDWIN-SOUTHWARK CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Hugh M. Morris, Alexander L. Nichols,* and *Leon Edelson* for petitioners. *Mr. Clifton V. Edwards* for respondent. Reported below: 88 F. (2d) 910.

No. 94. TRIEST & EARLE, INC. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Josephus C. Trimble* and *Jerry A. Mathews* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 84 Ct. Cls. 84.

No. 96. BALTIMORE & OHIO R. CO. *v.* ANDERSON, EXECUTRIX. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Cir-

cuit denied. *Mr. Harold R. Oakes* for petitioner. *Mr. Morton L. Fearey* for respondent. Reported below: 89 F. (2d) 629.

No. 98. R. D. BAKER CO. *v.* RARDEN ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Alex J. Groesbeck* for petitioner. *Mr. Victor W. Klein* for respondents. Reported below: 279 Mich. 145; 271 N. W. 712.

No. 101. GARROW MACCLAIN & GARROW, INC. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. R. C. Fulbright* and *Carl G. Stearns* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 88 F. (2d) 574.

No. 102. WHEELING ET AL. *v.* JOHN F. CASEY CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Jay T. McCamic, Benjamin L. Rosenbloom,* and *Charles McCamic* for petitioners. *Messrs. T. S. Riley* and *Robert J. Riley* for respondent. Reported below: 89 F. (2d) 308.

Nos. 103, 104, and 105. WINGERT ET AL. *v.* SMEAD ET AL. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioners. No appearance for respondents. Reported below: 89 F. (2d) 305.

No. 107. GREAT SOUTHERN LIFE INS. CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter E. Barton* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Edward H. Horton,* and *Charles A. Horsky* for respondent. Reported below: 89 F. (2d) 54.

No. 109. CONSUMERS POWER CO. *v.* KRAUSE ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas G. Long* and *Bernard J. Onen* for petitioner. *Messrs. Riley L. Crane* and *Frank A. Rockwith* for respondents. Reported below: 89 F. (2d) 565.

No. 113. BRADLEY ET AL. *v.* ADAMS EXPRESS CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William Waller* and *K. T. McConnice* for petitioners. *Messrs. Branch P. Kerfoot, F. M. Base,* and *Cecil Sims* for respondent. Reported below: 89 F. (2d) 641.

No. 114. WESTERN EXPRESS CO. *v.* SMELTZER;

No. 115. SAME *v.* LECHLGHTNER; and

No. 116. SAME *v.* BERKEY, ADMINISTRATOR. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Atlee Pomerene* and *Donald L. Marshman* for petitioner. *Mr. Homer H. Marshman* for respondents. Reported below: 88 F. (2d) 94.

No. 117. FRANCE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John J. Kendrick* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 88 F. (2d) 917.

No. 118. CHATEAUGAY ORE & IRON CO. *v.* EASTERN TRANSPORTATION CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward F. Platow* and *Leo J. Curren* for petitioner. *Mr. Robert S. Hume* for respondent. Reported below: 88 F. (2d) 1005.

No. 119. BYRNE MANUFACTURING CO. *v.* AMERICAN FLANGE & MANUFACTURING CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George B. Pitts* and *Anthony J. Guthrie* for petitioner. *Messrs. George L. Wilkinson* and *James H. Hayes* for respondent. Reported below: 87 F. (2d) 783.

No. 122. CORONA BREWING CORP. *v.* BONET, TREASURER OF PUERTO RICO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. James R. Beverley* for petitioner. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for respondent. Reported below: 89 F. (2d) 479.

No. 125. SIMMONS *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter P. Luck* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 89 F. (2d) 591.

No. 126. CITIZENS BANKING CO. ET AL. *v.* STURGEON BAY CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. I. Litzler* for petitioners. *Mr. Richard Inglis* for respondent. Reported below: 88 F. (2d) 1006.

No. 127. MIAMI CORPORATION *v.* LOUISIANA. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. Robert E. Milling, Roberts C. Milling,* and *A. P. Pujo* for petitioner. *Messrs. Gaston L. Porterie* and *Joseph A. Loret* for respondent. Reported below: 186 La. 784; 173 So. 315.

No. 130. PACIFIC ALASKA AIRWAYS *v.* MAHAN, ADMINISTRATOR. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George M. Naus* and *Cecil H. Clegg* for petitioner. No appearance for respondent. Reported below: 89 F. (2d) 255.

No. 131. PACIFIC ALASKA AIRWAYS *v.* SMITH, ADMINISTRATOR. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit

denied. *Mr. George M. Naus* and *Cecil H. Clegg* for petitioner. No appearance for respondent. Reported below: 89 F. (2d) 253.

No. 132. CRUSE, ADMINISTRATOR, ET AL. *v.* SABINE TRANSPORTATION CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. G. Adams* for petitioners. *Mr. M. A. Grace* for respondent. Reported below: 88 F. (2d) 298.

No. 133. FORT WORTH *v.* ACTIVATED SLUDGE, INC. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. E. Rouer* for petitioner. *Mr. Lynn A. Williams* for respondent. Reported below: 89 F. (2d) 278.

No. 134. BREEDLOVE, ADMINISTRATOR, *v.* FREUDENSTEIN, RECEIVER. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry M. Carroll* for petitioner. No appearance for respondent. Reported below: 89 F. (2d) 324.

No. 136. MORSMAN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edgar M. Morsman, Jr.,* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 90 F. (2d) 18.

No. 137. STIMSON ET AL. *v.* UNITED ADVERTISING CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. *Messrs. John H. Bruninga* and *John H. Sutherland* for petitioners. *Mr. George L. Wilkinson* for respondent. Reported below: 89 F. (2d) 450.

No. 141. PINKUSSOHN *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. I. Harvey Levinson* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 70.

No. 142. CITIZENS BANK & TRUST CO. *v.* MELLON NATIONAL BANK. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elbert E. Godwin* for petitioner. *Messrs. William Wallace Booth, Benjamin E. Carter, A. L. Burford,* and *Willis B. Smith* for respondent. Reported below: 88 F. (2d) 128.

No. 148. OGDEN *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. John Ogden, pro se. Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney, Harry LeRoy Jones,* and *Edward First* for respondents.

No. 151. CRICHTON *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. William J. Hughes, Jr., William E. Leahy, Dorsey K.*

Offutt, and *Donald Gottwald* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *William W. Barron* for the United States. Reported below: 67 App. D. C. 300; 92 F. (2d) 224.

No. 152. SANITARY GROCERY CO. *v.* SNEAD. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Messrs. Alvin L. Newmyer* and *David G. Bress* for respondent. Reported below: 67 App. D. C. 129; 90 F. (2d) 374.

No. 153. NORRIS GRAIN CO. *v.* TEXAS & NEW ORLEANS R. Co.; and

No. 154. CARPENTER ET AL., TRUSTEES, ET AL. *v.* SAME. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. C. G. Stearns* and *Charles M. Blackmar* for petitioners. No appearance for respondent. Reported below: 89 F. (2d) 274.

No. 155. NEW YORK LIFE INS. CO. *v.* LYDON ET AL., EXECUTORS. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William H. Becker* and *Louis H. Cooke* for petitioner. *Mr. Guy A. Thompson* for respondents. Reported below: 89 F. (2d) 78.

No. 156. BANKERS INDEMNITY INS. CO. *v.* LUNDGREN. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henry I. Quinn* for petitioner. *Mr. Thomas M. Carlson* for respondent. Reported below: 89 F. (2d) 200.

No. 157. BANKERS INDEMNITY INS. CO. *v.* PINKERTON. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henry I. Quinn* for petitioner. *Mr. Thomas M. Carlson* for respondent. Reported below: 89 F. (2d) 194.

No. 160. BORLAND ET AL. *v.* JOHNSON, DEPUTY DISTRICT ATTORNEY, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Lane Donahue* for petitioners. No appearance for respondents. Reported below: 88 F. (2d) 376.

No. 162. FEDERAL FARM MORTGAGE CORP. *v.* FALK ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of North Dakota denied. *Messrs. John Thorpe, Peyton R. Evans, Gerald E. Lyons,* and *Russell D. Burchard* for petitioner. No appearance for respondents. Reported below: 67 N. D. 154; 270 N. W. 885.

No. 164. BALDWIN ET AL., TRUSTEES, *v.* FLUITT. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. R. E. Milling* and *R. E. Milling, Jr.,* for petitioners. *Mr. Louis H. Yarrut* for respondent. Reported below: 187 La. 87; 174 So. 163.

No. 165. MEADOWS ET AL. *v.* CONTINENTAL ASSURANCE CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. A. Simmons* for petitioners. No appearance for respondent. Reported below: 89 F. (2d) 256.

No. 166. BUCHEN ET AL. *v.* BANK OF AMERICA. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Grover C. Buchen, pro se, W. Frank Shelley,* and *C. S. Mauk* for petitioners. *Mr. William C. Day* for respondent.

No. 168. HARTMAN, ADMINISTRATOR, ET AL. *v.* BALTIMORE & OHIO R. CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. F. E. Parrack* for petitioners. *Mr. George M. Hoffheimer* for respondents. Reported below: 89 F. (2d) 425.

No. 170. JARVIS ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William H. Lewis* and *Francis J. Carney* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *William W. Barron* for the United States. Reported below: 90 F. (2d) 243.

No. 171. CHESAPEAKE & OHIO RY. CO. *v.* VIGOR, ADMINISTRATRIX. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Fred C. Rector* and *Richard T. Rector* for petitioner. *Mr. James N. Beery* for respondent. Reported below: 90 F. (2d) 7.

No. 172. READING COMPANY *v.* MEASE ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. John T. Brady* for petitioner. *Mr. George H. Hafer* for respondents. Reported below: 126 Pa. Super. 436; 191 Atl. 402.

No. 173. James McWilliams Blue Line *v.* Koppers Connecticut Coke Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Horace L. Cheyney* and *Paul Speer* for petitioner. *Messrs. Leo J. Curren* and *Edward F. Platow* for respondent. Reported below: 89 F. (2d) 865.

No. 174. Nitkey *v.* Ward et al. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. George A. Gordon* for petitioner. *Messrs. John Junell* and *John W. Eckelberry* for respondents. Reported below: 199 Minn. 334; 271 N. W. 873.

No. 175. Texas Pipe Line Co. *v.* Commissioner of Internal Revenue. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. H. Bartholow* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 88 F. (2d) 278.

No. 176. Great Lakes Transit Corp. *v.* Interlake Steamship Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John B. Richards* and *Lawrence E. Coffey* for petitioner. *Mr. George William Cottrell* for respondent. Reported below: 89 F. (2d) 694.

No. 177. Hess, Trustee, *v.* Amidon. October 11, 1937. Petition for writ of certiorari to the Court of Appeals, 1st Appellate Judicial District, of Ohio, denied.

Messrs. John Weld Peck and *Sol. Goodman* for petitioner. *Mr. Walter K. Sibbald* for respondent. Reported below: 56 Ohio App. 99; 10 N. E. (2d) 26.

No. 178. GLOBE INDEMNITY CO. ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Horace S. Whitman* and *Washington Bowie, Jr.*, for petitioners. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 84 Ct. Cls. 587.

No. 180. CERTAIN-TEED PRODUCTS CORP. *v.* WALLINGER, TRUSTEE IN BANKRUPTCY, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John P. Buchanan* for petitioner. *Mr. Howard C. Gilmer* for respondents. Reported below: 89 F. (2d) 427.

No. 183. OAKWOOD REALTY CO. ET AL. *v.* GULF PRODUCTION CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Mr. W. D. Gordon* for petitioners. *Messrs. H. L. Stone, John E. Green, Jr.,* and *J. H. Tallichet* for respondents. Reported below: 99 S. W. (2d) 616.

No. 184. HAMMOND-KNOWLTON, ADMINISTRATRIX, *v.* HARTFORD CONNECTICUT TRUST CO., EXECUTOR. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. O'Hara* for petitioner. *Solicitor General*

Reed, Assistant Attorney General Morris, and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 89 F. (2d) 175.

No. 188. GINSBURG *v.* PACIFIC MUTUAL LIFE INS. CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bernard Sobol* for petitioner. *Messrs. Maxwell C. Katz* and *Raymond T. Heilpern* for respondent. Reported below: 89 F. (2d) 158.

No. 191. UNITED STATES *v.* GETZELMAN ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Solicitor General Reed* for the United States. *Messrs. Summers Hardy, Neal E. McNeill, Roscoe E. Harper, Grover C. Spillers, N. A. Gibson, R. B. F. Hummer,* and *A. D. Cochran* for respondents. Reported below: 89 F. (2d) 531.

No. 192. UNITED STATES *v.* ORDNANCE ENGINEERING CORP.; and

No. 193. ORDNANCE ENGINEERING CORP. *v.* UNITED STATES. October 11, 1937. Petitions for writs of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Messrs. George A. King, Eugene V. Myers,* and *George R. Shields* for respondent in No. 192, and *Messrs. George A. King* and *George R. Shields* for petitioner in No. 193. Reported below: 68 Ct. Cls. 301.

