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VOLUME 304

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1937

FROM APRIL 12, 1938, TO AND INCLUDING MAY 31, 1938
(END OF THE TERM)

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, 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.
STANLEY REED, Associate Justice.

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

HOMER S. CUMMINGS, Attorney General.
ROBERT H. JACKSON, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.[3]
THOMAS ENNALLS WAGGAMAN, Marshal.[3]

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[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, during the period covered by this volume.

[3] Mr. Frank Key Green, Marshal of the Court, died April 26, 1938 (see announcement by the Chief Justice, *post*, p. v). On May 2, 1938, Mr. Thomas Ennalls Waggaman was appointed Marshal of the Court.

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, STANLEY REED, Associate Justice.

For the Tenth Circuit, PIERCE BUTLER, Associate Justice.

February 7, 1938.

SUPREME COURT OF THE UNITED STATES.

Tuesday, April 26, 1938.

Present: The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE BUTLER, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED.

The CHIEF JUSTICE said:

"It is my sad duty to announce that Mr. Frank K. Green, the Marshal of the Court, died this morning. His life was spent in the service of the Court. He entered that service as a page boy over 46 years ago. Ten years later, in 1901, he became Librarian and, soon after, crier. He was appointed Marshal in 1915 and for over 23 years has acted in that capacity. Throughout this long period he has served the Court with the utmost fidelity, bringing to the discharge of his duties not only the advantages of his ability and thorough acquaintance with the work of the Court but an unfailing tact and kindliness which won the esteem of those who have been brought into contact with his office. His name belongs in the honor roll of those who have given themselves through long years to the service of the Court with complete devotion to its interests. As a token of our respect for his memory, we shall do nothing today but hear motions and finish the cause on argument, and we shall then adjourn until tomorrow morning."

Mr. Green was born, October 21, 1876, at "Forrest Hill," the home of his father, George Forrest Green, in the District of Columbia. This was part of a place near Georgetown, called Rosedale, which is said to have been purchased by his great-grandfather, Uriah Forrest, in 1790. He received his general schooling in Georgetown and a legal degree from the law school of Georgetown University. Funeral services were held at Holy Trinity Church on Thursday, April 28, 1938, and interment was in Cedar Hill Cemetery, Washington, D. C., on the same day.—REPORTER.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1937.

MORGAN ET AL. *v.* UNITED STATES ET AL.

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

No. 581. Argued March 10, 11, 1938.—Decided April 25, 1938. Petition for rehearing denied May 31, 1938.

1. An order of the Secretary of Agriculture fixing the maximum rates to be charged by market agencies (commission men) at stockyards *held* void for failure to allow the "full hearing" before the Secretary required by the Packers and Stockyards Act. *Morgan* v. *United States*, 298 U. S. 468. P. 13.
2. In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing. P. 14.
3. In requiring a "full hearing," the Packers and Stockyards Act has regard to judicial standards,—not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. Those requirements relate not only to the taking and consideration of evidence but also to the concluding, as well as to the beginning and intermediate, steps in the procedure. P. 19.
4. The proceeding was begun by a general notice of inquiry into the reasonableness of the rates of market agencies at the Kansas City Stockyards. Thousands of pages of testimony were taken by an examiner and numerous complicated exhibits were introduced, bearing upon all phases of the broad subject of the businesses in question. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and

argument, was refused. Oral argument, before an Assistant Secretary, was general and sketchy and did not reveal in any appropriate manner the Government's claims. The Government submitted no brief and furnished no statement of its contentions. Numerous and elaborate findings were prepared by subordinates who had conducted the proceedings for the Government, and were submitted to the Secretary, who accepted them, with certain rate alterations. No opportunity was afforded the appellants to examine the findings until they were served with the order fixing rates which they claim to be confiscatory. A rehearing was refused by the Secretary. The Secretary did not read the testimony, but examined it somewhat to get its drift; he did not hear the oral argument but read a transcript of it and the appellants' briefs, and conferred *ex parte* concerning the findings with the subordinates who prepared them. *Held:*

(1) The right to a "full hearing" embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. P. 18.

(2) No such reasonable opportunity was accorded in this case. P. 19.

(3) In all substantial aspects, the proceeding was an adversary one—a prosecution by the Government of the owners of the market agencies threatening the existence of the agencies and the owners' means of livelihood. P. 20.

(4) An earlier order containing findings of facts and fixing a schedule of rates, which was set aside because of changes in economic conditions, could not avail to remedy the defects in the conduct of the latter proceeding here in question. P. 21.

(5) The action of the Secretary in accepting and making as his own the findings which had been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them, was more than an irregularity in procedure; it was a vital defect. P. 21.

1 Argument for Appellants.

5. A petition for rehearing based upon the grounds of inconsistency of the decision on this appeal with rulings on the earlier appeal, 298 U. S. 468, and upon the ground of surprise—is denied. P. 23.
6. Questions as to the disposition of moneys impounded in the District Court representing charges for market-agency services paid in excess of the rates fixed by the void order, are for that court to decide. P. 26.

23 F. Supp. 380, reversed.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed the bills in fifty suits, consolidated for hearing, challenging the validity of maximum rates fixed by the Secretary of Agriculture for market agencies at the Kansas City Stock Yards. A former appeal is reported in 298 U. S. 468. The present report includes an opinion delivered May 31, 1938, denying a rehearing. Summaries of the arguments on the procedural questions are extracted from the main briefs used on the hearing.

Messrs. Frederick H. Wood and *John B. Gage,* with whom *Mr. Thomas T. Cooke* was on the brief, for appellants.

It is not necessary, in order to meet the requirements of a "full hearing," that the Secretary, in person, should hear all of the evidence or that he should read it all. On the other hand, the requirements of a "full hearing" are not met if, as testified to by the Secretary in this case, the order merely represents his "independent conclusion as based upon the findings" of his subordinates, or his "own independent reactions to the findings of" such subordinates. It is not enough that he has exercised an independent judgment of his own predicated upon findings of fact made by others. Nor that he has satisfied himself, as an executive might, after making some inquiries of his subordinates, that he is willing to

adopt their findings. He is, as stated by this Court, "the trier of the facts" and as such required to weigh the evidence upon which the findings depend, and upon which, in turn, his conclusions and ultimate determinations are based. This duty may not be delegated to or performed by others.

It is true that the "evidence . . . taken may be sifted and analyzed by competent subordinates," 298 U. S. 481, but this clearly means that the sifting and analysis must be of the evidence as a whole upon any controverted issue of fact or in respect of which any ultimate findings of fact must be based. It may not be a one-sided analysis. If variant or contrary inferences may be drawn from the evidence, the subordinates may not choose between them but must fairly present both sides of the evidence, so that the authorized tribunal may make his choice. If an ultimate or evidentiary finding of fact, controversial in character, requires for its determination consideration of evidence relating to different but related subjects, without the weighing of all of which no ultimate or evidentiary finding may be made, then such analysis must fairly set forth these several descriptions of evidence and their relation to the possible ultimate or evidentiary inferences presented. To what extent the Secretary may rely upon such analyses without examination of the record himself in respect of controverted questions, it is unnecessary to discuss. This is so because it plainly appears from the record as a whole that no such analysis of the evidence was made and submitted to him by any subordinate.

The law is not concerned with the mechanics employed. What it does require is that the findings of fact shall be those of the Secretary himself, made only after a weighing and appraisal of the evidence, however that evidence may be submitted to him for consideration.

In leaving the findings of fact to his subordinates, the Secretary proceeded upon the erroneous assumption that the delegation of the legislative power to fix rates was to the Department of Agriculture rather than to the Secretary in person.

The evidence as to the manner in which the findings, submitted to the Secretary and accepted by him, were prepared, discloses the absence of any quasi-judicial weighing or appraisal of the evidence by those who prepared them. The record discloses that neither the evidence nor the argument was thereafter weighed or appraised by the Secretary.

The findings prepared by the Secretary's subordinates do not constitute such a "sifting and analyzing" of the evidence as to absolve the Secretary from weighing and appraising the evidence itself.

The Secretary did not weigh and appraise the evidence concerning salesmanship performance, the findings concerning which are based on the flimsiest kind of evidence and are the most important of all.

The Secretary accepted without change findings made by his subordinates in respect of sales performance, apparently under the misapprehension that they were supported by actual performance, without any examination of the evidence in respect thereof, which, if made, would have disclosed the contrary.

The Secretary did not weigh and appraise the evidence upon which the order's so-called reasonable cost assigned to business-getting and maintaining was predicated.

The Secretary did not weigh and appraise the evidence bearing upon the reasonable cost of yarding or office salaries, but accepted the findings submitted upon a misunderstanding of their import.

Neither the fragmentary oral statements of his subordinates as to what some of the evidence was nor the

Secretary's hit or miss "investigation into" the record is an acceptable substitute for his weighing and appraising the evidence as a whole.

The altering by the Secretary of a few rates in the tentative order in no way tends to prove he weighed and appraised the evidence. Had he filled in a wholly blank schedule he would be no better off.

The inexorable requirement of a fair trial before an impartial tribunal, which shall render judgment upon the evidence, is not met where, without any allegation that any rates are unreasonable, and without any disclosure of their contentions as to the ultimate facts proved or the principles intended to be applied to them, the findings and order to be made are prepared by opposing counsel and, without the knowledge of the appellants or their counsel, submitted to the trier of the facts who, after private unrecorded conferences with opposing counsel, issues an order in accordance therewith, without himself weighing or appraising the evidence upon controverted issues.

There was no allegation or suggestion in the original order of inquiry that any of appellants' rates were unjust, or unreasonable or discriminatory. The "Order Granting Rehearing" was not more explicit in these respects.

Counsel for the Government, in his argument, presented no issues of fact. Where he did refer to individual agencies he paid them the highest possible compliment as to efficiency of operation. He stated that in his opinion the rates under investigation were not discriminatory and that none of the appellants were making too much money under the existing rates.

Nothing occurred in the course of the oral argument to forecast the fact that the Assistant Secretary was not to pass upon the issues but was to retire from further con-

sideration of the case. No statement indicated that a tentative report was to be prepared by the attorneys for the Government and a Government economist, an important witness for the Government. It was not suggested that the proposed findings and order, without having been first served upon counsel for appellants, would be presented to the Secretary personally and discussed with him by the attorneys for the Government in unrecorded conferences, out of the presence of appellants' counsel. Appellants' counsel, without the benefit of a complaint containing specific allegations as to the unreasonableness of any rates, having before him in the evidence a cost study prepared after extensive audits by Government accountants showing experienced costs to be in excess of receipts under existing rates, and without any knowledge of the contents of the tentative report, prepared a brief which was filed with the Assistant Secretary. No briefs were filed or served by the Government.

The proposed findings and order so prepared by the attorneys for the Government, together with certain memoranda prepared in part by the economist who was a Government witness in the case, was presented to the Secretary. The Secretary, according to his testimony, after examining the record casually, took the order, the briefs, and transcript of oral argument home with him. He states that he read the tentative order and part, at least, of the briefs. After discussing the matter with counsel for the Government in private unrecorded conferences, he changed, to an unimportant extent, a few figures expressing individual rates, and signed the order as proposed, otherwise unchanged, on June 14, 1933.

This he did without weighing or appraising the evidence on controverted issues of fact and without familiarizing himself with any part thereof except as com-

municated to him in *ex parte* oral conversations with his subordinates including the attorney prosecuting the case. No record was kept of these conversations, but it appears they were fragmentary and unaccompanied by any weighing and appraising of the evidence by the Secretary. And this although the findings accepted are directly contrary to statements in appellants' administrative briefs. Such a course of administrative procedure constitutes neither a full hearing nor due process of law.

The more extensive the employment of the implement of the administrative tribunal becomes—and its use is daily becoming more widespread—and the more credit which is given to its decisions, the more important is it that strict regularity be observed in the conduct of its hearings and that all the elements of a full and fair hearing and of due process of law be accorded. See Lord Chief Justice Hewart, "The New Despotism," pp. 50–51.

It is not contended by appellants that in cases where a fair and proper method has been adopted for limiting the issues, whether it be a tentative report of the Examiner or otherwise, the tribunal passing judgment must review or appraise all of the evidence relating to non-controversial as well as controversial issues. Nor is it contended that in order that there be a full hearing, oral argument or oral presentation is essential in every instance—for by other methods the trier of the facts may become so adequately informed as to enable himself to properly appraise the evidence. Nor is it contended that the order is void solely by reason of the fact that the attorneys for the prosecution, assisted by a witness for the prosecution, prepared it,—for had such an order, so prepared, been followed by presentation of it to counsel for appellants with full opportunity to refute the conclusions expressed therein before him whose duty it was to resolve the evidence into findings, the requirement of a fair trial

could be met if the Secretary weighed and appraised all of the evidence upon the findings questioned by appellants' counsel. A court or administrative tribunal may for its convenience require submission of issues upon written statement—if such written statements are, under conditions fairly permitting reply, made known to opposing parties. Evidence may for the assistance of the one charged with the responsibility of decision be fairly analyzed by impartial and competent assistants, unbiased by previous partisan connection with the proceeding. Where, however, issues are not defined and limited by means and methods fair to all persons affected or to be affected, fair analyses or synopses of the evidence are not prepared by impartial or competent assistants, and the one deciding the issues does not personally review and weigh and appraise the evidence, a full hearing is not had in accordance with statutory and constitutional requirements.

Assuming that, as claimed, the Secretary read oral and written argument, nevertheless it is clear that he did not judicially weigh and appraise the same, since he admittedly adopted the vitally important inferences drawn by his subordinates from the evidence, and rejected the widely differing inferences asserted by appellants in their briefs, without weighing or appraising the evidence upon which either set of inferences was based.

The order should be set aside because unsupported by essential findings of basic facts, because the fundamental findings of fact therein are not supported by substantial evidence, because based upon an erroneous conception of the law and of the powers of the Secretary, because based upon a departure from recognized and accepted standards, both of reasonableness and of administrative procedure, and because arbitrarily made.

Solicitor General Jackson and *Mr. Wendell Berge,* with whom *Ass't Solicitor General Bell,* and *Messrs. Hugh B. Cox, James C. Wilson, Edward J. Ennis,* and *G. N. Dagger* were on the brief, for the appellees.

The contention that the decision of a quasi-judicial officer, made upon a proper record after full hearing of argument, may be declared to be void on the ground that it was insufficiently considered is without precedent. In its prior decision, this Court held that where it was alleged that the Secretary heard neither evidence nor argument a case was made for judicial investigation. It did not hold that where he had heard argument, judicial investigation may test the adequacy of his further consideration of the case. The detailed facts of the Secretary's physical examination of arguments and evidence and the detailed mental processes which he employed in reaching his determination are not a proper subject for judicial inquiry. Appellants' contention is, in essence, an endeavor to avoid, by a novel doctrine of judicial review, the established rule that the findings of a quasi-judicial officer, made after hearing or reading full argument on a proper record submitted to him, can be attacked only by showing that the findings are in fact unsupported by the evidence.

The question of the scope of the issue is not of controlling importance in the present case. Should this Court decide that it is free to look behind the fact that the Secretary read and considered appellants' arguments, it will find that the evidence shows that the Secretary fully complied with any procedural standard that may reasonably be imposed.

The Secretary made his decision on the basis of his own personal consideration and appraisal of the evidence and argument. The transcript of record was in his possession and, while he did not read it consecutively or in full, he

consulted it wherever in his judgment such consultation was necessary. As a guide to his examination of the record he studied the arguments of appellants directed to the evidence and compared them with the voluminous findings of fact, which constituted a summary and analysis of the evidence. Having read and considered the tentative findings of fact and the arguments of appellants, he made an investigation into the record—assisted by consultation with members of the Department—for the purpose of considering and appraising the evidence upon which the findings were made. Uncontradicted testimony establishes that the Secretary, in the exercise of his independent judgment, altered three of the most important items in the tentative schedule of rates. With respect to all the numerous questions raised by appellants, persuasive evidence exists to show independent inquiry and the exercise of independent judgment by the Secretary. By asserting that the Secretary did not give them a fair hearing, appellants have assumed the burden of proving by clear and convincing evidence that the Secretary did not consider their arguments or the evidence to which those arguments related.