No. 195. JEFFERIES, EXECUTRIX, ET AL. *v.* FEDERAL LAND BANK. October 11, 1937. Petition for writ of certiorari to the Supreme Court of South Carolina denied.

Mr. Sam. M. Wolfe for petitioners. *Messrs. Harry D. Reed, Peyton R. Evans, Gerald E. Lyons,* and *May T. Bigelow* for respondent. Reported below: 185 S. C. 255; 193 S. E. 308.

No. 196. THOMPSON *v.* FALSTAFF BREWING CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George B. Boland* for petitioner. *Mr. W. C. Fraser* for respondent. Reported below: 89 F. (2d) 557.

No. 200. GLASS & LYNCH ET AL. *v.* NINE NORTH CHURCH STREET, INC. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Glass* for petitioners. *Mr. Edward S. Greenbaum* for respondent. Reported below: 89 F. (2d) 13.

No. 201. KITSELMAN, EXECUTRIX, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur L. Gilliom* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 89 F. (2d) 458.

No. 206. MERCED IRRIGATION DISTRICT *v.* BEKINS ET AL., EXECUTORS, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Stephen W. Downey* for petitioner. *Mr. Charles L. Childers* for respondents. Reported below: 89 F. (2d) 1002.

No. 207. CINCINNATI, NEWPORT & COVINGTON RY. Co. *v.* CINCINNATI ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John Weld Peck, Charles W. Milner, Frank M. Tracy, Matt Herold,* and *Chester J. Gerkin* for petitioner. No appearance for respondents. Reported below: 90 F. (2d) 1003.

No. 209. MOORE *v.* CHICAGO MERCANTILE EXCHANGE ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter Bachrach* and *Arthur Magid* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Hugh B. Cox* for respondents. Reported below: 90 F. (2d) 735.

No. 235. BENNETT ET AL. *v.* BOARD OF TRADE ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter Bachrach* and *Arthur Magid* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Hugh B. Cox* for respondents. Reported below: 90 F. (2d) 735.

No. 282. BOARD OF TRADE ET AL. *v.* MILLIGAN, U. S. ATTORNEY, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Douglas Stripp* and *E. R. Morrison* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Hugh B. Cox* for respondents. Reported below: 90 F. (2d) 855.

No. 211. SASNETT *v.* IOWA STATE TRAVELING MEN'S ASSN. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. Gwynn Gardiner* for petitioner. *Mr. Earl C. Mills* for respondent. Reported below: 90 F. (2d) 514.

No. 213. GESTAUTS *v.* AMERICAN MANGANESE STEEL CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Weaver* for petitioner. *Mr. Russell F. Locke* for respondents. Reported below: 87 F. (2d) 1005.

No. 214. LOCKHART *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. H. Stanley Hinricks* and *J. Merrill Wright* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 89 F. (2d) 143.

No. 216. PORTAGE SILICA CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur C. Denison, Newton D. Baker,* and *Raymond T. Jackson* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 89 F. (2d) 958.

No. 217. BRODERICK ET AL. *v.* SABINE LUMBER CO. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. U. M. Simon for petitioners. No appearance for respondent. Reported below: 88 F. (2d) 586.

No. 219. LIVERMORE *v.* BEAL ET AL. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. W. H. Metson, Randolph V. Whiting,* and *A. H. Ricketts* for petitioner. *Messrs. Frederick D. Anderson, Herbert W. Clark, Felix T. Smith, F. F. Thomas, Jr., A. L. Weil, L. R. Martineau, Jr.,* and *George W. Nilsson* for respondents. Reported below: 18 Cal. App. (2d) 535; 64 P. (2d) 987.

No. 220. BOYD, ADMINISTRATRIX, *v.* ELLIOTT ET AL. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. W. H. Metson, Randolph V. Whiting,* and *A. H. Ricketts* for petitioner. *Messrs. Frederick D. Anderson, Herbert W. Clark, Felix T. Smith, F. F. Thomas, Jr., A. L. Weil, L. R. Martineau, Jr.,* and *George W. Nilsson* for respondents. Reported below: 18 Cal. App. (2d) 535; 64 P. (2d) 987.

No. 221. KREISS *v.* ELLIOTT ET AL. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. W. H. Metson, Randolph V. Whiting,* and *A. H. Ricketts* for petitioner. *Messrs. Frederick D. Anderson, Herbert W. Clark, Felix T. Smith, F. F. Thomas, Jr., A. L. Weil, L. R. Martineau, Jr.,* and *George W. Nilsson* for respondents. Reported below: 18 Cal. App. (2d) 535; 64 P. (2d) 987.

No. 222. LIVERMORE *v.* BEAL ET AL. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. W. H. Metson, Randolph V. Whiting,* and *A. H. Ricketts* for petitioner. *Messrs. Frederick D. Anderson, Herbert W. Clark, Felix T. Smith, F. F. Thomas, Jr., A. L. Weil, L. R. Martineau, Jr.,* and *George W. Nilsson* for respondents. Reported below: 18 Cal. App. (2d) 535; 64 P. (2d) 987.

No. 223. OSSORIO *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. T. Ludlow Chrystie* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 168; 18 F. Supp. 959.

No. 224. EDMONDS, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. F. Eldred Boland* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 90 F. (2d) 14.

No. 225. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CECIL B. DEMILLE PRODUCTIONS, INC. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. A. Calder Mackay* and *Thomas R. Dempsey* for respondent. Reported below: 90 F. (2d) 12.

No. 227. CONCENTRATE MANUFACTURING CORP. *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph H. Choate, Jr.,* and *Maurice Leon* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Clarence E. Dawson* for respondent. Reported below: 90 F. (2d) 439.

No. 228. MERHENGOOD CORPORATION *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Paul E. Shorb* and *Dwight Taylor* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 67 App. D. C. 123; 89 F. (2d) 972.

No. 232. UNITED STATES *v.* CHICAGO, B. & Q. R. Co. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Solicitor General Reed* for the United States. *Messrs. J. C. James* and *Bruce Scott* for respondent. Reported below: 90 F. (2d) 161.

No. 233. F. W. MYERS & Co. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Elisha Hanson* and *Eliot C. Lovett* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Charles D. Lawrence* and *William Whynman* for the United States. Reported below: 24 C. C. P. A. (Customs) 464.

No. 234. COLYEAR ET AL. *v.* HALES. October 11, 1937. Petition for writ of certiorari to the District Court of Appeal, 2d Appellate District, of California, denied. *Mr. Benjamin W. Shipman* for petitioners. *Messrs. Clyde Doyle* and *Irving P. Austin* for respondent. Reported below: 19 Cal. App. (2d) 366; 65 P. (2d) 847.

No. 238. SHELL EASTERN PETROLEUM PRODUCTS, INC. *v.* MAXWELL, COMMISSIONER OF REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John D. Watkins* and *Jones Fuller* for petitioner. *Messrs. A. A. F. Seawell* and *Harry McMullan* for respondent. Reported below: 90 F. (2d) 39.

No. 241. KNOWLES *v.* AMERICAN SOUTH AFRICAN LINES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Simone N. Gazan* for petitioner. *Mr. Vernon Sims Jones* for respondent. Reported below: 90 F. (2d) 1011.

No. 249. CONTINENTAL LAND CO. ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. I. K. Lewis* for petitioners. *Solicitor General Reed* and *Mr. Charles E. Collett* for the United States. Reported below: 88 F. (2d) 104.

No. 250. PREFERRED ACCIDENT INS. CO. *v.* MARSH. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Messrs. Arthur D. Baldwin and *Clare M. Vrooman* for petitioner. *Messrs. Harry F. Payer* and *Gerald Pilliod* for respondent. Reported below: 89 F. (2d) 932.

No. 251. New York Life Ins. Co. *v.* Marsh. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur D. Baldwin* and *Clare M. Vrooman* for petitioner. *Messrs. Harry F. Payer* and *Gerald Pilliod* for respondent. Reported below: 89 F. (2d) 932.

No. 252. Morgan et al., Executors, *v.* United States. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. William D. Whitney* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 138; 18 F. Supp. 1017.

No. 253. Klingenstein *v.* United States. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert H. Montgomery, James O. Wynn, Thomas G. Haight,* and *J. Marvin Haynes* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 164; 18 F. Supp. 1015.

No. 255. Robinson et al. *v.* Harris Trust & Savings Bank, Trustee. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. F. Kelly* and *Harvey Carroll Ray* for petitioners. *Mr. J. M. Burford* for respondent. Reported below: 89 F. (2d) 929.

No. 257. MISSOURI *v.* HOMESTEADERS LIFE ASSN. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James P. Aylward, Jerome Walsh,* and *John M. Wheeler* for petitioner. *Messrs. John B. Gage, David A. Murphy, John T. Harding, J. Francis O'Sullivan,* and *John T. Barker* for respondent. Reported below: 90 F. (2d) 543.

No. 263. BANKERS TRUST CO. ET AL. *v.* WISE ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph M. Hartfield, Jesse E. Waid, Frank H. Towner,* and *Henry J. Brock* for petitioners. *Mr. Louis L. Dent* for respondents.

No. 264. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ralph H. Case, Kingman Brewster, J. S. Y. Ivins,* and *C. C. Calhoun* for petitioner. *Solicitor General Reed* and *Messrs. Charles E. Collett, George T. Stormont,* and *Oscar A. Provost* for the United States. Reported below: 85 Ct. Cls. 181.

No. 265. SCHUMACHER, SHERIFF, *v.* BEELER, TRUSTEE IN BANKRUPTCY. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Coleman Avery, Paul A. Baden, John W. Peck,* and *Harry N. Routzohn* for petitioner. *Messrs. Province M. Pogue* and *Henry B. Street* for respondent. Reported below: 90 F. (2d) 538.

No. 266. WILLIS *v.* BEELER, TRUSTEE IN BANKRUPTCY. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Messrs. Coleman Avery, John W. Peck, and *Harry N. Routzohn* for petitioner. *Messrs. Province M. Pogue* and *Henry B. Street* for respondent. Reported below: 90 F. (2d) 538.

No. 270. PHILADELPHIA & READING COAL & IRON CO. ET AL. *v.* SPRUKS. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Penrose Hertzler* and *A. Allen Woodruff* for petitioners. *Mr. Ralph W. Rymer* for respondent. Reported below: 89 F. (2d) 998.

No. 271. ST. JOHN *v.* THOMPSON ET AL. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. H. P. White* and *Roy St. Lewis* for petitioner. *Mr. Charles Stuart Macdonald* for respondents. Reported below: 179 Okla. 240; 65 P. (2d) 442.

No. 369. SODERSTROM, ADMINISTRATOR, ET AL. *v.* BONNER. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. William S. Hamilton* and *J. I. Howard* for petitioners. *Mr. Charles Stuart Macdonald* for respondent. Reported below: 180 Okla. 355; 71 P. (2d) 117.

No. 273. GOLDSMITH ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Israel B. Oseas* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *W. Marvin Smith* for the United States. Reported below: 91 F. (2d) 983.

No. 278. BRECHT CORPORATION *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Daniel P. McDonald* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Charles D. Lawrence* and *John R. Benney* for the United States. Reported below: 25 C. C. P. A. (Customs) 9.

No. 279. DAY-GORMLEY LEATHER CO. *v.* NATIONAL CITY BANK. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Borris M. Komar* for petitioner. *Mr. Philip A. Carroll* for respondent. Reported below: 89 F. (2d) 703.

No. 280. MOHR *v.* GREAT LAKES TRANSIT CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Clinton, Jr.,* for petitioner. *Mr. Lawrence E. Coffey* for respondent. Reported below: 89 F. (2d) 1014.

No. 283. ANGLE *v.* SHINHOLT ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ralph A. Cusick* for petitioner. No appearance for respondents. Reported below: 90 F. (2d) 294.

No. 284. UNITED STATES *v.* WOOD. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Mr. Raymond F. Garrity* for respondent. Reported below: 84 Ct. Cls. 367; 17 F. Supp. 521.

No. 383. UNITED STATES *v.* CLIFTON MANUFACTURING Co. October 11, 1937. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Messrs. William A. Sutherland* and *Joseph B. Brennan* for respondent. Reported below: 85 Ct. Cls. 525; 19 F. Supp. 723.

No. 286. EARWOOD *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Thomas Howell Scott* and *William T. Townsend* for petitioner. *Solicitor General Reed* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Young M. Smith,* and *W. Marvin Smith* for the United States. Reported below: 90 F. (2d) 494.

No. 288. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* GOVERNOR OF THE PANAMA CANAL ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James J. Lenihan* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 90 F. (2d) 225.

No. 290. WHITE TOWER SYSTEM, INC. *v.* WHITE CASTLE SYSTEM OF EATING HOUSE CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Clark R. Fletcher* and *Irving A. Fish* for petitioner. *Messrs. Earle W. Evans* and *Jos. G. Carey* for respondent. Reported below: 90 F. (2d) 67.

No. 291. JAMES ET AL. *v.* NELSON ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Cecil H. Clegg* for petitioners. *Mr. R. E. Robertson* for respondents. Reported below: 90 F. (2d) 910.