Appellants renew their objection that they were not given an opportunity to file exceptions to an examiner's report or to tentative findings of fact, and to present argument in support of those exceptions. This Court has already passed on this argument. [Citing *Morgan* v. *United States,* 298 U. S. 468, 478.] The practice which the Court described as desirable has now been established in proceedings under § 307 of the Act. See Order of September 16, 1936, 1 Federal Register 1362. It remains true, however, that the failure to follow it is not fatal to the validity of the hearing.

Appellants also complain that in his oral argument counsel for the Department did not apprise them of the

issues which they might be expected to meet, and they refer to statements he made which were in agreement with their contentions. It is not to be supposed that the appellants were prejudiced by such friendly statements in oral argument or that appellants' counsel needed the assistance of Government counsel, or of an examiner's report, or of tentative findings of fact, to determine what the important issues in the proceeding were. It is common knowledge that often in ordinary litigation the argument addressed by counsel to the court is made before the submission of proposed findings of fact or conclusions of law, and that the argument of opposing counsel does not in every case disclose with clarity the issues on which the case is to be decided. Such circumstances when they exist can hardly be said to amount to a denial of a full hearing.

Furthermore, it should be noted that, at the time of the oral argument and when petitioners filed their supplemental brief with the Secretary, they had before them an order, which had been signed on May 18, 1932, by the Secretary of Agriculture, containing findings of fact and fixing a schedule of rates. At the time the rehearing was granted, the Secretary had set this order aside. The record upon which that order had been made was a part of the record before the Secretary at the time of the rehearing, and the order served to inform the appellants of the nature of the issues involved. That it did so inform them is shown by the fact that much of appellants' supplemental brief was devoted to a discussion of this order, and that in the course of that discussion they advanced most of the contentions which they make with respect to the order now under attack.

Appellants attempt to distinguish this present situation from one in which a court adopts findings prepared by counsel on the ground that a court affords opposing

counsel an opportunity to submit findings of his own or to except to the findings which are adopted. There is no force in this distinction. Although the appellants were not given an opportunity to except to the tentative findings of fact, they had an unrestricted opportunity to submit findings of their own to the Secretary of Agriculture which he could have considered. They did not take advantage of that opportunity; but that is not a circumstance which can be held against the Secretary of Agriculture. There is no logic in appellants' suggestion that the adoption of findings is done independently if opposing counsel has a chance to criticize those findings, but must be presumed not to have been done independently if the opportunity to criticize is not afforded.

The order of the Secretary is based upon correct principles of law and is supported by substantial evidence.

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

This case presents the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yards. Packers and Stockyards Act, 1921, 42 Stat. 159; 7 U. S. C. 181–229. The District Court of three judges dismissed the bills of complaint in fifty suits (consolidated for hearing) challenging the validity of the rates, and the plaintiffs bring this direct appeal. 7 U. S. C. 217; 28 U. S. C. 47.

The case comes here for the second time. On the former appeal we met, at the threshold of the controversy, the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order. The District Court had struck from plaintiffs' bills the allegations that the Secretary had made the order

without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. *Morgan* v. *United States,* 298 U. S. 468.

After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. This evidence embraced the testimony of the Secretary and of several of his assistants. The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute and (2) that the order was arbitrary and unsupported by substantial evidence.

The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the

rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, 305; *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 393; *Morgan* v. *United States, supra.* And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a *"full hearing."* § 310.[1]

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with re-

[1] Section 310 of the Packers and Stockyards Act (42 Stat. 159, 166; 7 U. S. C. 211) provides:

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; . . ."

spect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The Government and appellants were represented by counsel and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was re-submitted and this was supplemented by additional testimony and exhibits. On March 24, 1933, oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted the brief which they had presented after the first administrative hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the Government. Apart from what was said on its behalf in the oral argument, the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government, and were submitted to the Secretary, who signed them, with a few

changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, office salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the

oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows:

"My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government pro-

poses and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. Counsel for appellants then discussed the evidence from his standpoint. The Government's counsel closed briefly, with a few additional and general observations. The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order.

Congress, in requiring a "full hearing," had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master

or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to

continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426) places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry.

Equally unavailing is the contention that the former Secretary of Agriculture had made an order in May, 1932, containing findings of fact and fixing a schedule of rates, of which appellants were apprised. Because of changes in economic conditions, the Secretary himself had set aside that order and directed a rehearing. This necessarily involved, as the Secretary found, a consideration "of changes both general and particular" which had "occurred since the year 1929" and brought up all the questions pertinent to the new situation to which the additional evidence upon the rehearing was directed. The former findings and order were no longer in effect and it is with the conduct of the later proceeding that we are concerned.

The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires "relates to substance and not form." Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear

the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is

Reversed.

MR. JUSTICE BLACK dissents.

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

1 On Petition for Rehearing.

A PETITION FOR REHEARING, FILED ON MAY 20, 1938, WAS DENIED ON MAY 31, 1938.

PER CURIAM.

The Solicitor General moves for a rehearing of this case upon two grounds:

First. The first ground is that the Court has reversed itself; that the present decision is "directly contrary to the law of the case" as established by the Court's decision on the former appeal, *Morgan* v. *United States,* 298 U. S. 468; and that "a procedural omission" previously held "to be of no significance" is now regarded as "fatally defective."

These assertions are unwarranted. Not only are the two decisions consistent, but the rule announced in our former opinion was applied and was decisive of the present appeal. And the Government is in no position to claim surprise. The question whether there had been a fair hearing in the present case, in the light of the situation disclosed by the Secretary's testimony and the other evidence, was fully argued at the bar. Appellants presented, both orally and in an elaborate brief, with copious references to the record, the contention which we sustained.

The first appeal was brought to this Court because the plaintiffs had been denied an opportunity to prove that the Secretary of Agriculture had failed to give them the full hearing which the statute required. Their allegations to that effect had been struck out by the District Court. 8 F. Supp. 766. We held its ruling to be erroneous and that the question whether the plaintiffs had a proper hearing should be determined, saying:

"But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."

The case was then tried by the District Court upon that issue. From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below. Because such action fails to satisfy the requirement of a full hearing stated in our first opinion and quoted above, we reversed the judgment of the District Court which sustained the order.

Testimony of the Secretary and his associates, disclosed what had actually occurred. It appeared that the oral argument before the Assistant Secretary had been general and sketchy; that, aside from the oral argument, which did not reveal the claims of the Government in any appropriate manner, the Government had submitted no brief and no statement of its contentions had been furnished; that in this situation findings had been prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government; that these findings, 180 in number, were elaborate, dealing with all phases of the practices and facilities at the Kansas City live-stock market, the services and methods of the plaintiffs, and the costs and profits which should be allowed them as reasonable. These findings, prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied.

The statement made in the petition for rehearing that the present decision is contrary to the law of the case as declared in our first opinion is wholly unfounded. Our decision was not rested upon the absence of an examiner's report. So far from departing from our former opinion,

or from the statement that the mere matter of the presence or absence of an examiner's report was not itself determinative, we reiterated both that statement and the principle underlying it in our opinion on the present appeal. We said:

"Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellants. . . .

. . . . . .

"The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires 'relates to substance and not form.' Conceivably the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings."

And, then, pointing out the distinction and the serious defect in the procedure in the instant case, we added:

"But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after

an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

The distinction was again brought out in our recent decision in the case of *National Labor Relations Board* v. *Mackay Radio & Telegraph Co., post,* p. 333, where the mere absence of an examiner's report was found not to be controlling, as the record showed that in that case the contentions of the parties had been clearly defined and that there had been in the substantial sense a full and adequate hearing.

The effort to establish a case for rehearing, either because of an asserted inconsistency in our rulings or because of lack of opportunity for full argument, is futile.

Second. The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

The petition for rehearing is denied.

MR. JUSTICE BLACK dissents.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration of this petition.

Syllabus.

UNITED STATES *v.* BEKINS ET AL., TRUSTEES, ET AL.

LINDSAY-STRATHMORE IRRIGATION DISTRICT *v.* BEKINS ET AL., TRUSTEES, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Nos. 757 and 772. Argued April 7, 1938.—Decided April 25, 1938.

1. Proceedings for voluntary composition of debts without adjudication of bankruptcy are within the scope of the bankruptcy power. P. 47.
2. California Law, 1934, Extra Sess., gave the State's consent to the application to state "taxing districts," of the Bankruptcy Act and amendments, including Chapter X, added to that Act Aug. 16, 1937. P. 47.
3. The omission from c. X of the Bankruptcy Act of a provision specifically requiring that the petition of a state taxing district under that chapter be approved by a governmental agency of the State, *held* unimportant in determining the validity of the legislation where the State has actually consented. P. 49.
4. In conditioning the confirmation of a plan of composition upon proof that the petitioning taxing district is "authorized by law" to take all action necessary to carry out the plan, c. X of the Bankruptcy Act refers to the law of the State. P. 49.
5. Chapter X of the Bankruptcy Act, adopted Aug. 16, 1937, empowers the courts of bankruptcy to entertain and pass upon petitions by state taxing agencies or instrumentalities, including irrigation districts, for the composition of their indebtedness payable out of assessments or taxes levied against and constituting liens upon property in their districts or out of income derived therefrom or from sale of water, etc. The plan of composition must be approved by creditors owning not less than 51% of the securities affected by the plan and can not be confirmed unless accepted by creditors holding 66⅔% of the aggregate indebtedness of the district. There must be consent by the State; and the judge must be satisfied that the district is authorized by local law to carry out the plan. The statute aims to relieve serious distress existing in many such improvement districts where, because of economic conditions, property owners can not pay assessments, and taxation is useless, so that the districts can not meet

their obligations and creditors are helpless. A remedy through composition of the debts of the district could not be afforded by state law unaided, because of the contract clause of the Federal Constitution. *Held* that the statute is a valid exercise of the bankruptcy power. *Ashton* v. *Cameron County District,* 298 U. S. 513, distinguished. P. 49.

6. The ability to contract and to give consents bearing upon the exertion of governmental power is of the essence of sovereignty. P. 51.
7. The reservation to the States by the Tenth Amendment, did not destroy, but protected, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. P. 52.
8. Coöperation between Nation and State through the exercise of the powers of each, to the advantage of the people who are citizens of both, is consistent with an indestructible Union of indestructible States. P. 53.
9. Chapter X of the Bankruptcy Act, *held* not violative of the Fifth Amendment, as applied to creditors of a state irrigation district, which sought a composition of its debts under that chapter. P. 54.

21 F. Supp. 129, reversed.

APPEALS from a decree of the District Court dismissing a petition for confirmation of a plan of composition presented by the above-named Irrigation District under c. X of the Bankruptcy Act. The District and the United States, which had been notified and had intervened, took separate appeals. The following arguments are extracted from a stenographic report of the hearing.

Mr. Hatton W. Sumners for the Committee on Judiciary of the House of Representatives of the United States, as *amicus curiae,* by special leave of Court.

As we understand the issues here presented, there is no question involving the rights of individuals, and there is no question with regard to the mechanics of the law. The sole question is whether or not legislation embodied in §§ 81, 82 and 83 of the Bankruptcy Act, as amended, which sections we know as the Municipal Bankruptcy Act, impinges upon the sovereignty of the State.

In this particular litigation the question arises with reference to an irrigation district.

Briefly visualizing the transactions with reference to that district and the character of the district, we observe that a group of farmers owning contiguous lands, desiring to cultivate those lands under irrigation, availed themselves of the facilities provided by the State of California for putting a blanket mortgage on those lands for the purpose of bringing water to those lands to aid them in the business of farming.

That district exercised, under delegation from the State, power of eminent domain and power of taxation. It did not relieve the State of California of any governmental responsibility theretofore exercised by it.

It seems to us that in so far as drainage and irrigation districts are concerned, they have more the characteristics of a railroad corporation than they do of an ordinary municipality. A railroad corporation, by delegation, exercises the right of eminent domain—probably as high a right and power as Government has—yet it does not thereby become a part of the State.

But I do not desire to take the time of the Court in discussing the differences, whatever they may be, between an irrigation district and an ordinary municipality, because the provisions of this Act cover them all.

When we come to examine what happened as the result of this legislation with reference to the sovereignty and dignity of the municipality, or of the State, however it may be considered, we discover that every debt which could be composed under this Act is a debt which, under the then existing law, would constitute a basis of litigation in an ordinary suit against the municipality.

The municipality, therefore, before this law was enacted, could be brought into court for these same debts by the process of the court, against the will of the municipality, the issues tried as though the municipality were

an ordinary defaulter, judgment had in the ordinary way; and if the judgment of the court were not complied with, the municipality could be brought into court again and subjected to the coercion of the court, even to the extent of the incarceration of its officers. . . .

In a similar situation this same municipality, which theretofore could be brought into court by the might of the court and without regard to its consent, under this Act comes into that court as a sovereign would come, a complete sovereign. It comes in under its own will. Nobody is compelling it to come. Nobody can compel it to come under this Act. In the exercise of its sovereign right to arrange its indebtedness—it had been sitting around a table with its creditors, and they had agreed. In the instant case 87 per cent. agreed that 59 cents on the dollar was the best thing for everybody concerned.

So this municipality, by authority of this Act, goes into that same courthouse, before the same judge, leading a procession of its consenting creditors, and says to the judge, "We have entered into this agreement, 87 per cent. There are 13 per cent. who do not consent. Will you be good enough to examine to determine whether or not this agreement is fair to the 13 per cent. and that it does not do some other things provided against in the law." It tells the court also, "I am here because, first, I was created by a sovereign State in the exercise of its sovereign powers. That sovereign gave me authority to come here. There is nowhere else myself and my creditors can go, and won't you please write our agreement into the book of judgments."

Even if it were an ordinary lawsuit, as we understand it, there is no higher act of sovereignty than for the sovereign voluntarily to submit itself to the judgment of a

court. The Federal Government does it all the time, the States do it; and we have never understood that, when a sovereign voluntarily submits itself to trial and judgment, by that submission it impairs its sovereignty or thereby makes it possible to be sued without its will.

May I respectfully submit to the Court that, instead of impinging upon the sovereignty of the State, this Act clearly is in line with the nature and philosophy of sovereignty of the State, and that to declare this Act unconstitutional would impinge upon the sovereignty of the State. Such a determination would deny to the State of California, in this matter, the right to have a sovereign will with reference to what it will permit its creatures to do.

All the way down the line there has been consent. First, the consent of the creator, California; consent of the Congress, the policy-fixing agency of the Federal Government; consent of the municipality itself, and consent of the creditors. Now, if we are to deny these agencies, which speak the voice of sovereignty and the judgment and will of the private citizen, the right thus to speak, what becomes of their sovereignty?

If the creditors consent, and the municipality consents, and the State consents, and the policy-fixing agency of the Federal Government consents, with all respect, whose else business is it, if they are sovereign?

We respectfully submit that to deny to a sovereign the right to have a sovereign will and to make that will effective, denies to it the very essence of sovereignty.

I am privileged to take a longer time of the Court, but I could not add to the substance of what I have said. We appreciate very much the Court permitting me to appear.

Solicitor General Jackson, with whom *Assistant Attorney General Whitaker,* and *Messrs. Vincent N. Miles, Warner W. Gardner,* and *Henry A. Julicher* were on the brief, for the United States in No. 757.

The District is utterly unable to meet its obligations in due course, and it is authorized by law to carry out a plan of composition.

It asks the bankruptcy court to serve the notice required by statute to bring in the dissenting creditors, to grant hearings, to hold inquiry as to the reasonableness and fairness of the plan, to stay all suits that might be brought to interfere with the District or its property meanwhile, and that the court, if it finally approves the plan, enter an order as provided for in the Act, discharging the District from all further obligations under these outstanding bonds which would be composed by a payment of 59 cents on the dollar.