No. 292. NORTHWESTERN MUTUAL LIFE INS. CO. *v.* CENTRAL HANOVER BANK & TRUST CO., EXECUTORS, ET AL. October 11, 1937. Petition for writ of certiorari to the Surrogate Court of New York County, New York, denied. *Mr. Sam T. Swansen* for petitioner. *Mr. Samuel A. Pleasants* for respondents. Reported below: 249 App. Div. 542; 293 N. Y. S. 126; 158 Misc. 481; 286 N. Y. S. 138.

No. 295. DURELL *v.* CARPENTER, RECEIVER. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank Montgomery* for petitioner. *Mr. J. A. Fowler* for respondent. Reported below: 90 F. (2d) 57.

No. 297. LAWRENCE STERN & CO. ET AL. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. A. J. Pflaum* and *H. N. Wyatt* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for the United States. Reported below: 89 F. (2d) 485.

No. 298. U. S. EX REL. SOCIETE DE CONDENSATION ET D'APPLICATIONS MECANIQUES *v.* COE, COMMISSIONER OF PATENTS. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia

denied. *Messrs. Reeve Lewis* and *Philip Mauro* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *R. F. Whitehead* for respondent. Reported below: 67 App. D. C. 207; 91 F. (2d) 238.

No. 299. VON DAMM *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Albert MacC. Barnes* and *James L. Gerry* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. John R. Benney* for the United States. Reported below: 25 C. C. P. A. (Customs) 97; 90 F. (2d) 263.

No. 302. HOUSTON NATURAL GAS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Irl F. Kennerly* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 90 F. (2d) 814.

No. 304. KELLEY ET AL. *v.* ATLANTIC CITY ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Martin Conboy* and *Harold E. Stonebraker* for petitioners. *Mr. Henry R. Ashton* for respondents. Reported below: 89 F. (2d) 659.

No. 306. GLOVER, RECEIVER, *v.* ILLINOIS. October 11, 1937. Petition for writ of certiorari to the Court of Claims of Illinois denied. *Mr. George P. Barse* for petitioner. *Mr. Otto Kerner* for respondent.

No. 307. MITCHELL *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Wallace* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lucius C. Buck* for respondent. Reported below: 89 F. (2d) 873.

No. 308. FIDELITY & COLUMBIA TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 309. MCGRATH *v.* SAME;

No. 310. LOUISVILLE TRUST CO. ET AL. *v.* SAME; and

No. 311. FIDELITY & COLUMBIA TRUST CO., TRUSTEE, *v.* SAME. October 11, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Camden R. McAtee* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 90 F. (2d) 219; 89 F. (2d) 1013; 89 F. (2d) 1012; 89 F. (2d) 1007.

No. 312. WALKER ET AL. *v.* HAZEN ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Frank Van Sant,* and *George E. Sullivan* for petitioners. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondents. Reported below: 67 App. D. C. 188; 90 F. (2d) 502.

No. 314. WINGET KICKERNICK CO. ET AL. *v.* SIL-O-ETTE UNDERWEAR CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the

Second Circuit denied. *Mr. Frank A. Whiteley* for petitioners. *Mr. Robert P. Weil* for respondent. Reported below: 89 F. (2d) 635.

No. 315. PENN MUTUAL LIFE INS. CO. *v.* MINNESOTA. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. H. C. Fulton* and *E. L. Boyle* for petitioner. *Mr. Thomas J. Naylor* for respondent. Reported below: 198 Minn. 115; 269 N. W. 37; 198 Min. 620; 272 N. W. 547.

No. 317. JONAS *v.* BELLERIVE INVESTMENT CO. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Harry L. Jacobs, I. J. Ringolsky,* and *Roy B. Thomson* for petitioner. *Messrs. Irvin Fane* and *James A. Reed* for respondents. Reported below: 90 F. (2d) 688.

No. 318. BOARD OF COUNTY COMMISSIONERS ET AL. *v.* MAYS, ADMINISTRATOR, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. V. Pryor* for petitioners. No appearance for respondents. Reported below: 90 F. (2d) 525.

No. 320. TEXAS PIPE LINE CO. *v.* ANDERSON ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Messrs. Charles L. Black, Ireland Graves,* and *John C. Jackson* for petitioner. *Messrs. William McCraw* and *H. Grady Chandler* for respondents. Reported below: 100 S. W. (2d) 754.

No. 325. COOPER *v.* IRVING TRUST CO., TRUSTEE, ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray C. Bernays* for petitioner. *Messrs. J. Arthur Leve* and *Charles Rosenbaum* for respondents. Reported below: 91 F. (2d) 947.

No. 326. UNITED STATES *v.* ALLGRUNN; and

No. 327. ALLGRUNN *v.* UNITED STATES. October 11, 1937. Petitions for writs of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States in No. 326. *Mr. C. B. Des Jardins* for respondent in No. 326 and petitioner in No. 327. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Alexander Holtzoff* for the United States in No. 327. Reported below: 67 Ct. Cls. 1.

No. 328. STRAUSS, TRUSTEE *v.* PINE BLOCK BUILDING CORP. ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Nicholas J. Pritzker* for petitioner. *Messrs. Daniel J. Schuyler* and *Edward J. Hennessy* for respondents. Reported below: 90 F. (2d) 238.

No. 329. HAMM *v.* RAILWAY EXPRESS AGENCY, INC. October 11, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. George Wolf* for petitioners. *Mr. Albert M. Hartung* for respondent.

No. 330. AETNA CASUALTY & SURETY CO. *v.* HALL, RECEIVER. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mark W. Maclay* for petitioner. No appearance for respondent. Reported below: 89 F. (2d) 885.

No. 331. CAPPOLA *v.* PLATT, SHERIFF. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied. *Mr. Anthony A. E. DeLucia* for petitioner. No appearance for respondent. Reported below: 123 Conn. 38; 192 Atl. 156.

No. 332. PHILLIPS ET AL., EXECUTORS, *v.* GHINGHER, RECEIVER. October 11, 1937. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Herbert C. Fooks* for petitioners. *Mr. Sherman P. Bowers* for respondent. Reported below: 172 Md. 612; 192 Atl. 782.

No. 333. COHEN *v.* SUPERIOR OIL CORP. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Meyer Kraushaar* for petitioner. *Messrs. E. Ennalls Berl* and *David F. Anderson* for respondent. Reported below: 90 F. (2d) 810.

No. 335. MARTIN *v.* HULL ET AL. October 11, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. H. Winship Wheatley* and *M. D. Rosenberg* for petitioner. *Mr. Marion Butler* for respondents. Reported below: 67 App. D. C. 284; 92 F. (2d) 208.

No. 336. PURMAN *v.* SMITH. October 11, 1937. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Thomas R. Purman, pro se.* No appearance for respondent. Reported below: 126 Pa. Super. 234; 191 Atl. 65.

No. 337. KARGMAN ET AL. *v.* GROCERY CENTER, INC. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max Rittenberg* for petitioners. *Messrs. Edward R. Johnston* and *Abraham Greenspahn* for respondent. Reported below: 91 F. (2d) 176.

No. 339. TAYLOR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John E. Hughes* and *Raymond S. Pruitt* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 89 F. (2d) 465.

No. 340. OTIS ET AL. *v.* BENNETT, ADMINISTRATRIX. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Sidney J. Watts* and *Horace F. Baker* for petitioners. *Mr. Harvey A. Miller* for respondent. Reported below: 91 F. (2d) 531.

No. 344. CONSOLIDATED AUTOMATIC MERCHANDISING CORP. *v.* UNITED STATES. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan A. Smyth* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for the United States. Reported below: 90 F. (2d) 598.

No. 347. MURNIGHAN *v.* GLEN SHERIDAN REALTY TRUST. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit

denied. *Mr. Meyer Abrams* for petitioner. *Messrs. Herbert W. Hirsh* and *Reuben L. Freeman* for respondent. Reported below: 90 F. (2d) 466.

No. 351. GOODMAN *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION. October 11, 1937. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. John B. Boddie* for petitioner. *Messrs. Charles Leviton* and *Werner W. Schroeder* for respondent. Reported below: 366 Ill. 346; 8 N. E. (2d) 941.

No. 358. FAYE, ADMINISTRATOR, *v.* AMERICAN DIAMOND LINES ET AL. October 11, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roderick Begg* for petitioner. *Mr. John W. Crandall* for respondents. Reported below: 90 F. (2d) 619.

No. 451. HUNTER *v.* VIRGINIA. October 18, 1937. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Minitree Jones Fulton* for petitioner. No appearance for respondent.

No. 462. PARIS *v.* UNITED STATES. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. David Paris, pro se.* No appearance for the United States.

No. 465. BROWN *v.* JOHNSTON, WARDEN. October 18, 1937. 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. Thurman A. Brown, pro se.* No appearance on behalf of respondent. Reported below: 91 F. (2d) 370.

No. 343. LEVER BROTHERS CO. *v.* COLGATE-PALMOLIVE-PEET CO. ET AL. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Messrs. George Wharton Pepper, Frank Parker Davis, George I. Haight,* and *John F. Neary* for petitioner. *Messrs. Marston Allen, Frank F. Dinsmore, Louis Quarles, Mason Trowbridge, Newton D. Baker,* and *Arthur C. Denison* for respondents. Reported below: 90 F. (2d) 178.

No. 348. PACIFIC COAST BISCUIT CO. *v.* UNITED STATES. October 18, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. J. S. Y. Ivins* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 381; 19 F. Supp. 545.

Nos. 353 and 354. RYAN ET AL. *v.* NEWFIELD; and

No. 355. FLORIDA TEX OIL CO. ET AL. *v.* BALLENTINE. October 18, 1937. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. K. Zewadski* and *William C. Pierce* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Allen E. Throop* and *Robert E. Kline, Jr.,* for respondents. Reported below: 91 F. (2d) 700.

No. 356. KELLY, TRUSTEE, *v.* UNITED STATES ET AL. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel B. Bassett* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondents. Reported below: 90 F. (2d) 73.

No. 359. BETHKE ET AL. *v.* GRAYBURG OIL CO. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Cofer* for petitioners. No appearance for respondent. Reported below: 89 F. (2d) 536.

No. 361. CHASE NATIONAL BANK ET AL. *v.* MALONE, RECEIVER, ET AL. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Fred C. Rector* and *Lawrence Bennett* for petitioners. *Messrs. Edward B. Levy, Province M. Pogue,* and *Homer C. Corry* for respondents. Reported below: 90 F. (2d) 1002.

No. 363. LONG *v.* UNITED STATES. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. L. Barnum* and *Chauncey F. Tramutolo* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 90 F. (2d) 482.

No. 364. BACON *v.* NORTHERN PACIFIC RY. CO. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr.*

H. Lowndes Maury for petitioner. *Mr. M. S. Gunn* for respondent. Reported below: 91 F. (2d) 173.

No. 368. JEFFERY-DE WITT INSULATOR CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. F. M. Livezey* for petitioner. *Solicitor General Reed,* and *Messrs. A. H. Feller* and *Charles Fahy* for respondent. Reported below: 91 F. (2d) 134.

No. 371. PACIFIC HOTEL APARTMENT CO. *v.* ARCADY-WILSHIRE CO. ET AL. October 18th, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lewis B. Randall* for petitioner. *Mr. Walter K. Tuller* for respondents. Reported below: 89 F. (2d) 248.

No. 372. GRAVES ET AL. *v.* ELLIOTT ET AL. October 18, 1937. Petition for writ of certiorari to the Surrogates' Court of New York County, New York, denied. *Messrs. Henry Epstein* and *Mortimer M. Kassell* for petitioners. *Mr. Walter H. Merritt* for respondents. Reported below: 272 N. Y. 1; 3 N. E. (2d) 612; 244 App. Div. 872; 280 N. Y. S. 274.

No. 379. BRIARCLIFF INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Theodore B. Benson* and *Joseph R. Little* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Hugh B. Cox* for respondent. Reported below: 90 F. (2d) 330.

No. 381. HAFFNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Koenigsberger* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 90 F. (2d) 1009.

No. 382. GENERAL BAKING CO. *v.* GOLDBLATT BROS., INC. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederic P. Warfield* for petitioner. *Messrs. Nicholas J. Pritzker* and *Stanford Clinton* for respondent. Reported below: 90 F. (2d) 241.

No. 386. PLAPAO LABORATORIES, INC., ET AL. *v.* FARLEY, POSTMASTER GENERAL. October 18, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. James E. Watson, Samuel A. King, Arthur G. Brode,* and *H. Max Ammerman* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 67 App. D. C. 304; 92 F. (2d) 228.

No. 400. LYON INCORPORATED ET AL. *v.* CLAYTON & LAMBERT MANUFACTURING CO. October 18, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Carlton Hill* for petitioners. *Mr. Hugh M. Morris* for respondent. Reported below: 90 F. (2d) 97.

No. 495. MITCHELL ET AL. *v.* SUPREME COURT OF FLORIDA ET AL. October 25, 1937. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *David F. Mitchell, Edith C. Worley* and *Edward M. L'Engle,* petitioners, *pro se.* Reported below: 128 Fla. 536; 175 So. 524.