The measure received careful consideration before the committees of the House and Senate, amendments were made with a view to insuring constitutionality, and the Congress concluded after full discussion that the bill as enacted was free from the objectionable features which had been held fatal to the original Act. [c. IX. See *Ashton* v. *Cameron County Dist.,* 298 U. S. 513.]

The only jurisdiction that is conferred, is the jurisdiction to compose

". . . indebtedness of or authorized by any taxing agencies or instrumentalities hereinafter named, which are payable out of assessments or taxes or both, or out of property acquired by foreclosure by the District, or out of income by such taxing districts."

These districts are then enumerated in separate subdivisions.

The purpose of the subdivisions and of the separability clause was clearly stated on the House floor by Judge Sumners.

Mr. Sumners frankly stated that the sixth classification, the political subdivisions, implied proceedings that would be unconstitutional under the *Ashton* case. He felt, however, it was not only the right, but the duty of Congress to present the question once more to this Court, since the decision, if allowed to stand, threatened grave impairment to the powers of the States, in that it forbade them to authorize their political subdivisions to enter into bankruptcy proceedings.

The case before this Court does not involve the sixth subdivision, but involves subdivision 1, so that if it be held that the law is constitutional in its application to this particular district, even though it could be held unconstitutional as applied to districts covered by subdivision 6, we are entitled to prevail.

The power to legislate on the subject of bankruptcies frequently has been passed upon by this Court. And the constitutional development of this clause at the hands of this Court in over a century has followed out the general conception of the breadth and sweep of that power as it seems to have been entertained at the time the power was given.

The whole method and purpose of bankruptcy has changed with that century of interpretation. Bankruptcy as it existed at the time, and as it existed in the first Bankruptcy Act passed by the Federal Government in 1800, was a remedy of the creditor, a further remedy, against the debtor.

It is now a new opportunity in life, and a clear field for further efforts to the bankrupt, unhampered by the pressure and discouragement of preëxisting debts. Certainly if that is the purpose of this Act, no reason appears why it should be extended to private debtors and not to public debtors. Many subdivisions of the bodies which composed the United States at the time of the Constitu-

tional Convention were themselves at that time in default, and in need, but there was no suggestion that public debtors should be excluded from the benefits of the bankruptcy power, although, we must grant, at that time the bankruptcy power was conceived to be a narrower power than it has since become.

There is equal urgency for applying this Act to public debtors—an urgency equal to any that has ever existed for extending it to private debtors.

The statistics are in the brief, and I will not dwell upon them at length, but over 2,000 improvement districts were in default in 1934. Cities as large as Detroit and Miami and Asheville were in default. 41 of the 48 States had defaults within their borders. The defaulted bonds were between one billion and two billion eight hundred million, and in 1938, when the Congress was reconsidering this matter, over 3,000 units of government were found to be in default.

The creditors in those cases stood without a practicable remedy. There is usually no property of a district subject to execution. Taxpayers are not personally liable. Mandamus to lay taxes is futile, because it results only in assessments that are defaulted. Tax sales drive down the value of property, and add further tax delinquencies. The experience of those creditors—who were themselves largely instrumental in the pressure which brought about the enactment of these Acts—the experience of those creditors was that they were without practicable remedies. This was because, though the only possible remedy was a remedy by agreement, it was almost always subject to defeat. Even though a great majority of the creditors agreed with the district on a practical course to restore some value to the defaulted bonds and to rehabilitate the district so that it could go on and exercise its public functions, any creditor who had a high estimate of the nuisance value of his particular security was in a

position to block the settlement, which required unanimous action.

Therefore the only remedy available to districts, or available to creditors, is the practicable plan of composition, in which nuisance values shall be ruled out, and in which equality of treatment of these creditors will prevail.

And it is clear that that power, as attempted to be exercised by this statute, is within the general bankruptcy power of the Congress. It is equally clear it is not within the power of the State. The States granted their power over bankruptcies to the Federal Government. They were expressly forbidden to pass laws impairing the obligation of contracts. It seems impossible to say that a statute of Congress which exercises a power twice denied to the States—denied once by delegation to the Federal Government, and denied once by express prohibition—can be an invasion of States' rights.

There is one thing the States can do. The State can connive at repudiation. It can refuse to extend remedies. It can fall back on its power to nullify a contract and refuse to approve. That, neither in point of good finance, nor of good morals, is a desirable situation. In order that the situation may be frankly faced, and that sounder remedies may be practicably applied, there must be an escape from the limitation imposed upon the State, and that escape must be found in the power of the Federal Government.

This power not only was delegated to the United States, but it was denied to the States, and it is clear the Tenth Amendment under such circumstances has no function whatever to perform in this case. Once a delegated power is found there is then no room for the operation of the Tenth Amendment.

There is then no question of state sovereignty involved, since we have a granted power.

Then there is the argument advanced here that from the necessities of our form of government, because of the dual nature of our system, there is a necessity to preserve the independence of the State and to protect its sovereignty, and that therefore this power, even though it be a delegated power, cannot be exercised if it impinges upon what would be called sovereign powers or independent powers of the State. I submit that the Tenth Amendment itself denies that argument.

If the Federal Government must point out the delegation of its powers, the Tenth Amendment equally holds the advocates of the rights of sovereignty of the States to the wording of the instrument. It clearly prohibits using the theory of necessity, the theory of the nature of government, or other philosophical reasons, for cutting down granted powers.

Now, there is an effort in the brief of our adversary to compare this power with the taxing power, and to hold that because there are certain immunities to the State and to state agencies under the taxing power, a similar immunity must be written into the bankruptcy power. That argument starts by asserting the theory that the bankruptcy power is found in the same subsection of the Constitution as the grant of the taxing power. So are the powers to regulate interstate commerce, and to punish counterfeiters. The taxing and bankruptcy powers are not parallel powers; and no argument based on the one can be applied to the other. The power of the Federal Government to tax is subject to qualification, and the bankruptcy power is not. The power to tax is to provide for the common defense and the general welfare, and hence it may very well be that where you have a plan of which the tax is a part, such as this Court held the Agricultural Adjustment Act to be, or the Child Labor Act, then you are led to an inquiry as to whether the taxing plan itself is local or is general, is national or

is within powers reserved to localities. The very nature of the taxing power, as it exists in the Federal Government, may demand that inquiry; but there is no such qualification in the bankruptcy clause. That requires only uniformity.

When we consider immunity as it exists in the States from federal taxes, and as it exists in the Government from state taxation, we are dealing with a totally different thing. The power of taxation derives from the relationship of sovereign and subject. That relationship derived originally from the duty of a sovereign to protect, and from the duty of the subject to assist the sovereign in maintaining that protection. We find no State has assumed such a duty toward the Federal Government; we find no State has assumed a relationship toward the Federal Government which in the nature of the taxing power makes it applicable, one to the other.

The very nature of the taxing power implies that it is exerted by the sovereign against the citizen, and not against another governmental body, regardless of whether the relationship is that of an equal sovereign, or that of a subsidiary governmental group.

Tax burdens, of course, are involuntary burdens and, as this Court has said, may be destructive. The power to tax may be the power to destroy, and it may be laid upon a State as a State only when it has assumed that obligation, or if the liability to taxation is to be implied from the nature of the activities of the taxpayer.

Bankruptcy is an entirely different kind of power. It is merely the opening, in this case, of a forum to which this State may resort, as we may open a forum to which foreign creditors or foreign debtors may resort.

No compulsion upon any State or State agency is here involved. This is a voluntary Act, and it raises no questions under the Eleventh Amendment.

This Court has held that, without any consent of a sovereign state, its taxing agencies may be sued. Mandamus may lie against a taxing district. And it has been held in one case that, where a state law provides a similar remedy, a receiver may be appointed to go into such a district and take over its affairs and operations.

Even the taxing immunity can be waived. This Court has held that a State may waive the tax immunity of its agencies, and that the Federal Government may waive the tax immunity of the agencies which it creates. In this case this Bankruptcy Act can never apply to any district unless there is a finding that the law of the State authorizes it to seek that remedy and authorizes it to carry that remedy to completion.

It is true we have a dual system of State and Federal Governments, but that does not mean that they can not coöperate for the common need. That question was settled by this Court in the *Social Security* cases. [301 U. S. 548, 619.]

Now, we find the State and the Nation confronted with this difficulty arising out of the limitation of the power of the State to deal with its own taxing agencies and their debts. We find these defaulted bonds in the channels of trade. We find taxing districts impaired in their capacity to carry on and perform the very functions for which they were created, and we say that there is no difficulty in the two units, the State and the Nation, without either one of them in the least receding from its sovereignty, setting up together a common remedy.

Acting Solicitor General Bell filed a memorandum for the United States in No. 757.

Messrs. Guy Knupp and *James R. McBride* for appellant in No. 772.

Mr. Knupp for the Irrigation District explained the character of the District, the history and extent of its

indebtedness and the hopelessness of its financial situation. The court below had misconceived the *Ashton* case and the nature and purpose of the new legislation. The present Act aims to avoid interference with governmental functions, public agencies, and their fiscal affairs. It deals with voluntary composition. Chapter IX gave power to the court to change the proposed plan of composition. Not so Chapter X. Chapter IX gave power to interfere with fiscal powers and policies of the public debtor. *Wright* v. *Vinton Branch,* 300 U. S. 440, is applicable.

Messrs. W. Coburn Cook and *Charles L. Childers,* with whom *Mr. Maurice E. Harrison* was on the briefs, for appellees.

Mr. Cook on behalf of appellees explained the peculiar importance of irrigation in California. The control of water is a public trust, embedded in the state constitution and executed through its laws. The work of the Irrigation District is work that the State might itself directly perform, without giving the land owners within the District any voice in the selection of managers and trustees. But California, in order that it might carry out what it conceived to be a state function, has permitted the organization of something like 100 irrigation districts in the State and has conferred upon those districts sovereign powers, the power of taxation, the power to borrow money.

The legislature itself could perform those functions directly by some department of the State. Instead of that, it chose to give the people greater control, because they were vitally interested. It could have raised revenues by direct taxation upon the entire State, because the purpose would have been public. But realizing that greater justice would be done, it allocated the indebtedness to the districts more directly affected, and thereby

permitted the people in those districts to have a voice in those affairs.

One of the greatest powers is that of borrowing money. There is a misunderstanding here as to what fiscal power is affected by this Act. It is true that in the Act everything has been done which could possibly have been thought of in order to relieve the court from the necessity of making a direct order on the district, but the effect upon the fiscal powers goes back to the time of the borrowing of the money.

Each holder of a bond and coupon is entitled to payment out of the bond values of the district in the order in which his bond or coupon has been presented. That makes each bond and coupon a separate class, and the one presented today is entitled to payment before the one presented tomorrow.

This Act would have the same effect as respects the fiscal powers of the district and State as would an exercise of powers to tax income from the bonds—it would tend much more to destroy, because under this Act you take the principal, whereas under the income act, you can take only a portion of the interest.

If this power under this Act is sustained, our great cities,—all the taxing districts, sewer districts, road districts, reclamation districts of California—could be forced into bankruptcy.

I believe it is true that a sovereign State as well as a sovereign nation does not have the right to abdicate any sovereign function which is essential to its sovereignty. *Perry* v. *United States,* 294 U. S. 330.

The Eleventh Amendment gives us no help. The State may waive its right not to be sued. The fact that these districts can be brought into court under certain conditions in no manner detracts from any essential of sovereignty, because the plaintiff in such case brought against the State is merely permitted to obtain an adju-

dication of whatever rights he may have. He is not by waiver of the immunity against suit given the right to assert other or different rights.

The Interstate Commerce Clause does not seem to us to be analogous.

I know of no principle permitting state or federal governments to waive their power to tax,—a power essential to sovereignty.

The bankruptcy power is not a power essential to the National Government. It was given to the National Government for convenience, for uniformity. It is a sort of regulatory or police power granted to the National Government, and therefore if it comes in conflict with the power of the State, which is essential to the maintenance of the sovereignty of the State, it must give way completely.

This is a bankruptcy act, whether it be called readjustment, or whether it be called composition. The effect of it is to compel certain persons to accept something which they have not contracted to accept. The difference in nomenclature between calling this district a taxing agency or a political subdivision, it seems quite obvious could have no effect upon the inherent powers which Congress may have.

Mr. Cook compared chapter X with chapter IX. One essential difference is that c. X does not require the consent of the State.

The California Enabling Act authorized the filing of a petition under c. IX.

Mr. Childers, on behalf of appellees, maintained that chapters IX and X were alike objectionable. The same classes of agencies are dealt with—arms of the sovereign power of the State. The *Ashton* case decides that the power of Congress does not extend over the sovereign function of a State.

If the power of bankruptcy extends over these state mandatories in a little way, that is, in a voluntary proceeding, it must follow that it may be exercised against these mandatories without their consent or without the consent of the State. The next logical step is to make that same power apply to the State itself. Congress must have all the power or none; and that is the principle that was announced in the *Ashton* case. We find nothing in this statute that would seem materially to differentiate it from the *Ashton* case.

To the great powers assigned to the United States by the Constitution, the States are powerless to add. Those powers are quite sufficient in themselves. The powers not delegated have been reserved to the States and to the people, and as this Court said in *United States* v. *Butler,* the Tenth Amendment was to make doubly sure.

It is the people who ultimately have the sovereign power; and the State is not in position to surrender those necessary elements of sovereignty by which it must exist.

A State, through its legislature, may consent to be sued, may surrender its sovereignty in a suit, because that is one of the powers not prohibited, and the legislature has the right to speak for the people to that extent. But it is prohibited from passing any law impairing the obligations of contract. Bankruptcy is necessarily an impairment of contract obligations. The taxing power is one of the highest attributes of sovereignty. If the United States can apply the bankruptcy power to a State, then it can control in the fiscal affairs of the State.

Though the Constitution does not expressly prohibit, State or Federal Governments may not tax each other's instrumentalities, because that would be to affect their sovereign functions. It is not a question of the size of the tax.

This must be true of bankruptcy. As soon as it touches the State in the remotest degree, it would seem that the power could not exist.

There surely cannot be a little bankruptcy. Surely Congress must have the whole power or none.

The power in bankruptcy would seem to be much more sinister than the power to tax, because the power to tax operates ordinarily in an even, like manner.

The State, of course, is prohibited by the contract clause from impairing the obligations of a contract. Now, it would seem that regardless of what sort of statute a State might pass, it can not add to or take away from the power of Congress in that regard. If a consent is needed to make an Act of Congress effective, then it must be that the power does not exist. If Congress must look to another sovereign for its power, it can not have the power.

Irrigation districts in California exercise governmental functions. The legislature has plenary power over them. They are State agencies.

The legislature can destroy them by simply repealing the Act under which they exist, and the State can go out and do the work itself, by its own agents directly. The better considered cases hold that the beneficial interest in the property acquired by one of these districts is in the State itself. It does not make much difference in this connection whether it is in the State or the land owner. The district, as a legal entity, is not the beneficial owner. If the beneficial interest is in the land owner, he must be brought into court.

How could there well be a bankruptcy of one of these public agencies that can not respond to a judgment? It has no property that is subject to execution.

In answer to questions from the Chief Justice, Mr. Childers conceded that, under chapter X, no plan of com-

position can go through unless approved by the district; and that the California Act of 1934 gave consent to the submission of such a plan under chapter IX, if not under chapter X; but he maintained that, even so, the federal bankruptcy power can not be applied.

All the power of government, whether possessed by the Nation or a State, can not be asserted to effect the composition of an indebtedness of such a district.

THE CHIEF JUSTICE. So that the State would be prohibited to effect a composition of 60 per cent., no matter how fair it is, and the Federal Government would be prohibited, although this district has an economic plight which needs relief for the benefit of the people of the district, and incidentally the people of the State. There is no power in the Government against a creditor to provide for that relief?

MR. CHILDERS. That is right. And the remedy would be much worse, I believe, than the disease.

THE CHIEF JUSTICE. Remedies often are.

MR. JUSTICE MCREYNOLDS. What power is there in a State Government or Federal Government or any other government to repudiate debts?

MR. CHILDERS. I think that is answered. I don't think there is any power, and I don't think the power ought to be there. As a matter of economics, I believe it would do much more harm to these districts than it could possibly do good. And if the power existed, the power might be exercised all the way.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. U. S. Webb,* Attorney General of California, *Greek L. Rice,* Attorney General of Mississippi, *Ray McKittrick,* Attorney General of Missouri, *Gray Mashburn,* Attorney General of Nevada, *Frank H. Patton,* Attorney General of New Mexico, *I. H. Van Winkle,* Attorney General of Oregon, and *Ray E. Lee,* Attorney

General of Wyoming, on behalf of those States; *Messrs. G. W. Hamilton,* Attorney General of Washington, and *Fred J. Cunningham,* on behalf of the State of Washington; and *Messrs. Jack Holt,* Attorney General of Arkansas, and *Chas. D. Frierson,* on behalf of the State of Arkansas and certain drainage districts thereof, all in support of appellant in No. 772; by *Messrs. Cary D. Landis,* Attorney General of Florida, and *Giles J. Patterson,* on behalf of the State of Florida, in support of appellant in No. 757; and by *Messrs. Francis V. Keesling* and *Charles L. Childers,* on behalf of the West Coast Life Ins. Co., in support of appellees.

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

These are direct appeals from the judgment of the District Court for the Southern District of California under the Act of August 24, 1937, c. 754, 50 Stat. 751. They present the question of the constitutional validity of the Act of August 16, 1937, 50 Stat. 653, amending the Bankruptcy Act by adding Chapter X providing for the composition of indebtedness of the taxing agencies or instrumentalities therein described. A certificate was issued to the Attorney General and the United States intervened. The District Court held the statute invalid as applied to the appellant and dismissed its petition for composition. The court considered itself bound by the decision in *Ashton* v. *Cameron County District,* 298 U. S. 513.

Appellant, the Lindsay-Strathmore Irrigation District, was organized in the year 1915 under the California Irrigation District Act of March 31, 1897 (Cal. Stat. 1897, p. 254). It comprises about 15,260 acres in Tulare County. It is an irrigation district and taxing agency created for the purpose of constructing and operating irrigation projects and works devoted to the improvement of lands for

agricultural purposes. On September 21, 1937, it presented its petition for the confirmation of a plan of composition. The petition alleged insolvency; that its indebtedness consisted of outstanding bonds aggregating $1,427,000 in principal, with unpaid interest of $439,085.15; that no interest or principal falling due since July 1, 1933, had been paid; that the low price of agricultural products had prevented the owners of land within the irrigation district from meeting their assessments; that upon the assessment levied by the District in the year 1932 there was a delinquency of 47 per cent. and that since that year there had been levied only an assessment of sufficient amount to maintain and operate its works; that the District's plan for the composition of its debts provided for the payment in cash of a sum equal to 59.978 cents for each dollar of the principal amount of its outstanding bonds in satisfaction of all amounts due; that creditors owning about 87 per cent. in the principal amount of the bonds had accepted the plan and consented to the filing of the petition; and that payment of the amount required was to be made from the proceeds of a loan which the Reconstruction Finance Corporation had agreed to make upon new refunding serial bonds equal to the amount borrowed and bearing interest at four per cent.

The District Court approved the petition as filed in good faith and directed the creditors to show cause why an injunction should not issue staying the commencement of suits upon the securities affected by the plan. The appellees as bondholders appeared and moved to dismiss the petition upon the ground that Chapter X of the Bankruptcy Act violated the Fifth and Tenth Amendments of the Federal Constitution. It appeared from the return to the order to show cause that these creditors had obtained an alternative writ of mandate from the state court directing the county board of supervisors to levy an assessment upon the lands within the District sufficient to pay

the amounts due the complaining creditors, and that the proceedings in that court had been suspended pending the proceeding in the bankruptcy court.

First. Chapter X of the Bankruptcy Act is limited to voluntary proceedings for the composition of debts. Aside from the question as to the power of the Congress to provide this method of relief for the described taxing agencies, it is well settled that a proceeding for composition is in its nature within the federal bankruptcy power. Compositions were authorized by the Bankruptcy Act of 1867, as amended by the Act of 1874, c. 390, § 17, 18 Stat. 182. It is unnecessary to the validity of such a proceeding that it should result in an adjudication of bankruptcy. *In re Reiman,* 20 Fed. Cas. 490, 496, 497; *Continental National Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 672, 673. In the *Continental Bank* case, in the course of a full consideration of the scope of the federal bankruptcy power and of the evolution of its exercise, we said:

"The constitutionality of the old provision for a composition is not open to doubt. *In re Reiman,* 20 Fed. Cas. 490, 496–497, cited with approval in *Hanover National Bank* v. *Moyses, supra.* [186 U. S. at p. 187.] That provision was there sustained upon the broad ground that the 'subject of bankruptcies' was nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.' That it was not necessary for the proceedings to be carried through in bankruptcy was held not to warrant the objection that the provision did not constitute a law on the subject of bankruptcies."

Second. It is unnecessary to consider the question whether Chapter X would be valid as applied to the irrigation district in the absence of the consent of the State which created it, for the State has given its consent. We think that this sufficiently appears from the statute of California enacted in 1934. Laws of 1934, Ex. Sess.,

ch. 4. This statute (§ 1) adopts the definition of "taxing districts" as described in an amendment of the Bankruptcy Act, to wit Chapter IX approved May 24, 1934, and further provides that the Bankruptcy Act and "acts amendatory and supplementary thereto, as the same may be amended from time to time, are herein referred to as the 'Federal Bankruptcy Statute'." Chapter X of the Bankruptcy Act is an amendment and appears to be embraced within the state's definition. We have not been referred to any decision to the contrary. Section 3 of the state act then provides that any taxing district in the State is authorized to file the petition mentioned in the "Federal Bankruptcy Statute." Subsequent sections empower the taxing district upon the conditions stated to consummate a plan of readjustment in the event of its confirmation by the federal court. The statute concludes with a statement of the reasons for its passage, as follows:

"There exist throughout the State of California economic conditions which make it impossible for property owners to pay their taxes and special assessments levied upon real or taxable property. The burden of such taxes and special assessments is so onerous in amount that great delinquencies have occurred in the collection thereof and seriously affect the ability of taxing districts to obtain the revenue necessary to conduct governmental functions and to pay obligations represented by bonds. It is essential that financial relief, as set forth in this act, be immediately afforded to such taxing districts in order to avoid serious impairment of their taxing systems, with consequent crippling of the local governmental functions of the State. This act will aid in accomplishing this necessary result and should therefore go into effect immediately."

While the facts thus stated related to conditions in California, similar conditions existed in other parts of the

country and it was this serious situation which led the Congress to enact Chapter IX and later Chapter X.[1]

Our attention has been called to the difference between § 80 (k) of Chapter IX and § 83 (i) of Chapter X of the Bankruptcy Act in the omission from the latter of the provision requiring the approval of the petition by a governmental agency of the State whenever such approval is necessary by virtue of the local law. We attach no importance to this omission. It is immaterial, if the consent of the State is not required to make the federal plan effective, and it is equally immaterial if the consent of the State has been given, as we think it has in this case. It should also be observed that Chapter X, § 83 (e) provides as a condition of confirmation of a plan of composition that it must appear that the petitioner "is authorized by law to take all action necessary to be taken by it to carry out the plan," and, if the judge is not satisfied on that point as well as on the others mentioned, he must enter an order dismissing the proceeding. The phrase "authorized by law" manifestly refers to the law of the State.

Third. We are thus brought to the inquiry whether the exercise of the federal bankruptcy power in dealing with a composition of the debts of the irrigation district, upon its voluntary application and with the State's consent, must be deemed to be an unconstitutional interference with the essential independence of the State as preserved by the Constitution.

In *Ashton* v. *Cameron County District, supra,* the court considered that the provisions of Chapter IX authorizing

[1] See Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1868 and H. R. 5950, 1934, 73rd Cong., 2nd Sess.; Hearings before the House Committee on the Judiciary on H. R. 1670, etc., 1933, 73rd Cong., 1st Sess.; *Ashton* v. *Cameron County District,* 298 U. S. 513, 533, 534.

the bankruptcy court to entertain proceedings for the "readjustment of the debts" of "political subdivisions" of a State "might materially restrict its control over its fiscal affairs," and was therefore invalid; that if obligations of States or their political subdivisions might be subjected to the interference contemplated by Chapter IX, they would no longer be "free to manage their own affairs."

In enacting Chapter X the Congress was especially solicitous to afford no ground for this objection. In the report of the Committee on the Judiciary of the House of Representatives,[2] which was adopted by the Senate Committee on the Judiciary,[3] in dealing with the bill proposing to enact Chapter X, the subject was carefully considered. The Committee said:

"Compositions are approvable only when the districts or agencies file voluntary proceedings in courts of bankruptcy, accompanied by plans approved by 51 per cent of all the creditors of the district or agency, and by evidence of good faith. Each proceeding is subject to ample notice to creditors, thorough hearings, complete investigations, and appeals from interlocutory and final decrees. The plan of composition cannot be confirmed unless accepted in writing by creditors holding at least 66⅔ percent of the aggregate amount of the indebtedness of the petitioning district or taxing agency, and unless the judge is satisfied that the taxing district is authorized by law to carry out the plan, and until a specific finding by the court that the plan of composition is fair, equitable, and for the best interests of the creditors. . . .

"The Committee on the Judiciary is not unmindful of the sweeping character of the holding of the Supreme Court above referred to [in the *Ashton* case], and believes

[2] H. Rep. No. 517, 75th Cong., 1st Sess.

[3] Sen. Rep. No. 911, 75th Cong., 1st Sess.

that H. R. 5969 is not invalid or contrary to the reasoning of the majority opinion. . . .

"The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill. . . .

"There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore, relief must come from Congress, if at all. The committee are not prepared to admit that the situation presents a legislative no-man's land. . . . It is the opinion of the committee that the present bill removes the objections to the unconstitutional statute, and gives a forum to enable those distressed taxing agencies which desire to adjust their obligations and which are capable of reorganization, to meet their creditors under necessary judicial control and guidance and free from coercion, and to affect such adjustment on a plan determined to be mutually advantageous."

We are of the opinion that the Committee's points are well taken and that Chapter X is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province and only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law. It is of the es-

sence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. Oppenheim, International Law, 4th ed., vol. 1, §§ 493, 494; Hyde, International Law, vol. 2, § 489; *Perry* v. *United States,* 294 U. S. 330, 353; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 597. The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const., Art. I, § 10, subd. 3. *Poole* v. *Fleeger,* 11 Pet. 185, 209; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725; *Hinderlider* v. *La Plata River Co., post,* p. 92. The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority. See *Fletcher* v. *Peck,* 6 Cranch 87, 137; *New Jersey* v. *Wilson,* 7 Cranch 164; *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 643, 644; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 549; *Jefferson Branch Bank* v. *Skelly,* 1 Black 436, 446. While the instrumentalities of the national government are immune from taxation by a State, the State may tax them if the national government consents (*Baltimore National Bank* v. *State Tax Comm'n,* 297 U. S. 209, 211, 212) and by a parity of reasoning the consent of the State could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied.

Nor did the formation of an indestructible Union of indestructible States make impossible coöperation between the Nation and the States through the exercise of the power of each to the advantage of the people who are citizens of both. We had recent occasion to consider that question in the case of *Steward Machine Co.* v. *Davis, supra,* in relation to the operation of the Social Security Act of August 14, 1935. 49 Stat. 620. The question was raised with special emphasis in relation to § 904 of the statute and the parts of § 903, complementary thereto, by which the Secretary of the Treasury is authorized to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. The contention was that Alabama in consenting to that deposit had "renounced the plenitude of power inherent in her statehood." 301 U. S. at pp. 595, 596. We found the contention to be unsound. As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that "Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she [the State] is prohibited from assenting to conditions that will assure a fair and just requital for benefits received."

In the instant case we have coöperation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of

taxation was useless. The creditors of the district were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its coöperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case.

Fourth. As the bankruptcy power may be exerted to give effect to a plan for the composition of the debts of an insolvent debtor, we find no merit in appellant's objections under the Fifth Amendment. *In re Reiman, supra; Continental National Bank* v. *Chicago, R. I. & P. Ry. Co., supra.*

The judgment of the District Court is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McReynolds and Mr. Justice Butler are of the opinion that the principle approved in *Ashton* v. *Cameron County District,* 298 U. S. 513, is controlling here and requires affirmation of the questioned decree.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

INTERSTATE CIRCUIT, INC., ET AL. *v.* UNITED STATES.*

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

No. 709. Argued April 5, 1938.—Decided April 25, 1938.

1. Under Equity Rule 70½ it is the duty of the District Court to make special, formal findings of fact, and state separately its conclusions of law thereon, determining all the issues in the case. The opinion of that court in this case was not a substitute.
2. Compliance with this rule is particularly important in an antitrust case which comes to this Court by direct appeal from the trial court. P. 56.

Decree in 20 F. Supp. 868, set aside and cause remanded for statement of findings of fact and conclusions of law.

Messrs. George S. Wright and *Thomas D. Thacher* for appellants.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold* and *Mr. Charles H. Weston* were on the brief, for the United States.

PER CURIAM.

The Government brought this suit for an injunction against the carrying out of an alleged conspiracy, in restraint of interstate commerce, between distributors and exhibitors of motion picture films. The restraint was alleged to consist in provisions in license agreements which prevented any "feature picture" of the distributors, which had been shown "first-run" in a theater of the defendant exhibitor at an admission price of 40 cents or more, from thereafter being exhibited in the same locality at an admission price of less than 25 cents or on the same program with another feature picture.

*Together with No. 710, *Paramount Pictures Distributing Co. et al.* v. *United States,* also on appeal from the District Court of the United States for the Northern District of Texas.

The evidence was presented by an agreed statement of certain facts and by oral testimony on behalf of each party. The District Court entered a final decree adjudging that in making the restrictive agreements the distributors had engaged in a conspiracy with the exhibitor, Interstate Circuit, Inc. and its officers, in violation of the Anti-Trust Act and granting a permanent injunction against the enforcement of the restrictions. 20 F. Supp. 868. The case comes here on direct appeal. Acts of Feb. 11, 1903, c. 544, 32 Stat. 823; February 13, 1925, c. 229. 28 U. S. C. 345.

Equity Rule 70½ provides:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . .

"Such findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

The District Court did not comply with this rule. The court made no formal findings. The court did not find the facts specially and state separately its conclusions of law as the rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact.

The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (*Railroad Commission* v. *Maxcy,* 281 U. S. 82, and cases

cited) and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court.

The Government contends that the distributors were parties to a common plan constituting a conspiracy in restraint of commerce; that each distributor would benefit by unanimous action, whereas otherwise the restrictions would probably injure the distributors who imposed them, and that prudence dictated that "no distributor agree to impose the restrictions in the absence of agreement or understanding that his fellows would do likewise"; that the restraints were unreasonable and that they had the purpose and effect of raising and maintaining the level of admission prices; that even if the distributors acted independently and not as participants in a joint undertaking, still the restraints were unreasonable in their effect upon the exhibitor's competitors.

Appellants, asserting copyright privileges, contend that the restrictions were reasonable; that they were intended simply to protect the licensee from what would otherwise be an unreasonable interference by the distributors with the enjoyment of the granted right of exhibition; that there was no combination or conspiracy among the distributors; that it was to the independent advantage of each distributor to impose the restrictions in its own agreement and that the contention that less than substantially unanimous action would have injured the distributors in making such agreements was contrary to the evidence; and that the restrictions did not have an injurious effect.

We intimate no opinion upon any of the questions raised by these rival contentions, but they point the importance of special and adequate findings in accordance with the prescribed equity practice.

The decree of the District Court is set aside and the cause is remanded with directions to the court to state

its findings of fact and conclusions of law as required by Equity Rule 70½.

It is so ordered.

MR. JUSTICE STONE and MR. JUSTICE BLACK think that the findings in the opinion and decree below, while informal, are sufficient for purposes of decision, and that the case should therefore be decided now without further proceedings below; the more so because of the public interest involved.