No. 275. HAWKINS *v.* UNITED STATES. October 25, 1937. 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. Hal Lindsay* for petitioner. No appearance for the United States. Reported below: 90 F. (2d) 551.

No. 396. KELLOGG COMPANY *v.* NATIONAL BISCUIT CO. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. W. H. Crichton-Clarke, Edward S. Rogers,* and *Robert T. McCracken* for petitioner. *Messrs. Thomas G. Haight, David A. Reed, Drury W. Cooper,* and *Charles A. Vilas* for respondent. Reported below: 91 F. (2d) 150.

No. 403. PATTERSON *v.* ALABAMA. October 25, 1937. Petition for writ of certiorari to the Supreme Court of Alabama denied. MR. JUSTICE BLACK took no part in the consideration and decision of this application. *Messrs. Samuel S. Leibowitz* and *Osmond K. Fraenkel* for petitioner. *Messrs. A. A. Carmichael* and *Thomas Seay Lawson* for respondent. Reported below: 175 So. 371.

No. 294. GENERAL ELECTRIC CO. *v.* AMPEREX ELECTRONIC PRODUCTS, INC., ET AL. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Drury W. Cooper* and *John C. Kerr* for petitioner. *Mr. Samuel E. Darby, Jr.* for respondents. Reported below: 89 F. (2d) 709.

No. 389. ZAHARIADIS *v.* HAYS, DIVISIONAL DIRECTOR OF IMMIGRATION AND NATURALIZATION. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. R. F. Clough* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 90 F. (2d) 3.

No. 390. INDIANAPOLIS AMUSEMENT CO. *v.* METRO-GOLDWYN-MAYER DISTRIBUTING CORP. ET AL. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William C. Bachelder* and *H. K. Bachelder* for petitioner. *Mr. Frank C. Dailey* for respondents. Reported below: 90 F. (2d) 732.

No. 394. MURINE COMPANY *v.* UNITED STATES. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David Jetzinger* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 90 F. (2d) 549.

No. 395. SNELL ISLE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth

Circuit denied. *Messrs. George E. H. Goodner* and *D. F. Prince* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 90 F. (2d) 481.

No. 399. SANTLY BROS., INC., ET AL. *v.* WILKIE. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Rosenschein* for petitioners. *Mr. Louis Nizer* for respondent. Reported below: 91 F. (2d) 978.

No. 401. EASTLAND COMPANY *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 402. CONGRESS SQUARE HOTEL CO. *v.* SAME. October 25, 1937. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Paul M. Segal* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Charles H. Weston* and *Hampson Gary* for respondent Federal Communications Commission. *Mr. M. L. Bernsteen* for intervener Portland Broadcasting System. Reported below: 67 App. D. C. 316; 92 F. (2d) 467.

No. 404. CROSSETT *v.* COMMISSIONER OF INTERNAL REVENUE. October 25, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 92 F. (2d) 996.

No. 405. GUARANTY TRUST CO., TRUSTEE, ET AL. *v.* THOMPSON, TRUSTEE. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. *Messrs. Godfrey Goldmark, Henry N. Ess,* and *John C. Higgins* for petitioners. *Messrs. Jerome N. Frank* and *Ernest A. Green* for respondent. Reported below: 89 F. (2d) 652.

No. 407. SANITARY DISTRICT OF CHICAGO *v.* ACTIVATED SLUDGE, INC., ET AL. October 25, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Newton D. Baker, Arthur C. Denison, Wallace R. Lane, James Hamilton Lewis,* and *Ralph M. Snyder* for petitioner. *Mr. Lynn A. Williams* for respondents. Reported below: 90 F. (2d) 727.

No. 411. ROYAL INDEMNITY CO. ET AL. *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. October 25, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Frank H. Myers* for petitioners. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Henry A. Julicher* for respondent Cardillo. *Mr. James E. McCabe* for respondent Rennie. Reported below: 67 App. D. C. 142; 90 F. (2d) 387.

No. 416. U. S. EX REL. HANDLER *v.* HILL, WARDEN. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied for the reason that the application for writ of certiorari was not made within the time provided by law. Section 8 (a), Act of February 13, 1925, 43 Stat. 936, 940. *Mr. Lewis Landes* for petitioner. No appearance for respondent. Reported below: 90 F. (2d) 573.

No. 450. HAYNES DRILLING CO. *v.* INDIAN TERRITORY ILLUMINATING OIL CO. November 8, 1937. Petition for writ of certiorari to the Supreme Court of Oklahoma de-

nied as it does not appear from the record that there is a final judgment. *Mr. Harry O. Glasser* for petitioner. *Messrs. W. P. McGinnis, Donald Prentice,* and *W. Tom Anglin* for respondent. Reported below: 180 Okla. 419; 69 P. (2d) 624.

No. 370. AMERICAN PAPER GOODS CO. *v.* UNITED STATES. November 8, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. M. Manning Marcus* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 85 Ct. Cls. 421; 19 F. Supp. 537.

No. 408. TRUSTEES OF SOMERSET ACADEMY ET AL. *v.* PICHER, RECEIVER. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harvey D. Eaton* for petitioners. *Mr. F. Harold Dubord* for respondent. Reported below: 90 F. (2d) 741.

No. 412. WABASH RAILWAY CO. *v.* JENKINS, ADMINISTRATOR. November 8, 1937. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, denied. *Messrs. N. S. Brown* and *Homer Hall* for petitioner. *Messrs. C. W. Prince, James N. Beery, Fenton Hume,* and *Walter A. Raymond* for respondent. Reported below: 107 S. W. (2d) 204.

No. 417. DAVID BUTTRICK CO. ET AL. *v.* UNITED STATES ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Brenton K. Fisk* and *Andrew J. Aldridge* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. John S. L. Yost* for respondents. Reported below: 91 F. (2d) 66.

Nos. 418 and 419. BERGER, TRUSTEE IN BANKRUPTCY, *v.* KINGSPORT PRESS, INC. November 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benjamin Spinoza* for petitioner. *Mr. Robert Burrow* for respondent. Reported below: 89 F. (2d) 444.

No. 420. WALKER, TRUSTEE, *v.* FLORIDA FRUIT CANNERS, INC., ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles R. Fenwick* for petitioner. *Mr. O. K. Reaves* for respondents. Reported below: 90 F. (2d) 753.

No. 421. DAVISON GULFPORT FERTILIZER CO. *v.* GULF & SHIP ISLAND R. CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. E. Eaton* for petitioner. *Messrs. Elmer A. Smith, Clinton H. McKay, E. C. Craig,* and *Charles N. Burch* for respondent. Reported below: 92 F. (2d) 107.

No. 424. ATLANTA TRUST CO. *v.* FEDERAL RESERVE BANK FOR USE OF AMERICAN SURETY CO. ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel Nesbitt Evins* for petitioner. *Messrs. Shepard Bryan, B. D. Murphy,* and *Max F. Goldstein* for respondents. Reported below: 91 F. (2d) 283.

No. 425. NATIONAL LABOR RELATIONS BOARD *v.* DELAWARE-NEW JERSEY FERRY CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General*

Reed and *Mr. Charles Fahy* for petitioner. *Mr. Otto Wolff, Jr.* for respondent. Reported below: 90 F. (2d) 520.

No. 428. ROGERS ET AL. *v.* MARCHANT, RECEIVER. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Adam H. Moss* for petitioners. No appearance for respondent. Reported below: 91 F. (2d) 660.

No. 429. CRAMER, ADMINISTRATOR, *v.* PHOENIX MUTUAL LIFE INS. CO. ET AL.;

No. 430. COBURN ET AL. *v.* SAME;

No. 431. CRAMER, ADMINISTRATOR, *v.* AETNA LIFE INS. CO. ET AL.; and

No. 432. COBURN ET AL. *v.* SAME. November 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George D. Weller, Fred E. Fuller, Bruce J. Flick,* and *H. M. Havner* for petitioners. *Mr. Wayne G. Cook* for respondents. Reported below: 91 F. (2d) 141.

No. 438. NATIONAL QUARRIES CO. *v.* DETROIT, TOLEDO & IRONTON R. CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert S. Marx, H. O. Bentley, Frank E. Wood,* and *Harry Kasfir* for petitioner. *Messrs. John S. Pratt, Melvin C. Light, Clifford B. Longley,* and *Wallace R. Middleton* for respondent. Reported below: 91 F. (2d) 80.

No. 441. MATSON NAVIGATION CO. *v.* INDUSTRIAL ACCIDENT COMM'N ET AL. November 8, 1937. Petition for writ of certiorari to the District Court of Appeal, 1st

Appellate District, of California, denied. *Messrs. Herman Phleger* and *Maurice E. Harrison* for petitioner. *Mr. Everett A. Corten* for respondents.

No. 442. MORGAN ET AL. *v.* BRONNER, RECEIVER; and No. 443. DREW ET AL. *v.* SAME. November 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Meyers* for petitioners. *Mr. Stuart G. Gibboney* for respondent.

No. 444. MORAN, RECEIVER *v.* HARRISON. November 8, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. D. C. Colladay* and *George P. Barse* for petitioner. No appearance for respondent. Reported below: 67 App. D. C. 237; 91 F. (2d) 310.

No. 384. SIOUX TRIBE OF INDIANS *v.* UNITED STATES. November 8, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ralph H. Case, Kingman Brewster, J. S. Y. Ivins,* and *C. C. Calhoun* for petitioner. *Solicitor General Reed, Assistant Attorney General McFarland,* and *Messrs. George T. Stormont* and *Oscar A. Provost* for the United States. Reported below: 84 Ct. Cls. 16.

No. 448. COCKRELL *v.* BOARD OF COMMISSIONERS OF BURAS LEVEE DISTRICT ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sidney L. Herold* for petitioner. No appearance for respondents. Reported below: 91 F. (2d) 127.

No. 449. FARRINGTON ET AL. *v.* PINK, SUPERINTENDENT OF INSURANCE OF NEW YORK, ET AL. November 8, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. W. Gwynn Gardiner* and *James M. Earnest* for petitioners. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Messrs. Henry A. Julicher* and *George F. Foley* for respondents Julian, Treasurer of the United States, et al. *Messrs. Joseph A. Carey, Ralph P. Dunn, Hubert G. King, Alfred C. Bennett,* and *Benjamin Potoker* for respondent Pink. Reported below: 67 App. D. C. 314; 92 F. (2d) 465.

No. 452. GRIFFIN MANUFACTURING CO. *v.* BOOM BOILER & WELDING CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence C. Spieth* for petitioner. *Mr. Frederick L. Leckie* for respondent. Reported below: 90 F. (2d) 452.

No. 454. STANDARD OIL CO. OF CALIFORNIA *v.* UNITED STATES. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Felix T. Smith* and *Eugene D. Bennett* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 90 F. (2d) 571.

No. 456. OCEAN ACCIDENT & GUARANTEE CORP. *v.* TORRES. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver Dibble* for petitioner. *Mr. Cyril W. McClean* for respondent. Reported below: 91 F. (2d) 464.

No. 457. STUYVESANT INSURANCE CO. *v.* SUSSEX FIRE INS. CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert Kelly Prentice, John A. Hartpence,* and *Thomas G. Haight* for petitioner. *Mr. Arthur T. Vanderbilt* for respondent. Reported below: 90 F. (2d) 281.

Nos. 460 and 461. ASSOCIATED INVESTING CORP. *v.* UTILITIES POWER & LIGHT CORP. ET AL. November 8, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Moultrie Hitt* for petitioner. *Messrs. Charles LeRoy Brown, Jacob Logan Fox* and *Nathan S. Blumberg,* for respondent Atlas Corporation. *Messrs. Arthur A. Gammell,* and *William P. Sidley* for respondent Chase National Bank. Reported below: 91 F. (2d) 598.

No. 463. PARKER *v.* MISSISSIPPI STATE TAX COMM'N. November 8, 1937. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. T. H. Hedgepeth* for petitioner. No appearance for respondent. Reported below: 178 Miss. 680; 174 So. 567.

No. 464. PHIPPS *v.* COMMISSIONER OF INTERNAL REVENUE. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. David A. Reed* and *W. A. Seifert* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 91 F. (2d) 627.

No. 466. READING HOTEL CORP. *v.* PROTECTIVE COMMITTEE ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit denied. *Mr. William A. Schnader* for petitioner. *Messrs. Robert T. McCracken, Mercer B. Tate, Jr.,* and *T. Iaeger Snyder* for respondents. Reported below: 89 F. (2d) 53.

No. 467. PRICE ET AL. *v.* READING HOTEL CORP. ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Percival H. Granger* for petitioners. *Messrs. Robert T. McCracken, Mercer B. Tate, Jr.,* and *T. Iaeger Snyder* for respondents. Reported below: 89 F. (2d) 53.

No. 468. MEYER *v.* READING HOTEL CORP. ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George Wharton Pepper, Harry Felix, Isaac A. Pennypacker,* and *James A. Montgomery, Jr.,* for petitioner. *Messrs. Robert T. McCracken, Mercer B. Tate, Jr.,* and *T. Iaeger Snyder* for respondents. Reported below: 89 F. (2d) 53.