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

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 638. Argued March 30, 1938.—Decided April 25, 1938.

In a suit to set aside orders of the Interstate Commerce Commission affecting rates on coke, *held:*

1. Unnecessary to pass upon the validity of an order canceling certain schedules and fixing future maximum rates, which order had later been supplemented by another of the orders attacked. P. 59.

2. A construction of an order, adopted by the Commission, and rendering it valid, is to be accepted rather than another construction which extends it beyond the Commission's jurisdiction. P. 60.

3. Objections to an order, that it is not supported by substantial evidence, disregards ordinary standards for determining reasonableness of rates, is not supported by necessary findings, and represents a mere attempt to equalize geographical and transportation disadvantages, fortune and opportunities, are answered in this case by findings of the court below, adequately supported. P. 60.

Affirmed.

APPEAL from a decree dismissing a bill to set aside orders of the Interstate Commerce Commission.

Mr. Leo P. Day, with whom *Messrs. Guernsey Orcutt* and *Anthony P. Donadio* were on the brief, for appellants.

Mr. J. Stanley Payne, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the brief, for the United States et al.

Mr. J. V. Norman, with whom *Mr. Hugh White* was on the brief, for the Alabama Iron & Steel Shippers Conference.

Messrs. William H. Swiggart, Charles Clark, and *Elmer A. Smith* submitted on brief for the Cincinnati, N. O. & T. P. Ry Co. et al.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellants, nineteen railroads operating within what is known as Central Territory—Ohio, Indiana, Illinois and Michigan—by their bill filed in the District Court, Northern District of Illinois, July 22, 1936, challenged the validity of two Interstate Commerce Commission orders affecting the rate structure on coke moving into that territory from southern points. Questions in respect of these rates have often been before the Commission. The court made findings of fact upon the evidence and dismissed the bill without opinion.

The first challenged order, dated March 11, 1935, followed an earlier suspension of certain proposed schedules and an investigation. It cancelled these schedules and determined what thereafter would be maximum reasonable rates upon a mileage basis. Subsequently, the proceed-

ings having been reopened, this order was modified and reaffirmed. In the circumstances, we think the court below properly declined to pass upon its validity.

The second challenged order, April 30, 1936, followed one entered April 15, 1936, which upon petition and replies reopened the proceedings for reconsideration on the record as it then stood. The later order affirmed former findings that the schedules suspended by the one of March 11, 1935, had not been justified, and prescribed future maximum rates upon a mileage basis. These were lower (some ten per cent.) than those authorized prior to 1935.

Here, counsel specially insist this second order exceeded the jurisdiction of the Commission since it undertook to determine rates concerning which there had been no proper notice or opportunity for hearing. But this contention rests upon an assumed construction of the order not obviously correct. The Commission has not so construed it, nor has that body been asked so to do, or for any further action in respect of it. Another construction brings the order clearly within the jurisdiction assumed by the Commission. In the circumstances appellants cannot prevail on this point.

Appellants further urge that the order is contrary to the weight of the evidence, not supported by substantial evidence, disregards ordinary standards for determining reasonableness of rates, is not supported by necessary findings, and represents a mere attempt to equalize geographical and transportation disadvantages, fortune and opportunities. The findings by the court below we think are adequately supported by the record. They negative these claims and leave no sufficient basis for our interference with the action there taken.

The challenged judgment must be

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE CARDOZO took no part in the consideration or decision of this cause.

Counsel for Parties.

ARKANSAS LOUISIANA GAS CO. *v.* DEPARTMENT OF PUBLIC UTILITIES ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 645. Argued March 31, 1938.—Decided April 25, 1938.

1. A corporation acquired natural gas in Louisiana, piped it into Arkansas, and there disposed of it, partly by selling it as a public utility to consumers in cities—an activity carried on through a special department of the corporate business—and partly by sales to selected industrial and other customers, under special contracts made in Louisiana, delivery of gas being made to them directly from the main pipeline, or through connecting spurs. *Held*, that a general order of an Arkansas state agency requiring all public utilities to file schedules of their rates is not unconstitutional when applied to the sales under the special contracts even though they be sales in interstate commerce. P. 62.

   In the circumstances it may be highly important for the State, which regulates local rates, to have information of all the operations. Merely requiring comprehensive reports of such operations would not materially burden or unduly interfere with interstate commerce.

2. The Court is not called upon to decide whether the sales under the special contracts are subject to rate regulation by Arkansas. P. 63.

194 Ark. 354; 108 S. W. 2d 586, affirmed.

APPEAL from a judgment which reversed that of a court of first instance holding invalid an order of the State Department of Public Utilities. The case got into the latter court by petition for a review of the order.

Mr. H. C. Walker, Jr., with whom *Mr. J. Merrick Moore* was on the brief, for appellant.

Messrs. Thomas Fitzhugh and *John E. Benton* for appellees. *Mr. P. A. Lasley* was on a brief with *Mr. Fitzhugh*. By leave of Court, *Mr. Clyde S. Bailey* and *Mr. Benton* filed a brief on behalf of the National Association of Railroad and Utilities Commissioners, as *amicus curiae*, in support of appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant, a Delaware corporation, lawfully purchases and produces natural gas in Texas and Louisiana and thereafter transports and delivers it through pipe lines to selected industries and public utility distributing corporations—so-called "pipe line customers"—at points in Arkansas. These deliveries are made under contracts entered into at Shreveport, Louisiana, and are effected by tapping a main pipe line or through connecting spurs. They amount annually to some eight billion cubic feet.

Appellant, by admission, also maintains a distribution department, through which it acts as a public utility, for the local sale and distribution of gas in many Arkansas towns; but this organization is distinct from the one which supplies pipe line customers.

The Arkansas Department of Public Utilities, proceeding under a local statute, in April 1935 issued a general order (No. 13) requiring public utilities to file, upon specified forms, schedules of rates, charges, etc. Appellant presented such schedules for local utility service in the State, but declined to file copies of contracts, agreements, etc., for sales and deliveries to pipe line customers.

Thereupon the Department issued an order to show cause for this failure. In response appellant "set forth that the sale and delivery of gas from its Texas and Louisiana fields to its pipe line and industrial customers in Arkansas constitute interstate commerce, and that in making such sales and deliveries it was and is not acting as a public utility, and that accordingly the sale and delivery of said gas and the rates, schedules and charges upon which the same is delivered and sold were and are not subject to the jurisdiction of the Department and are

beyond its power to regulate, and that Order No. 13 is not legally applicable to said business."

After a hearing upon the citation and response and much evidence, April 30, 1936, the Department ordered compliance with the general order. The matter then went for review to the Circuit Court, Pulaski County, and it held the challenged order invalid. Upon appeal, the Supreme Court ruled that the sales and deliveries in question were not free from state regulation because parts of interstate commerce, and directed compliance with the Department's general order.

The question for present determination is whether this general order, valid under the laws of the State, which only compels appellant to file certain designated information, amounts to an infringement of any right or privilege guaranteed to it by the Federal Constitution. And to this a negative answer must be given.

If, as claimed, certain of appellant's activities in Arkansas are parts of interstate commerce, that alone (and no other defense is relied upon) would not suffice to justify refusal to furnish the information presently demanded by the State.

Appellant operates locally at many places in Arkansas, also delivers within the State great quantities of gas said to move without interruption from another State. In such circumstances it may be highly important for the state authorities to have information concerning all its operations. We are unable to see that merely to require comprehensive reports covering all of them would materially burden or unduly interfere with the free flow of commerce between the States.

In case the Department undertakes by some future action to impose what may be deemed unreasonable restraint or burden upon appellant's interstate business, through rate regulation or otherwise, that may be con-

tested. The rule here often announced is that no constitutional question will be passed upon unless necessary for disposition of the pending cause.

The judgment of the Supreme Court must be

Affirmed.

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

ERIE RAILROAD CO. *v.* TOMPKINS.

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

No. 367. Argued January 31, 1938.—Decided April 25, 1938.

1. The liability of a railroad company for injury caused by negligent operation of its train to a pedestrian on a much-used, beaten path on its right-of-way along and near the rails, depends, in the absence of a federal or state statute, upon the unwritten law of the State where the accident occurred. Pp. 71 *et seq.*
2. A federal court exercising jurisdiction over such a case on the ground of diversity of citizenship, is not free to treat this question as one of so-called "general law," but must apply the state law as declared by the highest state court. *Swift* v. *Tyson,* 16 Pet. 1, overruled. *Id.*
3. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," whether they be commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. P. 78.
4. In disapproving the doctrine of *Swift* v. *Tyson,* the Court does not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. It merely declares that by applying the doctrine of that case rights which are reserved by the Constitution to the several States have been invaded. P. 79.

90 F. 2d 603, reversed.

CERTIORARI, 302 U. S. 671, to review the affirmance of a judgment recovered against the railroad company in an action for personal injuries. The accident was in Pennsylvania. The action was in New York, jurisdiction being based on diversity of citizenship.

Mr. Theodore Kiendl, with whom *Messrs. William C. Cannon* and *Harold W. Bissell* were on the brief, for petitioner.

The Pennsylvania decisions denying permissive rights on longitudinal pathways as distinguished from crossings should have received due consideration in recognition of the elementary principle that the law to be applied is the *lex loci delicti.* Restatement, Conflict of Laws, § 380, p. 462.

Whatever difficulties there may be in ascertaining the pertinent Pennsylvania law or in fixing the extent to which the federal courts are bound to recognize the pertinent decisions of the Pennsylvania courts, it is settled beyond question that it is the Pennsylvania law which the federal courts, quite as truly as the state courts, are bound to ascertain and apply. There is no such thing as a federal common law applicable in such cases. *Bucher* v. *Cheshire Railroad Co.,* 125 U. S. 555, 583–584; *Smith* v. *Alabama,* 124 U. S. 465, 478–479. See also *Carroll County* v. *Smith,* 111 U. S. 556, 563; *McGuire* v. *Sherwin-Williams Co.,* 87 F. 2d 112; *Boston & Maine R.* v. *Breslin,* 80 F. 2d 749, (cert. denied, 297 U. S. 715); *Moore* v. *Backus,* 78 F. 2d 571, (cert. denied, 296 U. S. 640); *Reed & Barton Corp.* v. *Maas,* 73 F. 2d 359; *Public Service Ry. Co.* v. *Wursthorn,* 278 F. 408, (cert. denied, 259 U. S. 585); *Keystone Wood Co.* v. *Susquehanna Boom Co.,* 240 F. 296, (cert. denied, 243 U. S. 655); *Snare & Triest Co.* v. *Friedman,* 169 F. 1, 11, (cert. denied, 214 U. S. 518).

Although each State unquestionably has the power to determine the particular conception of the common law

adopted by it, and although the common law is acclaimed as being adaptable to changing conditions, the opinion of the court below is an unqualified pronouncement that it is beyond the power of the Pennsylvania courts to determine or evolve the law of Pennsylvania as to permissive rights on railroad rights-of-way in Pennsylvania. It would seem clear that this is a sweeping repudiation of the principle that the law to be applied is that of the State.

The Pennsylvania decisions should have been recognized as controlling because they had established the rule of law with sufficient definiteness and finality to constitute it a local rule of property, action or conduct, even though the question might otherwise have been regarded as mainly one of general law.

We do not question the finality of the holding of this Court in *Swift* v. *Tyson,* 16 Pet. 1, that the "laws of the several States" referred to in the Rules of Decision Act do not include state court decisions as such. But whether by virtue of the Act or of comity, it is well settled that such decisions are pertinent and, under certain circumstances, controlling in ascertaining or determining the law of the State.

It would be idle to deny that this Court, in matters of a general nature, has exhibited a marked reluctance to recognize nonconformist state rules as settling the question of state law. But even in cases where an asserted rule of the state courts has been rejected, it has been stated or implied that the asserted rule would govern if sufficiently established. Expressions to this effect occur with such frequency and consistency that they must be recognized as forming a part of the general doctrine on the subject.

As a matter of comity at least and by virtue of the Rules of Decision Act as well, the federal courts are bound to recognize an asserted rule of state law where

the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality.

The implication from the *Swift* case would seem to be that the federal courts would follow the state rule if established with such definiteness and finality that the state courts would no longer resort to the general sources of the common law or to general reasoning and legal analogies, but would regard the question as foreclosed in the State.

This Court has so indicated in many cases where the conclusion was that there was no state rule so firmly established as to exclude resort to general principles. *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet. 495; *Lane* v. *Vick,* 3 How. 464; *Chicago* v. *Robbins,* 2 Black 418; *Yates* v. *Milwaukee,* 10 Wall. 497; *New York Central R. Co.* v. *Lockwood,* 17 Wall. 357; *Burgess* v. *Seligman,* 107 U. S. 20; *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368; *Barber* v. *Pittsburgh, F. W. & C. Ry. Co.,* 166 U. S. 83; *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518.

Obviously, a case is not regarded as depending "upon the doctrines of commercial law and general jurisprudence" when the applicable state rule is established by state statute, even though the statute deals with a matter which but for the statute would unquestionably come within the scope of commercial law and general jurisprudence. *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487; *Marine Bank* v. *Kalt-Zimmers Co.,* 293 U. S. 357. It would seem equally obvious that a case is not to be regarded as depending "upon the doctrines of commercial and general jurisprudence" when there is an applicable state rule of property, action or conduct, definitely and finally established as such by decisions of the highest state court, even though the decisions deal with a matter

which but for such established rule would unquestionably come within the scope of commercial law and general jurisprudence. *Snare & Triest Co.* v. *Friedman,* 169 F. 1, 12; 214 U. S. 518; *Bucher* v. *Cheshire Railroad Co.,* 125 U. S. 555; *Byrne* v. *Kansas City, Ft. S. & M. R. Co.,* 61 F. 605.

The Pennsylvania decisions denying permissive rights on longitudinal pathways, as distinguished from crossings, declare a Pennsylvania rule sufficiently local in nature to be controlling, even though more definiteness and finality might be required in a rule of a more general nature. It rests expressly on a local policy relating to the efficient operation of railroads, a policy which presumably was dictated by local conditions.

Mr. Fred H. Rees, with whom *Messrs. Alexander L. Strouse* and *William Walsh* were on the brief, for respondent.

In cases involving questions of general law, federal courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in *Swift* v. *Tyson,* 16 Pet. 1; has constantly been reaffirmed by this Court and was most recently applied in the case of *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518.

Decisions of this Court, as well as logic and reason, have established that questions of the type here presented, involving railroad accidents, are questions of general law, upon which independent judgment may be exercised by federal courts. [Citing *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, and many other cases.]

There is no doctrine that where a rule is well established in a State, the question is one of local law and federal courts must follow the rule even though the rule might otherwise be regarded as one of general law.

Even if a question of local law were here involved, the same result must be reached, since petitioner relies upon

a solitary Pennsylvania decision, clearly contrary to the weight of Pennsylvania decisions, and of doubtful applicability to the facts of the case at bar.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson*[1] shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

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[1] 16 Pet. 1 (1842). Leading cases applying the doctrine are collected in *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 530, 531. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in *Lane* v. *Vick*, 3 How. 464, 477. Dissenting opinions were also written by Mr. Justice Daniel in *Rowan* v. *Runnels*, 5 How. 134, 140; by Mr. Justice Nelson in *Williamson* v. *Berry*, 8 How. 495, 550, 558; by Mr. Justice Campbell in *Pease* v. *Peck*, 18 How. 595, 599, 600; and by Mr. Justice Miller in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 207, and *Butz* v. *City of Muscatine*, 8 Wall. 575, 585. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368, 390, and by Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370, and in the *Taxicab* case, 276 U. S. at 532.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held, 90 F. 2d 603, 604, that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by § 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. § 725, which provides:

"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."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

First. Swift v. *Tyson,* 16 Pet. 1, 18, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story:

"the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or

instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of § 34 to equity cases, in *Mason* v. *United States,* 260 U. S. 545, 559, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute." [2] The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given § 34,[3] and as to the soundness of the rule which it introduced.[4] But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling,

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[2] In *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 464, it was stated that § 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." See also *Bank of Hamilton* v. *Dudley's Lessee,* 2 Pet. 492, 525. Compare *Jackson* v. *Chew,* 12 Wheat. 153, 162, 168; *Livingston* v. *Moore,* 7 Pet. 469, 542.

[3] Pepper, The Border Land of Federal and State Decisions (1889) 57; Gray, The Nature and Sources of Law (1909 ed.) §§ 533–34; Trickett, Non-Federal Law Administered in Federal Courts (1906) 40 Am. L. Rev. 819, 821–24.

[4] Street, Is There a General Commercial Law of the United States (1873) 21 Am. L. Reg. 473; Hornblower, Conflict between State and Federal Decisions (1880) 14 Am. L. Rev. 211; Meigs, Decisions of the Federal Courts on Questions of State Law (1882) 8 So. L. Rev. (n. s.) 452, (1911) 45 Am. L. Rev. 47; Heiskell, Conflict between Federal and State Decisions (1882) 16 Am. L. Rev. 743; Rand, *Swift* v. *Tyson* versus *Gelpcke* v. *Dubuque* (1895) 8 Harv. L. Rev. 328, 341–43; Mills, Should Federal Courts Ignore State Laws (1900) 34 Am. L. Rev. 51; Carpenter, Court Decisions and the Common Law (1917) 17 Col. L. Rev. 593, 602–03.

the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[5]

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518.[6] There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by the Black and White; an injunction issued by the District Court

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[5] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49, 51–52, 81–88, 108.

[6] Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers (1928) 15 Va. L. Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928) 13 Corn. L. Q. 499, 524–30; Johnson, State Law and the Federal Courts (1929) 17 Ky. L. J. 355; Fordham, The Federal Courts and the Construction of Uniform State Laws (1929) 7 N. C. L. Rev. 423; Dobie, Seven Implications of Swift *v.* Tyson (1930) 16 Va. L. Rev. 225; Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy (1931) 20 Ky. L. J. 1; Campbell, Is Swift *v.* Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction (1932) 18 A. B. A. J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933) 28 Ill. L. Rev. 356, 362–64; Fordham, Swift *v.* Tyson and the Construction of State Statutes (1935) 41 W. Va. L. Q. 131.

was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift* v. *Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift* v. *Tyson,* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;[7] and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.[8]

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state

[7] Compare Mr. Justice Miller in *Gelpcke* v. *City of Dubuque,* 1 Wall. 175, 209. The conflicts listed in Holt, The Concurrent Jurisdiction of the Federal and State Courts (1888) 160 *et seq.* cover twenty-eight pages. See also Frankfurter, *supra* note 6, at 524–30; Dawson, *supra* note 6; Note, Aftermath of the Supreme Court's Stop, Look and Listen Rule (1930) 43 Harv. L. Rev. 926; cf. Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction (1931) 79 U. of Pa. L. Rev. 869, 881–86. Moreover, as pointed out by Judge Augustus N. Hand in *Cole* v. *Pennsylvania R. Co.,* 43 F. 2d 953, 956–57, decisions of this Court on common law questions are less likely than formerly to promote uniformity.

[8] Compare 2 Warren, The Supreme Court in United States History (rev. ed. 1935) 89: "Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. . . ." The Federal Digest, through the 1937 volume, lists nearly 1000 decisions involving the distinction between questions of general and of local law.

or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.[9] Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment.[10] In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State,[11] the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee;[12] the liability for torts committed within the State upon persons resident or property located there, even where the question of lia-

[9] It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare *Gardner* v. *Michigan Cent. R. Co.*, 150 U. S. 349; *Harrison* v. *Foley*, 206 Fed. 57 (C. C. A. 8); *Interstate Realty & Inv. Co.* v. *Bibb County*, 293 Fed. 721 (C. C. A. 5); see Mills, *supra* note 4, at 52.

[10] For a recent survey of the scope of the doctrine, see Sharp & Brennan, The Application of the Doctrine of Swift *v.* Tyson since 1900 (1929) 4 Ind. L. J. 367.

[11] *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518; *Rowan* v. *Runnels*, 5 How. 134, 139; *Boyce* v. *Tabb*, 18 Wall. 546, 548; *Johnson* v. *Chas. D. Norton Co.*, 159 Fed. 361 (C. C. A. 6); *Keene Five Cent Sav. Bank* v. *Reid*, 123 Fed. 221 (C. C. A. 8).

[12] *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 367–68; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Eels* v. *St. Louis, K. & N. W. Ry. Co.*, 52 Fed. 903 (C. C. S. D. Iowa); *Fowler* v. *Pennsylvania R. Co.*, 229 Fed. 373 (C. C. A. 2).

bility depended upon the scope of a property right conferred by the State;[13] and the right to exemplary or punitive damages.[14] Furthermore, state decisions construing local deeds,[15] mineral conveyances,[16] and even devises of real estate[17] were disregarded.[18]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.[19] And, without even change of residence, a corporate citizen of

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[13] *Chicago* v. *Robbins*, 2 Black 418, 428. Compare *Yates* v. *Milwaukee*, 10 Wall. 497, 506–07; *Yeates* v. *Illinois Cent. R. Co.*, 137 Fed. 943 (C. C. N. D. Ill.); *Curtis* v. *Cleveland, C. C. & St. L. Ry. Co.*, 140 Fed. 777 (C. C. E. D. Ill.). See also *Hough* v. *Railway Co.*, 100 U. S. 213, 226; *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368; *Gardner* v. *Michigan Cent. R. Co.*, 150 U. S. 349, 358; *Beutler* v. *Grand Trunk Junction Ry. Co.*, 224 U. S. 85; *Baltimore & Ohio R. Co.* v. *Goodman*, 275 U. S. 66; *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98; *Cole* v. *Pennsylvania R. Co.*, 43 F. (2d) 953 (C. C. A. 2).

[14] *Lake Shore & M. S. Ry. Co.* v. *Prentice*, 147 U. S. 101, 106; *Norfolk & P. Traction Co.* v. *Miller*, 174 Fed. 607 (C. C. A. 4); *Greene* v. *Keithley*, 86 F. (2d) 239 (C. C. A. 8).

[15] *Foxcroft* v. *Mallet*, 4 How. 353, 379; *Midland Valley R. Co.* v. *Sutter*, 28 F. (2d) 163 (C. C. A. 8); *Midland Valley R. Co.* v. *Jarvis*, 29 F. (2d) 539 (C. C. A. 8).

[16] *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349; *Mid-Continent Petroleum Corp.* v. *Sauder*, 67 F. (2d) 9, 12 (C. C. A. 10), reversed on other grounds, 292 U. S. 272.

[17] *Lane* v. *Vick*, 3 How. 464, 476; *Barber* v. *Pittsburgh, F. W. & C. R. Co.*, 166 U. S. 83, 99–100; *Messinger* v. *Anderson*, 171 Fed. 785, 791–792 (C. C. A. 6), reversed on other grounds, 225 U. S. 436; *Knox & Lewis* v. *Alwood*, 228 Fed. 753 (S. D. Ga.).

[18] Compare, also, *Williamson* v. *Berry*, 8 How. 495; *Watson* v. *Tarpley*, 18 How. 517; *Gelpcke* v. *City of Dubuque*, 1 Wall. 175.

[19] See *Cheever* v. *Wilson*, 9 Wall. 108, 123; *Robertson* v. *Carson*, 19 Wall. 94, 106–07; *Morris* v. *Gilmer*, 129 U. S. 315, 328; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 192; *Williamson* v. *Osenton*, 232 U. S. 619, 625.

the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case.

The injustice and confusion incident to the doctrine of *Swift* v. *Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.[20] Other legislative relief has been proposed.[21] If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.[22] But the uncon-

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[20] See, e. g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6–8; Hearing Before the House Committee on the Judiciary on H. R. 10594, H. R. 4526, and H. R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97–104; Sen. Rep. No. 530, 72d Cong., 1st Sess. (1932) 4–6; Collier, A Plea Against Jurisdiction Because of Diversity (1913) 76 Cent. L. J. 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra* note 6; Warren, Corporations and Diversity of Citizenship (1933) 19 Va. L. Rev. 661, 686.

[21] Thus, bills which would abrogate the doctrine of *Swift* v. *Tyson* have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H. R. 8094, 72d Cong., 1st Sess. See also Mills, *supra* note 4, at 68–69; Dobie, *supra* note 6, at 241; Frankfurter, *supra* note 6, at 530; Campbell, *supra* note 6, at 811. State statutes on conflicting questions of "general law" have also been suggested. See Heiskell, *supra* note 4, at 760; Dawson, *supra* note 6; Dobie, *supra* note 6, at 241.

[22] The doctrine has not been without defenders. See Eliot, The Common Law of the Federal Courts (1902) 36 Am. L. Rev. 498, 523–25; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907) 17 Yale L. J. 1; Schofield, Swift *v.* Tyson: Uniformity of Judge-Made State Law in State and Federal Courts (1910) 4 Ill. L. Rev. 533; Brown, The Jurisdiction of the Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa. L. Rev. 179, 189–91; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932) 18 A. B. A. J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933) 19 A. B. A. J. 71, 74–75; Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions (1934) 9 Tulane L. Rev. 64.

stitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 401, against ignoring the Ohio common law of fellow servant liability:

"I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and inde-

pendence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes.[23] The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

"but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .

"the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold

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[23] *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370–372; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 532–36.

unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203; 160 A. 859, the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law.[24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

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

MR. JUSTICE BUTLER.

The case presented by the evidence is a simple one. Plaintiff was severely injured in Pennsylvania. While walking on defendant's right of way along a much-used path at the end of the cross ties of its main track, he came into collision with an open door swinging from the side of a car in a train going in the opposite direction. Having been warned by whistle and headlight, he saw the locomo-

[24] Tompkins also contended that the alleged rule of the *Falchetti* case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

tive approaching and had time and space enough to step aside and so avoid danger. To justify his failure to get out of the way, he says that upon many other occasions he had safely walked there while trains passed.

Invoking jurisdiction on the ground of diversity of citizenship, plaintiff, a citizen and resident of Pennsylvania, brought this suit to recover damages against defendant, a New York corporation, in the federal court for the southern district of that State. The issues were whether negligence of defendant was a proximate cause of his injuries and whether negligence of plaintiff contributed. He claimed that, by hauling the car with the open door, defendant violated a duty to him. The defendant insisted that it violated no duty and that plaintiff's injuries were caused by his own negligence. The jury gave him a verdict on which the trial court entered judgment; the circuit court of appeals affirmed. 90 F. (2d) 603.

Defendant maintained, citing *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203; 160 A. 859, and *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122; 163 A. 212, that the only duty owed plaintiff was to refrain from willfully or wantonly injuring him; it argued that the courts of Pennsylvania had so ruled with respect to persons using a customary longitudinal path, as distinguished from one crossing the track. The plaintiff insisted that the Pennsylvania decisions did not establish the rule for which the defendant contended. Upon that issue the circuit court of appeals said (p. 604): "We need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law."

Upon that basis the court held the evidence sufficient to sustain a finding that plaintiff's injuries were caused by the negligence of defendant. It also held the question of contributory negligence one for the jury.

Defendant's petition for writ of certiorari presented two questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. Plaintiff contends that, as always heretofore held by this Court, the issues of negligence and contributory negligence are to be determined by general law against which local decisions may not be held conclusive; that defendant relies on a solitary Pennsylvania case of doubtful applicability and that, even if the decisions of the courts of that State were deemed controlling, the same result would have to be reached.

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. *Olson* v. *United States,* 292 U. S. 246, 262. *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 494. *Gunning* v. *Cooley,* 281 U. S. 90, 98. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.

The opinion just announced states that "the question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson* [1842, 16 Pet. 1] shall now be disapproved."

That case involved the construction of the Judiciary Act of 1789, § 34: "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." Expressing the view of all the members of the Court, Mr. Justice Story said (p. 18): "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. *In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed,* that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. *It never has been supposed by us,* that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. *And we have not now the slightest difficulty in holding,* that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character

before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." (Italics added.)

The doctrine of that case has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.[1] *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 390. In that case, Mr. Justice Brewer, speaking for the Court, truly said (p. 373): "Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

And since that decision, the division of opinion in this Court has been one of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a

[1] Mr. Justice Field filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to § 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. *Oakes* v. *Mase,* 165 U. S. 363.

court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349. But that dissent accepted (p. 371) as "settled" the doctrine of *Swift* v. *Tyson,* and insisted (p. 372) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied.[2] In *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518, three judges dissented. The writer of the dissent, Mr. Justice Holmes, said, however (p. 535): "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.,* but I would not allow it to spread the assumed dominion into new fields."

No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co.* v. *Britt,* 258 U. S. 268. *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, 70. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman* case was somewhat ameliorated by *Pokora* v. *Wabash Ry. Co.,* 292 U. S. 98.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335, 339. See *Burgess* v. *Seligman,* 107 U. S. 20, 34. *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co., supra,* 530. Unquestionably the issues of negligence and contributory negligence upon which decision of this case

[2] In *Salem Trust Co.* v. *Manufacturers' Finance Co.,* 264 U. S. 182, Mr. Justice Holmes and Mr. Justice Brandeis concurred (p. 200) in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

depends are questions of general law. *Hough* v. *Railway Co.*, 100 U. S. 213, 226. *Lake Shore & M. S. Ry. Co.* v. *Prentice*, 147 U. S. 101. *Baltimore & Ohio R. Co.* v. *Baugh, supra. Gardner* v. *Michigan Central R. Co.*, 150 U. S. 349, 358. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 512. *Baltimore & Ohio R. Co.* v. *Goodman, supra. Pokora* v. *Wabash Ry. Co., supra.*

While amendments to § 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed § 34. But that author's "New Light on the History of the Federal Judiciary Act of 1789" does not purport to be authoritative and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab* case, Mr. Justice Holmes referred to Mr. Warren's work but failed to persuade the Court that "laws" as used in § 34 included varying and possibly ill-considered rulings by the courts of a State on questions of common law. See, e. g., *Swift* v. *Tyson, supra*, 16–17. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon § 34. Indeed, the opinion in this case so indicates. For it declares: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789, passed to establish judicial

courts to exert the judicial power of the United States, and especially § 34 of that Act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the State in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our opinion in the *Taxicab* case cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions, and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to support them is no longer necessary. But see e. g.: *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 553; *Township of Pine Grove* v. *Talcott,* 19 Wall. 666, 673; *Chicago & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339, 345;

Baker v. *Grice,* 169 U. S. 284, 292; *Martin* v. *District of Columbia,* 205 U. S. 135, 140.

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that requires the conclusion reached. Admittedly, there is no authority to support that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers* v. *United States,* 272 U. S. 52, 176.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751. It declares: "That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a

party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act." That provision extends to this Court. § 5. If defendant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, § 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been "drawn in question." Congress intended to give the United States the right to be heard in every case involving constitutionality of an Act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first "drawn in question" by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that Act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the Act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the Act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift* v. *Tyson* shall now be disapproved; it recites (p. 72) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of § 34 in *Swift* v. *Tyson* and since; after discussion, it declares (pp. 77–78) that "the unconstitutionality of the course pursued [meaning the rule of decision

resulting from that construction] compels" abandonment of the doctrine so long applied; and then near the end of the last page the Court states that it does not hold § 34 unconstitutional, but merely that, in applying the doctrine of *Swift* v. *Tyson* construing it, this Court and the lower courts have invaded rights which are reserved by the Constitution to the several States. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional § 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding questions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular State.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries and that the judgment below should be reversed upon that ground.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

MR. JUSTICE REED.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift* v. *Tyson,* and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

The "doctrine of *Swift* v. *Tyson,*" as I understand it, is that the words "the laws," as used in § 34, line one, of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said (16 Pet. 19):

"Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

To decide the case now before us and to "disapprove" the doctrine of *Swift* v. *Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift* v. *Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift* v. *Tyson,* for he said in the very opinion quoted by the majority, "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.,* but I would not allow it to spread the assumed dominion into new fields." *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518, 535. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts,

that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman* v. *Southard,* 10 Wheat. 1. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis,* in statutory construction, is a useful rule, not an inexorable command. *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, dissent, p. 406, note 1. Compare *Read* v. *Bishop of Lincoln,* [1892] A. C. 644, 655; *London Street Tramways Co.* v. *London County Council,* [1898] A. C. 375, 379. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366.