No. 470. D. A. SCHULTE, INC. *v.* CENTRAL MANHATTAN PROPERTIES, INC., ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray C. Bernays* for petitioner. *Messrs. George R. Coughlan* and *William B. Chadbourne* for respondents. Reported below: 91 F. (2d) 728.

No. 471. D. A. SCHULTE, INC. *v.* GUINZBURG ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray C. Bernays* for petitioner. *Mr. James Marshall* for respondents. Reported below: 91 F. (2d) 733.

No. 472. D. A. SCHULTE, INC. *v.* SMITH ET AL., TRUSTEES. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray C. Bernays* for petitioner. *Mr. Godfrey Goldmark* for respondents. Reported below: 91 F. (2d) 732.

No. 473. D. A. SCHULTE, INC. *v.* MCCANCE, ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray C. Bernays* for petitioner. *Mr. Rudolph L. Von Bernuth* for respondents. Reported below: 91 F. (2d) 733.

No. 474. NAVIGAZIONE LIBERA TRIESTINA, S. A., *v.* MORAN TOWING & TRANSPORTATION CO. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Homer L. Loomis* and *Reginald B. Williams* for petitioner. *Messrs Chauncey I. Clark* and *Eugene Underwood* for respondent. Reported below: 92 F. (2d) 37.

No. 480. GREEN *v.* CITY OF STUART. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. T. Oughterson* for petitioner. *Mr. A. Y. Milam* for respondent. Reported below: 91 F. (2d) 603.

No. 482. DEEM *v.* EQUITABLE LIFE ASSURANCE SOCIETY. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert B. McDougle* for petitioner. *Mr. E. W. Knight* for respondent. Reported below: 91 F. (2d) 569.

No. 488. WESTERN MARYLAND RY. CO. ET AL. *v.* PENN VENEER CO. ET AL. November 8, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. W. Montgomery, Jr., Henry Wolf Biklé, John S. Flannery, Charles Myers,* and *Frederic D. McKenney* for petitioners. *Mr. Russell Duane* for respondents. Reported below: 92 F. (2d) 146.

No. 14, original. EX PARTE E. D. FRYER ET AL. November 15, 1937. The motion for leave to file petition for writ of certiorari is granted, and the petition is denied. *Mr. B. F. Saltzstein* for petitioners.

No. 392. LEE *v.* UNITED STATES. November 15, 1937. 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. Ray E. Lane* for petitioner. No appearance for the United States. Reported below: 91 F. (2d) 326.

No. 516. COLLER *v.* PEARCE, TRUSTEE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob N. Halper* for petitioner. No appearance for respondent. Reported below: 92 F. (2d) 237.

No. 520. GIORDANO *v.* ASBURY PARK ET AL. November 15, 1937. 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. *Gabriele Giordano, pro se.* No appearance for respondents. Reported below: 91 F. (2d) 455.

No. 527. STEVENS, ADMINISTRATRIX, *v.* MEGAN, TRUSTEE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John A. Senneff, Jr.,* for petitioner. *Messrs. A. A. McLaughlin, George E. Hise,* and *James C. Davis, Jr.,* for respondent. Reported below: 91 F. (2d) 419.

No. 478. LOUISIANA & ARKANSAS RY. CO. *v.* FRANCIS. November 15, 1937. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. A. L. Burford* and *R. E. Milling, Jr.,* for petitioner. No appearance for respondent. Reported below: 187 La. 975; 175 So. 638.

No. 483. WILSON ET AL. *v.* FISHER ET AL. November 15, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Mr. John D. Cofer* for petitioners. No appearance for respondents. Reported below: 105 S. W. (2d) 304.

No. 489. JOHN II ESTATE, LTD., *v.* UNITED STATES. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Benjamin Lodge Marx* for petitioner. *Solicitor General Reed, Assistant Attorney General McFarland,* and *Mr. Oscar A. Provost* for the United States. Reported below: 91 F. (2d) 93.

No. 490. SHINGLE ET AL. *v.* UNITED STATES. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Benjamin Lodge Marx* for petitioners. *Solicitor General Reed, Assistant Attorney General McFarland,* and *Oscar*

A. Provost for the United States. Reported below: 91 F. (2d) 85.

No. 492. BELMONT IRON WORKS *v.* PACIFIC COAST DIRECT LINE, INC. November 15, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Ernie Adamson* and *Julius L. Goldstein* for petitioner. *Messrs. John W. Van Gordon* and *Aaron U. Homnick* for respondent. Reported below: 249 App. Div. 156; 291 N. Y. S. 360.

No. 493. TYRRELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. L. J. Benckenstein* and *W. A. Bolinger* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 91 F. (2d) 500.

No. 494. ATLANTIC PIPE LINE CO. *v.* BROWN COUNTY ET AL. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry C. Weeks, Charles I. Francis,* and *Thomas R. Freeman* for petitioner. *Messrs. William McCraw* and *H. Grady Chandler* for respondents. Reported below: 91 F. (2d) 394.

No. 496. TEXAS *v.* ANDERSON, CLAYTON & CO. ET AL. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William McCraw, William Madden Hill,* and *A. L. Reed* for petitioner. No appearance for respondents. Reported below: 92 F. (2d) 104.

No. 497. FORT WORTH PROPERTIES CORP. *v.* IRVING TRUST CO., TRUSTEE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioner. *Mr. William J. Donovan* for respondent. Reported below: 91 F. (2d) 938.

No. 498. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* CHRISTIAN GANAHL CO. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Llewellyn A. Luce* for respondent. Reported below: 91 F. (2d) 343.

No. 500. IRVING TRUST CO., TRUSTEE, *v.* HIPPODROME BUILDING CO. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Donovan* for petitioner. *Mr. John E. Morley* for respondent. Reported below: 91 F. (2d) 753.

No. 501. MORLEY CONSTRUCTION CO. ET AL. *v.* MARYLAND CASUALTY CO. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Martin J. O'Donnell* for petitioners. *Messrs Spencer F. Harris* and *Paul G. Koontz* for respondent. Reported below: 90 F. (2d) 976.

No. 503. ELECTRO THERMAN CO. *v.* FEDERAL TRADE COMMISSION. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Daniel N. Dougherty* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 91 F. (2d) 477.

No. 506. PARAMOUNT PRODUCTIONS, INC. *v.* SMITH. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. H. W. O'Melveny* and *Walter K. Tuller* for petitioner. *Mr. Zach Lamar Cobb* for respondent. Reported below: 91 F. (2d) 863.

No. 507. UNITED STATES PIPE & FOUNDRY CO. *v.* WACO ET AL. November 15, 1937. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. Ralph M. Shaw* for petitioner. *Mr. Clay McClellan* for respondents. Reported below: 130 Tex. —; 108 S. W. (2d) 432.

No. 513. GLOBE & RUTGERS FIRE INS. CO. *v.* ROSE. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Amos Thomas* for petitioner. *Messrs. Eugene D. O'Sullivan* and *Charles J. Southard* for respondent. Reported below: 91 F. (2d) 635.

No. 541. CLARKSON *v.* INDIANA & ILLINOIS COAL CORP. ET AL. November 15, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John H. Bruninga* for petitioner. *Mr. Clarence E. Mehlhope* for respondent. Reported below: 91 F. (2d) 717.

No. 534. NEW YORK EX REL. MOODY *v.* HUNT, WARDEN. November 22, 1937. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *George Moody, pro se.* No appearance for respondent. Reported below: 252 App. Div. 718; 299 N. Y. S. 296; 251 App. Div. 872; 298 N. Y. S. 746.

No. 485. UNITED STATES *v.* PRATT. November 22, 1937. The motion to remand is denied. The petition for writ of certiorari to the Court of Claims is also denied. *Solicitor General Reed* for the United States. *Mr. Edward H. Cumpston* for respondent. Reported below: 85 Ct. Cls. 1.

No. 486. UNITED STATES *v.* NORTHERN PACIFIC RY. CO. November 22, 1937. The motion to remand is denied. The petition for writ of certiorari to the Court of Claims is also denied. *Solicitor General Reed* for the United States. *Messrs. Charles W. Bunn, John S. Flannery, Lorenzo B. daPonte,* and *M. L. Countryman, Jr.,* for respondent. Reported below: 85 Ct. Cls. 42; 18 F. Supp. 543.

No. 543. BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT ET AL. *v.* KURN ET AL., TRUSTEES. November 22, 1937. The motion to strike is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is denied. *Messrs. Burk Mann, Walter G. Riddick,* and *Charles T. Coleman* for petitioners. *Messrs. E. L. Westbrooke, A. P. Stewart,* and *J. W. Jamison* for respondents. Reported below: 91 F. (2d) 118.

No. 508. PETERS *v.* LAURITZEN. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas Blake Axtell* for petitioner. *Messrs. Edgar R. Kraetzer* and *Harold S. Deming* for respondent. Reported below: 91 F. (2d) 1001.

No. 512. AMEY *v.* COLEBROOK GUARANTY SAVINGS BANK ET AL. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Florence E. Moore* for petitioner. *Mr. John J. McDonald* for respondents. Reported below: 92 F. (2d) 62.

No. 515. SPENCER KELLOGG & SONS, INC., *v.* NAVIGAZIONE GENERALE ITALIANA. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* for petitioner. *Mr. Homer L. Loomis* for respondent. Reported below: 92 F. (2d) 41.

No. 517. WESTCHESTER FIRE INS. CO. *v.* JOHN CONLON COAL CO. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Horace M. Schell* and *Charles B. Waller* for petitioner. No appearance for respondent. Reported below: 92 F. (2d) 160.

Nos. 521 and 522. JENSEN ET AL. *v.* LORENZ ET AL. November 22, 1937. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. C. Russell Riordon, Charles E. Riordon,* and *Marston Allen* for petitioners. *Messrs. Thomas J. MacKavanagh* and *Carlton Hill* for respondents. Reported below: 68 App. D. C. 39; 92 F. (2d) 992.

No. 524. CORRADO SOCIETA ANONIMA DI NAVIGAZIONE *v.* L. MUNDET & SON, INC. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Homer L. Loomis* and *Howard H. Yocum* for petitioner. *Messrs. Henry N. Longley* and *Ezra G. Benedict Fox* for respondent. Reported below: 91 F. (2d) 726.

No. 531. UNITED STATES *v.* HUNT. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Vernon S. Jones* and *Raymond Parmer* for petitioner. *Mr. David Haar* for respondent. Reported below: 91 F. (2d) 1014; 17 F. Supp. 578.

No. 540. TORRE *v.* NATIONAL CITY BANK. November 22, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis H. Dexter* for petitioner. *Mr. Earle T. Fiddler* for respondent. Reported below: 91 F. (2d) 399.

No. 525. OCEAN CITY *v.* FEDERAL RESERVE BANK. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied, without prejudice to the right to apply for a reinstatement of the petition at any time before the end of this term in case a new trial shall not be awarded. *Messrs. George A. Bourgeois, Harry A. Coulomb,* and *William B. Hunter* for petitioner. *Messrs. Yale L. Schekter* and *Clarence L. Cole* for respondent. Reported below: 91 F. (2d) 635.

No. 546. CARTER *v.* WOODRING, SECRETARY OF WAR. December 6, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE BLACK took no part in the consideration and decision of this application. *Mr. Oberlin M. Carter, pro se. Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 67 App. D. C. 393; 92 F. (2d) 544.

No. 518. DUNCAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. December 6, 1937. Petition for writ

of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Israel T. Deyo* and *Martin W. Deyo* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 91 F. (2d) 1012.

No. 523. MANN *v.* WHALEY. December 6, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frederick A. Mann, pro se. Mr. Eugene Van Voorhis* for respondent.

No. 526. CHICAGO SILK CO. *v.* FEDERAL TRADE COMMISSION. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Horace J. Donnelly, Jr.,* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Hugh B. Cox, Robert L. Stern,* and *W. T. Kelley* for respondent. Reported below: 90 F. (2d) 689.

No. 529. BRADLEY ET AL. *v.* THE NIEL MAERSK ET AL. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas H. Middleton* for petitioners. *Mr. John W. Griffin* for respondents. Reported below: 91 F. (2d) 932.

No. 532. RINN, ADMINISTRATOR, *v.* NEW YORK LIFE INS. CO. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Francis O'Sullivan* for petitioner. *Messrs. Homer H. Cooper* and *Wendell J. Brown* for respondent. Reported below: 89 F. (2d) 924.

No. 533. RINN, ADMINISTRATOR, *v.* MUTUAL LIFE INS. Co. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Francis O'Sullivan* for petitioner. *Messrs. Silas H. Strawn* and *George T. Evans* for respondent. Reported below: 89 F. (2d) 1017.

No. 537. IRVING TRUST CO., TRUSTEE, *v.* BURNETT. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William J. Donovan* and *Theodore S. Hope, Jr.,* for petitioner. *Messrs. George W. Yancey* and *Walter Brower* for respondent. Reported below: 91 F. (2d) 1004.