There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

HINDERLIDER, STATE ENGINEER, ET AL. *v.* LA PLATA RIVER & CHERRY CREEK DITCH CO.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 437. Argued February 10, 11, 1938.—Decided April 25, 1938.

1. The water of an interstate stream, used beneficially in each of the two States through which it flows, must be equitably apportioned between the two. P. 101.

   The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been consistently denied by this Court. P. 102.

2. A decree of a state court can not confer a right in the water of an interstate stream in excess of the State's equitable portion of such water. P. 102.

3. A decree of a state court adjudicating to a local user a right in the water of an interstate stream in excess of the State's equitable portion thereof is not *res judicata* as to another State and its citizens who claim the right to divert water from the stream in such other State, and who were not parties to the proceedings. P. 103.
4. It is not essential to the validity of a compact between States for the apportionment of the water of an interstate stream that there be judicial or quasi-judicial decision in respect of existing rights. P. 104.
5. Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, including grantees whose rights antedate the compact or decree. P. 106.
6. A compact between two States for apportionment of the water of an interstate stream may provide for division of the water at times, and at other times for the use of the entire flow by one State or the other in alternating periods; and authority may validly be delegated to the States' engineers to determine when the use should be rotated. P. 108.

   So *held* where the evidence conclusively established that, at the times when rotation was determined upon, the stream could in that way be more efficiently used.
7. No vitiating infirmity being here shown in the proceedings preliminary to the La Plata River Compact or in its application, the apportionment made by it between Colorado and New Mexico of the water of the La Plata River could not be held to deprive a Colorado appropriator of any vested right, even though a right had previously been adjudicated to him in a water proceeding in a court of that State. P. 108.
8. The assent of Congress to the La Plata River Compact between Colorado and New Mexico does not make the compact a "treaty or statute of the United States" within the meaning of § 237 (a) of the Judicial Code, and a decision of the state court against its validity is not appealable to this Court. P. 109.
9. A claim based on the equitable interstate apportionment of water, like one based on the proper location of a state boundary, is not within the provisions of § 237 (a) of the Judicial Code. P. 109.
10. The decision of the Supreme Court of Colorado in this case, restraining the State Engineer from taking action required by the La Plata River Compact, denied an important claim under the

Constitution and is reviewable by this Court on certiorari under § 237 (b) of the Judicial Code. P. 110.

11. Whether the water of a stream must be apportioned between the two States through which it flows is a federal question, upon which neither the statutes nor decisions of either State can be conclusive. P. 110.

12. That the States which are parties to a compact are not parties to the suit and can not be made so, does not deprive this Court of jurisdiction to determine the validity and effect of the compact. P. 110.

101 Colo. 73; 70 P. 2d 849, reversed.

APPEAL from the affirmance of a judgment requiring water officials of Colorado to permit diversion of water from the La Plata River by the respondent Ditch Company, notwithstanding contrary provisions of the La Plata River Compact. Appeal dismissed; certiorari granted.

Messrs. Ralph L. Carr and *Byron G. Rogers,* Attorney General of Colorado, with whom *Messrs. Shrader P. Howell, R. F. Camalier,* and *Jean S. Breitenstein* were on the brief, for appellants.

Mr. Charles J. Beise, with whom *Mr. Reese McCloskey* was on the brief, for appellee.

Attorney General Cummings filed a memorandum by which he sought to maintain that, within the meaning of the Act of Aug. 24, 1937, c. 754, 50 Stat. 751, this Court is "a court of the United States" and the state compact here in question, approved by Congress, is an "Act of Congress affecting the public interest," the constitutionality of which is drawn in question on the appeal. The Attorney General and *Acting Solicitor General Bell* also filed a memorandum suggesting the interest of the United States in interstate water compacts and interstate compacts generally.

Messrs. Percy Warren Green, Attorney General of Delaware, *Herbert R. O'Conor,* Attorney General of Maryland, *David Wilentz,* Attorney General of New Jersey, *John J. Bennett, Jr.,* Attorney General, *Henry Epstein,* Solicitor General, of New York, *Julius Henry Cohen, T. Harry Rowland, Adrian Bonnelly, Austin T. Tobin,* and *Daniel B. Goldberg,* appearing as *amici curiae,* by leave of Court, filed on behalf of their respective States and certain state agencies a memorandum taking issue with the views of the Attorney General of the United States as expressed in the first of his memoranda above mentioned. *Mr. Abram P. Staples,* Attorney General of Virginia, appearing by leave of Court as *amicus curiae,* joined with the other States in this matter.

Mr. Justice Brandeis delivered the opinion of the Court.

The La Plata River and Cherry Creek Ditch Company, a Colorado corporation, owns a ditch by which it diverts from that river in Colorado water for irrigation. On July 5, 1928, it brought in the District Court for La Plata County a suit which charged that since June 24, 1928, the defendants, Hinderlider, State Engineer of Colorado, and his subordinates have so administered the water of the river as to deprive the plaintiff of water which it claims the right to divert. A mandatory injunction was sought.

The defendants admit that in administering the water of the stream during the period named they shut the headgate of the Ditch Company so as to deprive it of water for purposes of irrigation; but assert that they did so pursuant to the requirements of the La Plata River Compact entered into by the States of Colorado and New Mexico with the consent of the Congress of the United States.

The Compact provides that each State shall receive a definite share of water under the varying conditions which obtain during the year, and, among other things: [1]

"1. At all times between the 1st day of December and the 15th day of the succeeding February each State shall have the unrestricted right to the use of all water which may flow within its boundaries.

"2. By reason of the usual annual rise and fall, the flow of said river between the 15th day of February and the 1st day of December of each year shall be apportioned between the States in the following manner:

"(a) Each State shall have the unrestricted right to use all the waters within its boundaries in each day when the mean daily flow at the interstate station is one hundred cubic feet per second, or more.

"(b) On all other days, the State of Colorado shall deliver at the interstate station a quantity of water equiv-

[1] The Compact had its inception in 1921 when the legislature of each state authorized the appointment of a commissioner who shall represent the State "upon a Joint Commission . . . to be constituted by said states for the purpose of negotiating and entering into a compact or agreement between said states, with the consent of Congress, respecting the future utilization and disposition of the waters of the La Plata River, and all streams tributary thereto, and fixing and determining the rights of each of said states to the use, benefit and disposition of the waters of said stream, provided, however, that any compact or agreement so entered into on behalf of said states shall not be binding or obligatory upon either of said states or the citizens thereof, unless and until the same shall have been ratified and approved by the Legislatures of both states, and by the Congress of the United States." Colo. Session Laws, 1921, p. 803; Session Laws of New Mexico, 1921, p. 322.

The compact drafted by the commissioners was ratified by the General Assembly of New Mexico on February 7, 1923 (Session Laws of New Mexico, 1923, p. 13) and by the General Assembly of Colorado on April 13, 1923 (Colorado Session Laws, 1923, p. 696.)

The consent of Congress was granted by Act of January 29, 1925, 43 Stat. 796.

alent to one-half of the mean flow at the Hesperus station for the preceding day, but not to exceed one hundred cubic feet per second.

"3. Whenever the flow of the river is so low that in the judgment of the State engineers of the States the greatest beneficial use of its waters may be secured by distributing all of its water successively to the lands in each State in alternating periods, in lieu of delivery of water as provided in the second paragraph of this article, the use of the waters may be so rotated between the two States in such manner, for such periods, and to continue for such time as the State Engineers may jointly determine."

For the administration of water rights, Colorado and New Mexico each set up an administrative system with the State Engineers at its head. The State Engineers agreed that, in order to put the water to its most efficient use in the hot summer months of 1928, when the river was very low, the whole of the available supply should be rotated between the two States. In other words, that each State should be permitted to enjoy the entire flow of the river during alternating ten-day periods. During the ten days commencing June 24, 1928, all the water of the river (except small amounts diverted in Colorado for domestic and stock requirements) was thus allowed to pass to New Mexico; and during the succeeding ten-day period all the water in the stream was similarly allowed to be diverted in Colorado. The defendant water officials contend that in so rotating the water of the stream they administered it as required by the Compact and wisely.

The La Plata River rises in the mountains of Colorado, flows in a southerly direction until it reaches the boundary of New Mexico and in the latter State until it empties into the San Juan River. The stream is non-navigable; has a narrow watershed; and a large run-off in the early spring. Then the quantity flowing begins to fall rapidly;

and during the summer months little water is available for irrigation. In each State the water of the stream has long been used for irrigation; and each adopted the so-called appropriation doctrine of water use.[2] Under that doctrine the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water. The rights of subsequent appropriations are subject to rights already held in the stream.

The relative rights of all claimants to divert in Colorado water from the La Plata River were adjudicated in a proceeding under the Colorado statutes. By decree therein of January 12, 1898 (and later amended) the Ditch Company was declared entitled to divert 39¼ cubic feet of water per second, subject to five senior priorities aggregating 19 second feet. On June 24, 1928, there was in the stream, at the recognized Colorado gauging station, 57 second feet of water. The Ditch Company claimed that by reason of the 1898 decree it was entitled to all the water in the stream except that required to satisfy the Colorado priorities. If it had been permitted to draw all that water, none would have been available to the New Mexico water claimants, who, under similar laws, had made appropriations. Some of them were earlier in date than the Ditch Company's.

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[2] Colorado Constitution, Art. XVI, § 5, provides: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Article XVI, § 6, provides in part: "The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose." For the law of New Mexico, see its Constitution, Art. XVI, §§ 2 and 3.

The case was first heard in the District Court on evidence in 1930. The Ditch Company objected at the trial to the admission or consideration of the Compact. It insisted that the Compact attempted to surrender to New Mexico, and thus destroy, vested property rights of Colorado citizens; that this is a violation of the obligations of its contract; and that the Compact in so far as it "applies or is intended to apply to private rights of the individuals or citizens of Colorado, or to be used as a defense of or justification for the acts of the State Engineer or his subordinates in interfering with or violating the private rights of citizens of Colorado, or in attempting to disregard, ignore or set aside the decrees of this [District] Court for the distribution of water in accordance with the decrees, is unconstitutional and void"
in violation of the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution and of § 25 of the Constitution of Colorado.

The District Court overruled the objection; found in substance the facts stated above; held that the Compact justified the action of defendants; and entered a decree that the bill be dismissed, each party to bear its own costs. That judgment was reversed by the Supreme Court of the State (one judge dissenting), *La Plata River & Cherry Creek Ditch Co.* v. *Hinderlider,* 93 Colo. 128; 25 P. 2d 187. The opinion declared:

"There is not the slightest pretense, either in this compact itself or in the proceedings leading up to it, to a decision of the question of what water Colorado owns, or what water New Mexico owns, or what their respective citizens own. It is a mere compromise of presumably conflicting claims, a trading therein, in which the property of citizens is bartered, without notice or hearing and with no regard to vested rights."

An appeal to this Court was dismissed for want of final judgment below. *Hinderlider* v. *La Plata River & Cherry*

Creek Ditch Co., 291 U. S. 650. The case was then retried by the District Court on the same pleadings and evidence; and, pursuant to the opinion of the Supreme Court of Colorado, a decree was entered which, after reciting in substance the facts above stated, declared:

"6. That the said La Plata River Compact, entered into between the States of Colorado and New Mexico with the consent of the Congress of the United States of America, does not constitute a defense to the actions of said defendant water officials complained of by plaintiff, and is not available to said defendant water officials, as a legal defense or justification, for their acts in closing and shutting down the headgate of plaintiff and in depriving the said plaintiff, thereby, of its right to the use of the waters from said La Plata River for irrigation purposes, as provided by the terms and provisions of said decree of adjudication of January 12, 1898."

The decree specifically:

"(3) Enjoined and commanded [the defendants] to permit the diversion through the plaintiff's headgate [of] water for plaintiff's ditch in accordance with the terms of said decree at any and all times when there is water in said stream to which said decree, under its terms and conditions would apply; . . ."

This second judgment of the trial court was affirmed by the Supreme Court of the State; an additional opinion being delivered by the court, and a dissent by a different justice. 101 Colo. 73; 70 P. 2d 849. An appeal to this Court was allowed by the Acting Chief Justice of the State.[3] Pursuant to the Act of Congress, August 24, 1937, c. 754, 50 Stat. 751, the attention of the Attorney Gen-

[3] The first judgment in the trial court was entered June 16, 1930; the first judgment of the Supreme Court of Colorado on July 3, 1933; the dismissal by this Court of the first appeal on March 12. 1934; the second judgment in the trial court on May 12, 1936; the second judgment of the Supreme Court of Colorado on July 6, 1937.

eral of the United States was directed to the contention that the validity of a federal statute is involved, 302 U. S. 646. He filed memoranda in which he contended that:

"(1) this Court is included in the courts to which Section 1 of the Act of August 24, 1937, is applicable; (2) the constitutionality of the compact is drawn in question whether or not a decision on this point is necessary; (3) a compact is an Act of Congress; and (4) it is an Act 'affecting the public interest.' "

Opposing some of the views expressed by the Attorney General, a brief was filed on behalf of Delaware, Maryland, New Jersey, New York, Virginia, the Port of New York Authority and the Delaware River Joint Commission.

The Ditch Company moved to dismiss the appeal, contending, among other things, that the mere fact that the Compact was approved by Congress does not make it a federal statute within the meaning of the jurisdictional act authorizing appeals. Decision on the motion to dismiss was postponed to the hearing on the merits. For reasons to be stated, we are of opinion that the case is not reviewable on appeal; that it presents a federal question reviewable on certiorari; that because of its importance certiorari should be granted; and that the judgment must be reversed.

First. As the La Plata River flows from Colorado into New Mexico and in each State the water is used beneficially, it must be equitably apportioned between the two. The decision below in effect ignores that rule. It holds immaterial the fact that the acts complained of were being done in compliance with the Compact, and does so on the ground that the Compact in authorizing diversion and rotation violated rights awarded by the January 12, 1898 decree in the Colorado water proceeding; holds that the decree awarded to the Ditch Company the right to divert from the river 39¼ cubic feet per second (subject

only to the senior Colorado priorities of 19 second feet), even if by so doing it exhausts the whole flow of the stream and leaves nothing for the New Mexico claimants; and holds that the right so awarded is a vested property right which the two States, although acting with the consent of the United States, lacked power to diminish or modify except by a condemnation proceeding and payment of compensation. No such proceeding was provided for in the Compact and none was had otherwise.

It may be assumed that the right adjudicated by the decree of January 12, 1898 to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.

The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in litigation concerning other interstate streams, but has been consistently denied by this Court. The rule of equitable apportionment was settled by *Kansas* v. *Colorado,* 206 U. S. 46, 97. It was discussed again in *Wyoming* v. *Colorado,* 259 U. S. 419, 466, where the Court said:

"The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in

Kansas v. *Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right."

And in *New Jersey* v. *New York,* 283 U. S. 336, 342–43, the Court said of an interstate stream:

"It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be."

The decree obviously is not *res judicata* so far as concerns the State of New Mexico and its citizens who claim the right to divert water from the stream in New Mexico. As they were not parties to the Colorado proceedings, they remain free to challenge the claim of the Ditch Company that it is entitled to take in Colorado all the water of the stream and leave nothing for them.[4]

Second. The declared purpose of the Compact was, as the preamble recites, equitable apportionment:

"The State of Colorado and the State of New Mexico, desiring to provide for the equitable distribution of the waters of the La Plata River and to remove all causes of present and future controversy between them with respect thereto, and being moved by considerations of interstate comity, pursuant to Acts of their respective legislatures, have resolved to conclude a compact for these purposes and have named as their commissioners: Delph

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[4] *Washington* v. *Oregon,* 297 U. S. 517, 528. Compare *Fowler* v. *Lindsey,* 3 Dall. 411, 412; *Arkansas* v. *Tennessee,* 246 U. S. 158, 176.