No. 539. KAY & ESS CO. *v.* COE, COMMISSIONER OF PATENTS. December 6, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.,* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. R. F. Whitehead* for respondent. Reported below: 68 App. D. C. 3; 92 F. (2d) 552.

No. 547. DELAWARE *v.* IRVING TRUST CO. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ralph G. Albrecht* and *Amos J. Peaslee* for petitioner. *Mr. Godfrey Goldmark* for respondent. Reported below: 92 F. (2d) 17.

No. 481. MEURER STEEL BARREL CO. *v.* UNITED STATES. December 6, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. Emanuel A. Stern* for peti-

tioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul Campbell* for the United States. Reported below: 85 Ct. Cls. 554.

No. 535. FOLLETT ET AL. *v.* CALIFORNIA. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. Calvin Brown* for petitioners. *Messrs. U. S. Webb* and *John O. Palstine* for respondent. Reported below: 91 F. (2d) 633.

No. 538. FIDELITY & CASUALTY CO. *v.* UNITED STATES. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harry S. Hall* and *Otto B. Schmidt* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 92 F. (2d) 57.

No. 545. STUMBO ET AL. *v.* UNITED STATES. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George B. Martin* and *Sawyer A. Smith* for petitioners. *Assistant Attorney General McMahon* and *Mr. William W. Barron* for the United States. Reported below: 90 F. (2d) 828.

No. 548. COLUMBIAN NATIONAL LIFE INS. CO. *v.* WALLERSTEIN. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frederick H. Nash* and *Richard Wait* for petitioner. *Mr. Thad M. Talcott, Jr.,* for respondent. Reported below: 91 F. (2d) 351.

No. 549. HINES *v.* UNITED STATES. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Barry Gilbert* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 90 F. (2d) 957.

No. 550. TAYLOR, RECEIVER, *v.* BANCROFT, RECEIVER. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. H. Burwell, E. B. Kurtz,* and *W. L. Reed* for petitioner. *Mr. Carl T. Hoffman* for respondent. Reported below: 91 F. (2d) 582.

No. 551. DELAWARE & HUDSON R. CORP. ET AL. *v.* PENN ANTHRACITE MINING CO.; and

No. 552. DELAWARE & HUDSON R. CORP. ET AL. *v.* CHRISTIAN FEIGENSPAN. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Alex H. Elder* for petitioners. *Mr. Edwin A. Lucas* for respondents. Reported below: 91 F. (2d) 634.

No. 556. HOEY, COLLECTOR OF INTERNAL REVENUE, *v.* HESSLEIN. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Walter S. Orr* for respondent. Reported below: 91 F. (2d) 954.

No. 557. ODELL *v.* BAUSCH & LOMB OPTICAL CO. ET AL. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin F. J. Odell, pro se. Mr. John D. Black* for respondents. Reported below: 91 F. (2d) 359.

No. 559. First National Bank, Trustee, *v.* United States. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederic Ullman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for the United States. Reported below: 90 F. (2d) 691.

No. 562. Murphy et al. *v.* Bloom et al. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George I. Haight* and *Harry A. Biossat* for petitioners. *Messrs. Thomas C. McConnell* and *Irwin T. Gilruth* for respondents. Reported below: 91 F. (2d) 713.

No. 593. Gillette Rubber Co. *v.* Martin et al. December 6, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas C. McConnell* for petitioner. *Mr. Harold M. Wilkie* for respondents. Reported below: 93 F. (2d) 1005.

No. 590. Ehlers *v.* Nebraska. See *ante,* p. 655.

No. 15, original. Ex parte James H. Avery. December 13, 1937. The motion for leave to file petition for writ of certiorari is granted. The petition for writ of certiorari, and motion for leave to proceed further *in forma pauperis,* denied. *James H. Avery, pro se.*

No. 619. Smith *v.* Zerbst, Warden. December 13, 1937. 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. *Sidney Charles Smith, pro se.* No appearance for respondent. Reported below: 92 F. (2d) 1017.

No. 553. HOPPER ET AL. *v.* ELLIOTT ET AL. December 13, 1937. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. W. H. Metson* and *A. H. Ricketts* for petitioners. *Messrs. A. L. Weil* and *George W. Nilsson* for respondents. Reported below: 8 Cal. (2d) 734; 68 P. (2d) 235.

No. 561. FLANIGAN *v.* DITTO, INCORPORATED. December 13, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Carl V. Wisner, John J. Healy,* and *Floyd E. Thompson* for petitioner. *Mr. Max W. Zabel* for respondent. Reported below: 91 F. (2d) 1.

No. 570. READINGER, ADMINISTRATOR, *v.* RORICK ET AL. December 13, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George D. Welles, Earl F. Boxell,* and *David F. Maxwell* for petitioner. *Mr. Harold W. Fraser* for respondents. Reported below: 92 F. (2d) 140.

No. 580. O'CONNOR ET AL. *v.* LUDLAM ET AL. December 13, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Abraham Tulin* and *Samuel J. Rosensohn* for petitioners. *Messrs. Nathan L. Miller* and *Edward J. Bennett* for respondents. Reported below: 92 F. (2d) 50.

No. 258. WHITCOMBE *v.* UNITED STATES;
No. 259. TURNIA *v.* SAME;
No. 260. GIORDANO *v.* SAME; and
No. 261. MARLO *v.* SAME. December 13, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederick M. P. Pearse* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 90 F. (2d) 290.

No. 623. SHEARER *v.* ZERBST, WARDEN. December 20, 1937. 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. *Jack Shearer, pro se.* No appearance for respondent. Reported below: 92 F. (2d) 1016.

No. 628. DISTASIO *v.* MASSACHUSETTS. December 20, 1937. Petition for writ of certiorari to the Superior Court of Massachusetts, and motion for leave to proceed further *in forma pauperis,* denied. *Anthony DiStasio, pro se. Messrs. Paul A. Dever* and *James J. Ronan* for respondent. Reported below: 8 N. E. (2d) 923.

No. 629. JACKSON *v.* VIRGINIA. December 20, 1937. Petition for writ of certiorari to the Circuit Court for Elizabeth City County, Virginia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. William Davis Butts* for petitioner. No appearance for respondent.

No. 422. HEBERT ET AL. *v.* RIO BRAVO OIL CO. ET AL. December 20, 1937. Petition for writ of certiorari to the

Supreme Court of Texas denied. *Mr. Leon P. Howell* for petitioners. *Messrs. H. L. Stone, John E. Green, Jr.*, and *John P. Bullington* for respondents. Reported below; 130 Tex. 1; 106 S. W. (2d) 242.

No. 542. CLEVINGER *v.* ST. LOUIS-SAN FRANCISCO RY. Co. December 20, 1937. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Walter A. Raymond* and *Fenton Hume* for petitioner. *Messrs. Joseph W. Jamison* and *Mitchel J. Henderson* for respondent. Reported below: 341 Mo. 797; 109 S. W. (2d) 369.

No. 564. LAFOREST *v.* BOARD OF COMMISSIONERS. December 20, 1937. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Edward A. Aaronson* for petitioner. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondent. Reported below: 67 App. D. C. 396; 92 F. (2d) 547.

No. 567. FOOTE ET AL. *v.* NEW YORK. December 20, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Milton Pinkus* for petitioners. *Messrs. John F. X. McGohey* and *Henry Epstein* for respondent. Reported below: 273 N. Y. 630; 7 N. E. (2d) 729; 242 App. Div. 162; 273 N. Y. S. 567; 141 Misc. 409; 252 N. Y. S. 676.

No. 571. SHECKLES *v.* COMMISSIONER OF INTERNAL REVENUE;
No. 572. WOODRING-MEYER LUMBER CO. *v.* SAME;
No. 573. W. A. CARNES *v.* SAME;
No. 574. PAULUS *v.* SAME;

No. 575. PECK WELHAUSEN *v.* SAME;
No. 576. S. A. CARNES *v.* SAME;
No. 577. FETTERLY *v.* SAME;
No. 578. C. C. WELHAUSEN *v.* SAME; and
No. 579. MEYER, EXECUTOR, *v.* SAME. December 20, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Camden R. McAtee* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Louise Foster* for respondent. Reported below: 91 F. (2d) 192.

No. 582. BANKS, TRUSTEE, *v.* SOUTHERN DAIRIES, INC. December 20, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John N. Duncan* for petitioner. *Mr. John J. Carmody* for respondent. Reported below: 92 F. (2d) 282.

Nos. 584, 585, and 586. WEIR *v.* UNITED STATES;
Nos. 587, 588, and 589. KORTE *v.* UNITED STATES. December 20, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. U. S. Lesh* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, W. Marvin Smith,* and *L. E. Birdzell* for the United States. Reported below: 92 F. (2d) 634.

No. 591. GENERAL BAKING CO. *v.* HARR, SECRETARY OF BANKING, ET AL. December 20, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George E. Beechwood, Mark E. Lefever,* and *James S. Benn, Jr.,* for petitioner. *Messrs. Charles J. Margiotti* and *Joseph S. Clark, Jr.,* for respondents. Reported below: 92 F. (2d) 162.

No. 592. DIAMOND P TRANSPORTATION CO. *v.* EASTERN STATE FARMER'S EXCHANGE. December 20, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. Harry LaBrum* and *James S. Benn, Jr.,* for petitioner. No appearance for respondent. Reported below: 92 F. (2d) 180.

No. 622. SPEECE *v.* ILLINOIS. See *ante,* p. 659.

No. 643. HICKS *v.* ZERBST, WARDEN. January 3, 1938. 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. *Scott Hicks, pro se.* No appearance for respondent. Reported below: 92 F. (2d) 1005.

No. 595. W. E. HEDGER TRANSPORTATION CORP. *v.* LLOYD. January 3, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Robert Ash* for petitioner. *Mr. John S. Powers* for respondent. Reported below: 270 N. Y. 617; 1 N. E. (2d) 358; 244 App. Div. 878; 281 N. Y. S. 686; 244 App. Div. 884; 281 N. Y. S. 691.

No. 555. HOFFERD, ADMINISTRATOR, *v.* COYLE, EXECUTOR, ET AL. January 3, 1938. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. B. F. Welty* for petitioner. *Mr. Albert H. Cole* for respondents. Reported below: 212 Ind. —; 8 N. E. (2d) 827.

No. 598. SPEAR ET AL. *v.* THOMPSON ET AL. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs.*

Reynolds Robertson, Fred Upchurch, James F. Gray, and *Leonard J. Ganse* for petitioners. *Messrs. William McCraw, W. J. Holt, William C. Davis, Charles M. Kennedy,* and *Earl Street* for respondents. Reported below: 91 F. (2d) 430.

No. 601. AGRICULTURAL BOND & CREDIT CORP. *v.* NORTON ET AL. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George W. Swain* and *Benjamin F. Hegler* for petitioner. *Mr. Austin M. Cowan* for respondents. Reported below: 92 F. (2d) 348.

No. 602. STANOLIND OIL & GAS CO. ET AL. *v.* LOGAN, TRUSTEE IN BANKRUPTCY. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William D. Mitchell, Rhodes S. Baker, Clay Tallman,* and *Donald Campbell* for petitioners. *Mr. John T. Pearson* for respondent. Reported below: 92 F. (2d) 28.

No. 603. HARRY T. ROLLINS *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 604. GLENDORA M. ROLLINS *v.* SAME;

No. 605. MARGARET C. ROLLINS *v.* SAME;

No. 606. HARRY T. ROLLINS ET AL., EXECUTORS, *v.* SAME; and

No. 607. RALPH E. ROLLINS *v.* SAME. January 3, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Joseph G. Gamble* and *Joseph F. Rosenfield* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *John J. Pringle, Jr.,* for respondent. Reported below: 92 F. (2d) 390.

No. 612. INTERNATIONAL SALT CO. *v.* DIAMOND P TRANSPORTATION CO. ET AL. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leonard J. Matteson* for petitioner. *Messrs. George C. Sprague* and *George E. Beechwood* for respondents. Reported below: 92 F. (2d) 65.

No. 617. GULLO *v.* UNITED STATES. January 3, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Otto Christensen* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Fred E. Strine* for the United States. Reported below: 91 F. (2d) 691.

No. 624. OSTROW ET AL. *v.* MCNEAL; and

No. 625. SAME *v.* FISHER. January 3, 1938. Petition for writs of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. James P. Donovan* and *Albert W. Jacobson* for petitioners. No appearance for respondents. Reported below: 68 App. D. C. 69; 93 F. (2d) 228.

No. 651. SPRUILL *v.* SERVEN. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondent. Reported below: 68 App. D. C. 60; 93 F. (2d) 219; 67 App. D. C. 39; 89 F. (2d) 511.

No. 652. SPRUILL *v.* BALLARD ET AL. January 10, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to

proceed further *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondents. Reported below: 64 App. D. C. 60; 74 F. (2d) 464.

No. 609. BLEVINS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioner. *Mr. Herbert W. Erskine* for respondent. Reported below: 91 F. (2d) 593.

No. 611. PORTLAND ET AL. *v.* BANK OF CALIFORNIA ET AL. January 10, 1938. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. Frank S. Grant* for petitioners. *Mr. Robert Treat Platt* for respondents. Reported below: 157 Ore. 203; 69 P. (2d) 273.

No. 613. ALMOURS SECURITIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John W. Davis, Henry P. Adair,* and *Warren W. Grimes* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 91 F. (2d) 427.

No. 614. GOLD CREEK MINING CO. *v.* STANDISH. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Taylor B. Weir* and *William Meyer* for petitioner. No appearance for respondent. Reported below: 92 F. (2d) 662.

No. 627. ROBINS ET AL. *v.* WETTLAUFER ET AL. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Stephen H. Philbin* for petitioners. *Mr. John S. Powers* for respondents. Reported below: 92 F. (2d) 573.

No. 631. MINNIE KAPLAN *v.* LOEV; and

No. 632. CHARLES KAPLAN *v.* SAME. January 10, 1938. Petition for writs of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Robert M. Bernstein* for petitioners. *Mr. Frederick H. Spotts* for respondent. Reported below: 327 Pa. 465; 194 Atl. 653.

No. 615. TAULBEE, ADMINISTRATOR, *v.* GREAT NORTHERN RY. CO. January 10, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lester H. Loble* for petitioner. *Mr. T. B. Weir* for respondent. Reported below: 92 F. (2d) 20.

No. 670. MATARINI *v.* READING COMPANY. January 17, 1938. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Saul Nemser* for petitioner. No appearance for respondent. Reported below: 119 N. J. L. 43; 194 Atl. 246.

No. 671. SCHULTZ *v.* LIVE STOCK NATIONAL BANK, ADMINISTRATOR. January 17, 1938. Petition for writ of certiorari to the Appellate Court of Illinois, First District, and motion for leave to proceed further *in forma pauperis,* denied. *Catherine Schultz, pro se.* No appearance for respondent. Reported below: 289 Ill. App. 626; 7 N. E. (2d) 636.

No. 673. SAYLAR *v.* UNITED STATES. January 17, 1938. 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. *Julian K. Saylor, pro se.* No appearance for the United States. Reported below: 92 F. (2d) 1015.

No. 626. ALSOP *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. R. T. M. McCready* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 92 F. (2d) 148.

No. 630. DI GIORGIO FRUIT CORP. ET AL. *v.* NORTON, DEPUTY COMMISSIONER. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph W. Henderson, Thomas F. Mount,* and *George M. Brodhead, Jr.,* for petitioners. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Henry A. Julicher* for respondent. Reported below: 93 F. (2d) 119.

No. 639. MEYER ET AL. *v.* KENMORE GRANVILLE HOTEL CO. ET AL. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Messrs. Claude A. Roth, Isaac E. Ferguson, Arthur M. Cox,* and *Irving H. Flamm* for respondents. Reported below: 92 F. (2d) 778.

No. 646. AEROVOX CORPORATION *v.* MICAMOLD RADIO CORP. January 17, 1938. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Oscar W. Jeffery* and *Morris Hirsch* for petitioner. *Mr. Kenneth S. Neal* for respondent. Reported below: 92 F. (2d) 45.

No. 659. NEW YORK LIFE INS. CO. *v.* GRAHAM. January 17, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Louis H. Cooke, Raymond G. Wright, Harry B. Jones,* and *Robert E. Bronson* for petitioner. *Mr. Cyril D. Hill* for respondent. Reported below: 92 F. (2d) 377.

Nos. 185 and 186. UNITED SHOE MACHINERY CORP. *v.* WHITE, COLLECTOR OF INTERNAL REVENUE; and

No. 187. SAME *v.* NICHOLS, FORMERLY COLLECTOR OF INTERNAL REVENUE. January 17, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Claude R. Branch* and *Edward H. Green* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *John G. Remey* for respondents. Reported below: 89 F. (2d) 363.

No. 568. F. W. WOOLWORTH CO. *v.* UNITED STATES; and

No. 653. UNITED STATES *v.* F. W. WOOLWORTH CO. January 17, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John L. McMaster* for petitioner in No. 568 and respondent in No. 653. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for the United States. Reported below: 91 F. (2d) 973.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT THROUGH JANUARY 17, 1938.

No. 139. INGELS, DIRECTOR OF MOTOR VEHICLE DEPARTMENT ET AL. *v.* LORD ET AL. Appeal from the District Court of the United States for the Southern District of California. June 15, 1937. Dismissed per stipulation. *Mr. Frank Richards* for appellants. *Mr. Warren E. Libby* for appellees.

No. 272. HARTMANN ET AL. *v.* MILWAUKEE ELECTRIC RY. & LIGHT CO. Appeal from the Supreme Court of Wisconsin. July 30, 1937. Docketed and dismissed. No appearance for plaintiffs in error. *Mr. William F. Hannan* for defendant in error.

No. 95. EPPLEY ET AL., RECEIVERS, *v.* FREUDENHEIM ET AL. Petition for certiorari to the Circuit Court of Appeals for the Third Circuit. August 1, 1937. Dismissed per stipulation pursuant to Rule 35. *Messrs. William S. Moorhead* and *Arthur W. Henderson* for petitioners. *Mr. J. Roy Dickie* for respondents. Reported below: 88 F. (2d) 280.

No. 236. BAKER v. IOWA. Appeal from the Supreme Court of Iowa. August 30, 1937. Dismissed per stipulation pursuant to Rule 35. *Messrs. John F. Devitt* and *A. G. Bush* for appellant. *Mr. T. J. Mahoney* for appellee. Reported below: 222 Iowa 903; 270 N. W. 359.

No. 86. IOWA CITY LIGHT & POWER CO. *v.* ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET

AL. On writ of certiorari to the Court of Appeals for the District of Columbia. October 4, 1937. Pursuant to a stipulation of counsel the decree of the Court of Appeals is reversed and the cause is remanded to the District Court of the United States for the District of Columbia with directions to vacate its decree and to dismiss the proceeding upon the ground that the cause is moot. *Messrs. Walter B. Guy, Wayne G. Cook,* and *Newton D. Baker* for petitioner. *Solicitor General Reed, Assistant Attorneys General Morris* and *Whitaker,* and *Messrs. John W. Scott, Edward H. Foley,* and *Jerome N. Frank* for respondent Ickes. Reported below: 67 App. D. C. 230; 91 F. (2d) 303.

No. 409. NEW YORK CENTRAL R. Co. *v.* CINCINNATI UNION STOCK YARD Co. On petition for writ of certiorari to the Supreme Court of Ohio; and

No. 410. NEW YORK CENTRAL R. Co. *v.* CINCINNATI UNION STOCK YARD Co. On petition for writ of certiorari to the Court of Appeals of Hamilton County, Ohio. October 18, 1937. Petitions for writs of certiorari dismissed on motion of counsel for the petitioner. *Mr. J. L. Kohl* for petitioner. *Mr. Murray Seasongood* for respondent. Reported below: No 409, 132 Ohio St. 552; 9 N. E. (2d) 366; No. 410, 10 N. E. (2d) 456.

No. 479. JACKSON *v.* FIRST NATIONAL BANK. October 25, 1937. Petition for writ of certiorari to the Supreme Court of Oklahoma dismissed on motion of counsel for the petitioner. *Mr. James Edward Whitehead* for petitioner. No appearance for respondent. Reported below: 180 Okla. 77; 70 P. (2d) 88.

No. 554. WEST VIRGINIA POWER Co. *v.* UNITED STATES. December 6, 1937. On petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fourth Circuit. Dismissed on motion of counsel for the petitioner. *Messrs. Newton D. Baker* and *Raymond T. Jackson* for petitioner. No appearance for the United States. Reported below: 91 F. (2d) 611.

No. 618. MOTOR WHEEL CORP. *v.* RUBSAM CORPORATION. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. December 20, 1937. Dismissed on motion of counsel for the petitioner. *Messrs. Drury W. Cooper* and *Carroll R. Taber* for petitioner. No appearance for respondent. Reported below: 92 F. (2d) 129.

PETITIONS FOR REHEARING GRANTED FROM OCTOBER 4, 1937, THROUGH JANUARY 17, 1938.

No. 804 (October Term 1936). RAILROAD COMMISSION OF CALIFORNIA ET AL. *v.* PACIFIC GAS & ELECTRIC CO. October 11, 1937. The petition for rehearing in this case is granted and the case is restored to the docket and assigned for reargument. *Mr. Ira H. Rowell* for appellants. *Messrs. Warren Olney, Jr., Allan P. Matthew,* and *Robert L. Lipman* for appellee. Reported below: 13 F. Supp. 931; 16 F. Supp. 884.

No. 163. BRADY *v.* TERMINAL RAILROAD ASSN. See *ante,* p. 678.

PETITIONS FOR REHEARING DENIED, FROM OCTOBER 4, 1937, THROUGH JANUARY 17, 1938.*

No. 202 (October Term 1935). STONE ET AL., TRUSTEES, *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE. See *ante,* p. 639.

No. 1003 (October Term 1936). TALLY ET AL. *v.* FOX FILM CORP. ET AL. October 11, 1937. The CHIEF JUSTICE took no part in the decision of this application. 301 U. S. 710.

No. 228 (October Term 1936). CHIPPEWA INDIANS OF MINNESOTA *v.* UNITED STATES ET AL. October 11, 1937. 301 U. S. 358.

No. 652 (October Term 1936). GREAT ATLANTIC & PACIFIC TEA CO. ET AL. *v.* GROSJEAN ET AL. October 11, 1937. 301 U. S. 412.

No. 667 (October Term 1936). ANNISTON MANUFACTURING CO. *v.* DAVIS, COLLECTOR OF INTERNAL REVENUE. October 11, 1937. 301 U. S. 337.

No. 734 (October Term 1936). UNITED STATES ET AL. *v.* AMERICAN SHEET & TIN PLATE CO. ET AL. October 11, 1937. 301 U. S. 402.

No. 855 (October Term 1936). GOODMAN LUMBER CO. *v.* UNITED STATES ET AL. October 11, 1937. 301 U. S. 669.

---

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 856 (October Term 1936). A. O. SMITH CORP. *v.* UNITED STATES ET AL. October 11, 1937. 301 U. S. 669.

Nos. 867, 868, and 869 (October Term 1936). HALLIDAY ET AL. *v.* OHIO EX REL. FULTON, SUPERINTENDENT. October 11, 1937. 301 U. S. 699.

No. 897 (October Term 1936). MCDONALD *v.* UNITED STATES. October 11, 1937. 301 U. S. 697.

No. 899 (October Term 1936). NITKEY ET AL. *v.* S. T. MCKNIGHT CO. ET AL. October 11, 1937. 301 U. S. 697.

No. 904 (October Term 1936). INDIANA FARMER'S GUIDE PUBLISHING CO. *v.* PRAIRIE FARMER PUBLISHING CO. ET AL. October 11, 1937. 301 U. S. 696.

No. 914 (October Term 1936). MILLHAUBT *v.* KANSAS. October 11, 1937. 301 U. S. 701.

No. 918 (October Term 1936). DAVIS *v.* UNITED STATES. October 11, 1937. 301 U. S. 704.

No. 931 (October Term 1936). MCLEOD, SHERIFF, *v.* COOPER, TRUSTEE. October 11, 1937. 301 U. S. 705.

No. 932 (October Term 1936). IRVIN *v.* BUICK MOTOR CO. ET AL. October 11, 1937. 301 U. S. 702.

No. 938 (October Term 1936). PAINTER *v.* OHIO. October 11, 1937. 301 U. S. 667.

No. 940 (October Term 1936). GENERAL ELECTRIC Co. *v.* ELECTRIC MACHINERY MANUFACTURING Co. October 11, 1937. 301 U. S. 702.

No. 944 (October Term 1936). FEARON *v.* TREANOR. October 11, 1937. 301 U. S. 667.

No. 947 (October Term 1936). GRUBB *v.* LAWMAN, RECEIVER. October 11, 1937. 301 U. S. 668.

No. 974 (October Term 1936). REILLY ET AL. *v.* STEDRONSKY ET AL. October 11, 1937. 301 U. S. 698.

No. 978 (October Term 1936). TURMAN *v.* TURMAN. October 11, 1937. 301 U. S. 698.

No. 935 (October Term 1936). RATIGAN *v.* UNITED STATES. October 18, 1937. 301 U. S. 705.

No. —. EX PARTE SOPHY CALLAHAN. October 25, 1937.

No. 235. BENNETT ET AL. *v.* BOARD OF TRADE ET AL. October 25, 1937.

No. 564 (October Term, 1936). HAMERSLEY *v.* UNITED STATES. November 8, 1937. 300 U. S. 659.

No. 65. ELLIOTT ET AL. *v.* UNIVERSITY OF ILLINOIS ET AL. November 8, 1937.

No. 88. ANDERSON ET AL. *v.* UNITED STATES. November 8, 1937.

No. 119. BYRNE MANUFACTURING CO. *v.* AMERICAN FLANGE & MFG. CO. November 8, 1937.

No. 132. CRUSE, ADMINISTRATOR, ET AL. *v.* SABINE TRANSPORTATION CO. November 8, 1937.

No. 166. BUCHEN ET AL. *v.* BANK OF AMERICA. November 8, 1937.

No. 174. NITKEY *v.* WARD ET AL. November 8, 1937.

No. 179. STEWART ET AL. *v.* WALL, ADMINISTRATOR, ET AL. November 8, 1937.

No. 207. CINCINNATI, NEWPORT & C. RY. CO. *v.* CINCINNATI ET AL. November 8, 1937.

No. 212. DEMAROIS *v.* FARREL, U. S. MARSHAL, ET AL. November 8, 1937.

No. 229. DUKE *v.* UNITED STATES. November 8, 1937.

No. 240. LYNCH *v.* KEMP. November 8, 1937.

No. 254. DIOCESE OF OLYMPIA, INC., *v.* PEMBERTON, SUPERVISOR, ET AL. November 8, 1937.

No. 267. VILAS *v.* IOWA STATE BOARD OF ASSESSMENT AND REVIEW ET AL. November 8, 1937.

No. 285. ROLAND TO USE OF SHICK ET AL. *v.* ALBRIGHT ET AL. November 8, 1937.

No. 298. U. S. EX REL. SOCIETE DE CONDENSATION ET D'APPLICATIONS MECANIQUES *v.* COE, COMMISSIONER OF PATENTS. November 8, 1937.

No. 308. FIDELITY & COLUMBIA TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 8, 1937.

No. 309. MCGRATH *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 8, 1937.

No. 310. LOUISVILLE TRUST CO. ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 8, 1937.

No. 311. FIDELITY & COLUMBIA TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 8, 1937.

No. 336. PURMAN *v.* SMITH. November 8, 1937.

No. 341. COUCHE *v.* LOUISIANA. November 8, 1937.

No. 345. ANDERSON *v.* ODISHO. November 8, 1937.

No. 350. GENERAL MOTORS CORP. *v.* SWAN CARBURETOR CO. November 8, 1937.

No. 351. GOODMAN *v.* ILLINOIS EX REL. CHICAGO BAR ASSOCIATION. November 8, 1937.

Nos. 353 and 354. RYAN ET AL. *v.* NEWFIELD. November 8, 1937.

No. 355. FLORIDA TEX OIL CO. ET AL. *v.* BALLENTINE. November 8, 1937.

No. 376. DALLAO *v.* LOUISIANA. November 8, 1937.

No. 377. UGARTE *v.* LOUISIANA. November 8, 1937.

No. 385. SPRUILL *v.* SERVEN. November 8, 1937.

No. 396. KELLOGG COMPANY *v.* NATIONAL BISCUIT CO. November 8, 1937.

No. 229. DUKE *v.* UNITED STATES. See *ante*, p. 650.

No. 202 (October Term, 1935). STONE ET AL. *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE. November 15, 1937. The motion for leave to file petition for rehearing is granted and the petition is denied. 301 U. S. 532.

No. 219. LIVERMORE *v.* BEAL ET AL. November 15, 1937.

No. 220. BOYD, ADMINISTRATRIX, *v.* ELLIOTT ET AL. November 15, 1937.

No. 221. KREISS *v.* ELLIOTT ET AL. November 15, 1937.

No. 222. LIVERMORE *v.* BEAL ET AL. November 15, 1937.

No. 382. GENERAL BAKING CO. *v.* GOLDBLATT BROS., INC. November 15, 1937.

No. 429. CRAMER, ADMINISTRATOR, *v.* PHOENIX MUTUAL LIFE INS. CO. ET AL. November 15, 1937.

No. 430. COBURN ET AL. *v.* PHOENIX MUTUAL LIFE INS. CO. ET AL. November 15, 1937.

No. 431. CRAMER, ADMINISTRATOR, *v.* AETNA LIFE INS. CO. ET AL. November 15, 1937.

No. 432. COBURN ET AL. *v.* AETNA LIFE INS. CO. ET AL. November 15, 1937.

No. 440. MORRIS *v.* ALABAMA. November 15, 1937.

No. 17. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* NEILL ET AL. November 22, 1937.

No. 411. ROYAL INDEMNITY CO. ET AL. *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. November 22, 1937.

No. 495. MITCHELL ET AL. *v.* SUPREME COURT OF FLORIDA ET AL. November 22, 1937.

No. 21. GROMAN *v.* COMMISSIONER OF INTERNAL REVENUE. See *ante*, p. 654.

No. —, original. EX PARTE SAMUEL LESSER. December 6, 1937.

No. 416. U. S. EX REL. HANDLER *v.* HILL, WARDEN. December 6, 1937.

No. 480. GREEN *v.* CITY OF STUART. December 6, 1937.

No. 11. UNITED STATES *v.* WILLIAMS. December 13, 1937.

No. 370. AMERICAN PAPER GOODS CO. *v.* UNITED STATES. December 13, 1937.

No. 478. LOUISIANA & ARKANSAS RY. CO. *v.* FRANCIS. December 13, 1937.

No. 501. MORLEY CONSTRUCTION CO. ET AL. *v.* MARYLAND CASUALTY CO. December 13, 1937.

No. 520. GIORDANO *v.* ASBURY PARK ET AL. December 13, 1937.

No. —, original. EX PARTE CHARLES LEFKOWITZ. December 20, 1937.

No. 14. FEDERAL TRADE COMMISSION *v.* STANDARD EDUCATION SOCIETY ET AL. December 20, 1937. *Ante*, p. 112.

No. 496. TEXAS *v.* ANDERSON, CLAYTON & CO. ET AL. December 20, 1937.

Nos. 521 and 522. JENSEN ET AL. *v.* LORENZ ET AL. December 20, 1937.

No. —, original. EX PARTE JOSEPH E. JONES. January 3, 1938.

No. 28. TEXAS ET AL. *v.* DONOGHUE, TRUSTEE. January 3, 1938.

No. 38. FIDELITY & DEPOSIT CO. *v.* PINK, SUPERINTENDENT OF INSURANCE. January 3, 1938.

No. 544. HORNBLOWER ET AL. *v.* MCGRAY. January 3, 1938.

No. 557. ODELL *v.* BAUSCH & LOMB OPTICAL CO. ET AL. January 3, 1938.

No. 921 (October Term 1936). NEW YORK TRUST CO., EXECUTOR, *v.* UNITED STATES. January 10, 1938. 301 U. S. 704.

No. 422. HEBERT ET AL. *v.* RIO BRAVO OIL CO. ET AL. January 10, 1938.

No. 550. TAYLOR, RECEIVER *v.* BANCROFT, RECEIVER. January 10, 1938.

No. 569. BARNETT *v.* ROGERS, SHERIFF. January 10, 1938.

No. 525. OCEAN CITY *v.* FEDERAL RESERVE BANK. January 10, 1938. The motion to reinstate the petition for writ of certiorari is denied. The petition for rehearing is also denied.

No. 382. GENERAL BAKING CO. *v.* GOLDBLATT BROS. INC. January 17, 1938. The motion for leave to file a second petition for rehearing is granted. The petition for rehearing is denied.

No. 27. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GOWRAN. January 17, 1938. *Ante*, p. 238.

Nos. 584, 585, and 586. WEIR *v.* UNITED STATES. January 17, 1938.

Nos. 587, 588 and 589. KORTE *v.* UNITED STATES. January 17, 1938.

No. 591. GENERAL BAKING CO. *v.* HARR, SECRETARY OF BANKING, ET AL. January 17, 1938.

No. 616. WEST BROTHERS BRICK CO. *v.* ALEXANDRIA. January 17, 1938.

ORDERS RE RULES OF PROCEDURE.

Order of December 20, 1937.

It is ordered that Rules of Procedure for the District Courts of the United States be adopted pursuant to Section 2 of the Act of June 19, 1934, Chapter 651 (48 Stat. 1064), and the Chief Justice is authorized and directed to transmit the Rules as adopted to the Attorney General and to request him, as provided in that section, to report these Rules to the Congress at the beginning of the regular session in January next. Mr. Justice Brandeis states that he does not approve of the adoption of the Rules.

Order of January 17, 1938.

By its order of June 3, 1935, the Court appointed an Advisory Committee to assist the Court in the preparation of a unified system of general rules of procedure in the District Courts of the United States, in accordance with Section 2 of the Act of June 19, 1934, c. 651 (48 Stat. 1064). The members of the Committee were:

William D. Mitchell, of New York City, Chairman.

Scott M. Loftin, of Jacksonville, Florida, President of the American Bar Association.

George W. Wickersham, of New York City, President of the American Law Institute.

Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota.

Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University.

Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia.

Robert G. Dodge, of Boston, Massachusetts.

George Donworth, of Seattle, Washington.

Joseph G. Gamble, of Des Moines, Iowa.

Monte M. Lemann, of New Orleans, Louisiana.

Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University.

Warren Olney, Jr., of San Francisco, California.

Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan.

Edgar B. Tolman, of Chicago, Illinois.

Charles E. Clark, of New Haven, Connecticut, was appointed Reporter to the Advisory Committee.

Following the death of George W. Wickersham, the Court, on February 17, 1936, appointed George Wharton Pepper, of Philadelphia, Pennsylvania, in his stead, and Mr. Pepper succeeded Mr. Wickersham as Vice Chairman of the Committee.

The Committee at once organized and for about two years and a half its members devoted themselves to the task assigned them. Apart from the work of the reporter of the committee, and of those who gave special assistance in drafting, the members served without compensation. They held frequent and protracted meetings and prepared tentative drafts which were submitted to Federal Judges, to committees of lawyers appointed in various Judicial Districts, and to associations of the Bar. These drafts had a wide circulation and a large number of lawyers and judges availed themselves of the opportunity to offer criticisms and suggestions.

The Committee submitted its final draft to this Court in November last, and the Court after considering the draft and making such changes as were deemed advisable transmitted the rules to the Attorney General of the United States for submission to Congress as provided in the statute. The Court is informed that the Attorney General submitted the rules accordingly at the opening of the present session of Congress.

The Court expresses its high appreciation of the services of the members of the Advisory Committee who at great personal sacrifice have performed a most important public duty and by their expert knowledge and painstaking collaboration have aided the Court in the formulation of a system of rules designed to promote the simplification of procedure in the Federal Courts and thus to increase the efficiency of the administration of justice.

The Court directs that this expression be spread upon the Journal of the Court and that a copy be sent to each member of the Committee.

32094°—38——50

AMENDMENT OF RULES OF COURT.

ORDER OF JANUARY 10, 1938.

It is ordered that the Rules of this Court be amended by adding thereto Rule 46½, to read as follows:

"46½

"APPEALS UNDER THE ACT OF AUGUST 24, 1937

"Appeals to this court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States; provided, however, that when an appeal is taken under Section 2 of the Act the service required by paragraph 2 of Rule 12 shall be made on all parties to the suit other than the party or parties taking the appeal. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

AMENDMENT OF BANKRUPTCY RULES.

ORDER OF NOVEMBER 16, 1937.

It is ordered that paragraph 4 of Rule XVIII of the General Orders in Bankruptcy be, and the same hereby is, amended, effective immediately, to read as follows:

XVIII.

4. This general order shall not apply to reorganization proceedings under section 77 of the Act.

It is further ordered that Rule LII of the General Orders in Bankruptcy be, and the same hereby is, amended, effective immediately, by inserting a new paragraph therein to read as follows:

LII.

4. Not less than ten days' notice of hearing upon any application for the sale or lease of property of the debtor pursuant to section 77B c (3½), except sales of perishable property, shall be given by mail to all creditors and stockholders of the debtor, addressed to them at their last known addresses appearing upon the records of the debtor or of the trustee, or to their attorneys of record. Paragraphs 1, 2, and 3 of General Order XVIII shall be applicable to such sales.

[See further order on next page following.]

ORDER OF DECEMBER 7, 1937.

It is ordered that paragraph 4 of Rule LII of the General Orders in Bankruptcy be, and the same hereby is, amended, effective immediately, to read as follows:

LII

4. Not less than ten days' notice of hearing upon any application for the sale or lease of property of the debtor pursuant to section 77B c (3½), except sales of perishable property, shall be given by mail to all creditors and stockholders of the debtor, addressed to them at their last known addresses appearing upon the records of the debtor or of the trustee or to their attorneys of record, or, for good cause shown, by advertisement in the manner and for the time directed by the District Court. Paragraphs 1, 2, and 3 of General Order XVIII shall be applicable to such sales.

INDEX.

I. **Miscellaneous.**

1. *States. Suits Against.* Interpleader of tax officers asserting rival claims of States to death taxes. *Worcester County Co.* v. *Riley*, 292.

2. *Judicial Power.* Challenge of executive appointment to public office; sufficiency of interest of petitioner to invoke judicial power. *Ex parte Levitt*, 633.

3. *Army and Navy.* Congress may require military service of minors. *U. S.* v. *Williams*, 46.

4. *Indians.* Federal guardianship. *U. S.* v. *McGowan*, 535.

○

LSCMFDLP102775