E. Carpenter, for the State of Colorado, and Stephen B. Davis, Jr., for the State of New Mexico, who have agreed upon the following articles."

The Supreme Court of Colorado held the Compact unconstitutional because, for aught that appears, it embodies not a judicial, or quasi-judicial, decision of controverted rights, but a trading compromise of conflicting claims. The assumption that a judicial or quasi-judicial decision of the controverted claims is essential to the validity of a compact adjusting them, rests upon misconception. It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies,[5] was practiced by the States before the adoption of the Constitution,[6] and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 723–25.[7]

The extent of the existing equitable rights of Colorado and of New Mexico in the La Plata River could ob-

[5] Nine colonial boundary agreements are listed by Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments (1925) 34 Yale L. J. 685, 730–32.

[6] Five agreements made under the Articles of Confederation have been found. See Frankfurter and Landis, *supra* note 5, at 732–34.

[7] Nine compacts were apparently executed in this period (although five of these were without express Congressional consent). See Frankfurter and Landis, *supra* note 5, at 735–37, 749–52. See also Ely, Oil Conservation through Interstate Agreement (1933) 371–72, 389–91; (June 1936) 9 State Government 118; Dodd, Interstate Compacts (1936) 70 U. S. L. Rev. 557, 574. The agreement between New Jersey and New York in 1833 put an end to the boundary suit begun in 1829. *New Jersey* v. *New York,* 3 Pet. 461, 5 Pet. 284, 6 Pet. 323.

viously have been determined by a suit in this Court, as was done in *Kansas* v. *Colorado, supra,* in respect to rights in the Arkansas River and in *Wyoming* v. *Colorado, supra,* in respect to the Laramie.[8] But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested "that the parties endeavor with the consent of Congress to adjust their boundaries." *Washington* v. *Oregon,* 214 U. S. 205, 217, 218; *Minnesota* v. *Wisconsin,* 252 U. S. 273, 283.[9] In *New York* v. *New Jersey,* 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific;[10] and compacts for the apportion-

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[8] See also *Connecticut* v. *Massachusetts,* 282 U. S. 660, 283 U. S. 789 (Connecticut River); *New Jersey* v. *New York,* 283 U. S. 336, 805 (Delaware River); *Wyoming* v. *Colorado,* 286 U. S. 494, 298 U. S. 573 (Laramie River); *Washington* v. *Oregon,* 297 U. S. 517 (Walla Walla River). Three other water apportionment suits are pending in this Court. *Colorado* v. *Kansas,* Original No. 6 (Arkansas River); *Nebraska* v. *Wyoming,* 295 U. S. 40, Original No. 9 (North Platte River); *Texas* v. *New Mexico,* Original No. 11 (Rio Grande).

[9] The long drawn out irritating boundary litigation, *Rhode Island* v. *Massachusetts,* 7 Pet. 651; 11 Pet. 226; 12 Pet. 657, 755; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591; was finally settled by a Compact. See Frankfurter and Landis, *supra* note 5, at 696, 737–38.

[10] "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by coöperative study and by conference and mutual concession on the part of represent-

ment of the water of interstate streams have been common.[11]

Third. Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. That the private rights of grantees of a State are determined by the adjustment by compact of a disputed boundary was settled a century ago in *Poole* v. *Fleeger,* 11 Pet. 185, 209, where the Court said:

"It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union; unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress."

In *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725, the Court, discussing the origin and scope of the Compact clause, said:

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atives of the States so vitally interested in it than by proceedings in any court however constituted." (p. 313.)

[11] Congress has consented to 15 such compacts, of which 5 have been ratified by two or more of the contracting States. See State Government, *supra* note 7, at 120–21. See also Ely, *supra* note 7, at 381–88; Dodd, *supra* note 7, at 574–78.

"If Congress consented, then the States were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the States as they were before, as held by this Court in *Poole* v. *Fleeger,* 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries."

See also *Garcia* v. *Lee,* 12 Pet. 511, 521; *Coffee* v. *Groover,* 123 U. S. 1, 29, 30, 31; *Virginia* v. *Tennessee,* 148 U. S. 503, 525.

The rule as applied to the apportionment by judicial decree of the water of an interstate stream was stated in *Wyoming* v. *Colorado,* 286 U. S. 494, 508:

"But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado'; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U. S. 468. Decisions in other cases also warrant the conclusion that the water claimants in Colo-

rado, and those in Wyoming, were represented by their respective States and are bound by the decree."

Fourth. As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water from time to time in the stream, or by providing for alternate periods of flow to the one State and to the other of all the water in the stream. To secure "the greatest beneficial use of" the water in the stream, the Compact provided that the water may be "rotated between the two States, in such manner for such periods, and to continue for such time as the State Engineers may jointly determine." That such alternate rotating flow was then a more efficient use of the stream than if the flow had been steadily divided equally between the Colorado and the New Mexico appropriators was conclusively established by the evidence. That is, the rotating supply which the Compact authorized, and the two State Engineers agreed upon, was clearly more beneficial to the Ditch Company than to have given to it and other Colorado appropriators steadily one-half of the water in the river. The delegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional power. There is no claim that the authority conferred was abused.

Fifth. As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898, in the Colorado water proceeding did not award to the Ditch Company any right greater than the equitable share. Hence the apportionment made by the Compact can not have taken from the Ditch Company any vested right, unless there was in the proceedings leading up to the Compact or in its application, some vitiating infirmity. No such infirmity or illegality

has been shown. There is no allegation in the pleadings, no evidence in the record, no suggestion in brief or argument, that the apportionment agreed upon by the commissioners was entered into without due enquiry; or that it was not an honest exercise of judgment; or even that it was, or is, inequitable. The fact that the appointment of the Joint Commissioners was authorized in 1921, that their agreement was not adopted by the States until 1923, and that it was not approved by Congress until 1925 shows that there was ample time for consideration by all concerned. There is no suggestion that the Ditch Company, or indeed anyone else, was denied by the commissioners opportunity to be heard; or even that any water claimant objected to the terms of the Compact. It appears that although the State of Colorado was not permitted to intervene in this litigation, *Colorado* v. *La Plata River & C. C. Ditch Co.,* 101 Colo. 368; 73 P. 2d 997, its Attorney General represented the State's water officials. Moreover, the Compact provides in Article VI that it "may be modified or terminated at any time by mutual consent"; and there is not even a suggestion that either State, or the Ditch Company, has expressed a desire to modify or terminate it.

Sixth. The water officials rely for their defense upon the rule requiring equitable apportionment of the water of an interstate stream and the action of Congress in approving the adjustment of the equitable apportionment which the States made by their compacts. The assent of Congress to the compact between Colorado and New Mexico does not make it a "treaty or statute of the United States" within the meaning of § 237 (a) of the Judicial Code, and no question as to the validity of the consent is presented. *People* v. *Central Railroad,* 12 Wall. 455. A claim based on the equitable interstate apportionment of water, like one based on the proper location of a State boundary, is not within the provisions of

§ 237 (a). *Rust Land & Lumber Co.* v. *Jackson,* 250 U. S. 71. The appeal must therefore be dismissed. But in holding that the State Engineer and his subordinates should be enjoined from taking action required by the Compact the State Court denied an important claim under the Constitution which may be reviewed on certiorari by this Court under § 237 (b). For the decision below necessarily rests upon the premise that at the time the Compact was made Colorado was absolutely entitled to at least 58¼ cubic feet of water per second regardless of the amount left for New Mexico. The judgment cannot stand if this determination is erroneous. For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. *Kansas* v. *Colorado,* 206 U. S. 46, 95, 97–98; *Connecticut* v. *Massachusetts,* 282 U. S. 660, 669–71; *New Jersey* v. *New York,* 283 U. S. 336, 342–43; *Washington* v. *Oregon,* 297 U. S. 517, 528. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.[12]

It has been suggested that this Court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the parties to it, are not

[12] *Cissna* v. *Tennessee,* 246 U. S. 289, 295; compare *Rust Land & Lumber Co.* v. *Jackson,* 250 U. S. 71, 76. In *Howard* v. *Ingersoll,* 13 How. 381, this Court reversed the Supreme Court of Alabama's decision locating the Alabama-Georgia boundary, which depended upon the construction of a cession of territory by Georgia to the United States in 1802. Compare *Coffee* v. *Groover,* 123 U. S. 1. The decisions are not uniform as to whether the interpretation of an interstate compact presents a federal question. Compare *People* v. *Central Railroad,* 12 Wall. 455, with *Wedding* v. *Meyler,* 192 U. S. 573, and *Wharton* v. *Wise,* 153 U. S. 155.

parties to this suit and cannot be made so. The contention is unsound. The cases are many where title to land dependent upon the boundary between States has been passed upon by this Court upon review of judgments of federal and of State courts in suits between private litigants.[13]

Reversed.

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

UNITED STATES *v.* SHOSHONE TRIBE OF INDIANS.

CERTIORARI TO THE COURT OF CLAIMS.

No. 668. Argued March 31, April 1, 1938.—Decided April 25, 1938.

1. The opinion of the Court of Claims may not be referred to for the purpose of altering or modifying the scope of unambiguous findings. P. 115.
2. The right of the Shoshone Tribe in the lands set apart for it, under the treaty of July 3, 1868, with the United States, included the mineral and timber resources of the reservation; and the value of these was properly included in fixing the amount of compensation due for so much of the lands as was taken by the United States. P. 118.
3. The phrase "absolute and undisturbed use and occupation" in the treaty is to be read, with other parts of the treaty, in the light of the purpose of the arrangement made, the relation between the parties, and the settled policy of the Government to deal fairly with the Indian tribes. P. 116.

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[13] Compare *Handly's Lessee* v. *Anthony*, 5 Wheat. 374; *Howard* v. *Ingersoll*, 13 How. 381; *Poole* v. *Fleeger*, 11 Pet. 185; *Coffee* v. *Groover*, 123 U. S. 1; *St. Louis* v. *Rutz*, 138 U. S. 226; *Moore* v. *McGuire*, 205 U. S. 214; *Cissna* v. *Tennessee*, 246 U. S. 289; *Marine Ry. & Coal Co.* v. *United States*, 257 U. S. 47; *Smoot Sand & Gravel Corp.* v. *Washington Airport*, 283 U. S. 348.

4. Treaties made by the United States with Indian tribes are not to be construed narrowly, but rather in the sense in which naturally the Indians would understand them. P. 116.

85 Ct. Cls. 331, affirmed.

CERTIORARI, 303 U. S. 629, to review a judgment against the United States in a suit brought by the Indian Tribe under the special jurisdictional Act of March 3, 1927. For an earlier phase of the case, see 299 U. S. 476.

Assistant Attorney General McFarland, with whom *Solicitor General Jackson* and *Mr. Oscar Provost* were on the brief, for the United States.

Messrs. George M. Tunison and *Albert W. Jefferis,* with whom *Mr. Charles J. Kappler* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Shoshone Tribe brought this suit to recover the value of part of its reservation taken by the United States by putting upon it, without the tribe's consent, a band of Arapahoe Indians. The Court of Claims found the taking to have been in August, 1891, ascertained value as of that date, on that basis fixed the amount of compensation, and gave judgment accordingly. We held, 299 U. S. 476, that the court erred as to the date of the taking, declared it to have been March 19, 1878, reversed the judgment and remanded the case for further proceedings. Then the lower court proceeded to determine the value of the tribe's right at the time of the taking, and the amount to be added to produce the present worth of the money equivalent of the property, paid contemporaneously with the taking. It heard evidence, made additional findings, and gave plaintiff judgment for $4,408,-444.23, with interest from its date until paid. This Court granted writ of certiorari.

The sole question for decision is whether, as the United States contends, the Court of Claims erred in holding that the right of the tribe included the timber and mineral resources within the reservation.

The findings show: The United States, by the treaty of July 2, 1863, set apart for the Shoshone Tribe a reservation of 44,672,000 acres located in Colorado, Utah, Idaho and Wyoming. By the treaty of July 3, 1868, the tribe ceded that reservation to the United States. And by it the United States agreed that the "district of country" 3,054,182 acres definitely described "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians . . ., and the United States now solemnly agrees that no persons," with exceptions not important here, "shall ever be permitted to pass over, settle upon, or reside in" that territory. The Indians agreed that they would make the reservation their permanent home. The treaty provided that any individual member of the tribe having specified qualifications, might select a tract within the reservation which should then cease to be held in common, and be occupied and held in the exclusive possession of the person selecting it, and of his family, while he or they continued to cultivate it. It declared: ". . . Congress shall provide for protecting the rights of the Indian settlers . . . and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper."

The treaty emphasized the importance of education; the United States agreed to provide a schoolhouse and teacher for every thirty children, and the tribe promised to send the children to school. The United States also agreed to provide instruction by a farmer for members

cultivating the soil, clothing for members of the tribe, and a physician, carpenter, miller, engineer and blacksmith. It stipulated that no treaty for the cession of any portion of the reservation held in common should be valid as against the Indians, unless signed by at least a majority of all interested male adults; and that no cession by the tribe should be construed to deprive any member of his right to any tract of land selected by him.

When the treaty of 1868 was made, the tribe consisted of full blood blanket Indians, unable to read, write, or speak English. Upon consummation of the treaty, the tribe went, and has since remained, upon the reservation. It was known to contain valuable mineral deposits—gold, oil, coal and gypsum. It included more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable. It was well protected by mountain ranges and a divide, and was the choicest and best-watered portion of Wyoming.

In 1904 the Shoshones and Arapahoes ceded to the United States 1,480,000 acres to be held by it in trust for the sale of such timber lands, timber and other products, and for the making of leases for various purposes. The net proceeds were to be credited to the Indians. From 1907 to 1919 there were allotted to members of the tribes 245,058 acres.

The court's finding of the ultimate fact is: "The fair and reasonable value of a one-half undivided interest of the Shoshone or Wind River Reservation of a total of 2,343,540 acres, which was taken by the United States on March 19, 1878, from the Shoshone Tribe of Indians for the Northern Arapahoe Tribe, was, on March 19, 1878, $1,581,889.50." That is $1.35 per acre for 1,171,770 acres, one-half of the reservation in 1878, at the time of taking. The United States does not challenge the principle or

basis upon which the court determined the amount to be added to constitute just compensation.

The substance of the Government's point is that in fixing the value of the tribe's right, the lower court included as belonging to the tribe substantial elements of value, ascribable to mineral and timber resources, which in fact belonged to the United States.

It contends that the Shoshones' right to use and occupy the lands of the reservation did not include the ownership of the timber and minerals and that the *opinion* of the court below departs from the general principles of law regarding Indian land tenure and the uniform policy of the Government in dealing with Indian tribes. It asks for reversal with "directions to determine the value of the Indians' right of use and occupancy but to exclude therefrom 'the net value of the lands' and 'the net value of any timber or minerals.' "

The findings are unambiguous; there is no room for construction. The opinion of the Court of Claims may not be referred to for the purpose of eking out, controlling, or modifying the scope of the findings. *Stone* v. *United States,* 164 U. S. 380, 383. *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 539–540. Cf. *American Propeller Co.* v. *United States,* 300 U. S. 475, 479–480.

In this case we have held, 299 U. S. 476, 484, that the tribe had the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and as sacred as the fee, division by the United States of the Shoshones' right with the Arapahoes was an appropriation of the land *pro tanto;* that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe,

for that would be, not the exercise of guardianship or management, but confiscation.

It was not then necessary to consider, but we are now called upon to decide, whether, by the treaty, the tribe acquired beneficial ownership of the minerals and timber on the reservation. The phrase "absolute and undisturbed use and occupation" is to be read, with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes. In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them. *Worcester* v. *Georgia,* 6 Pet. 515, 582. *Jones* v. *Meehan,* 175 U. S. 1, 11. *Starr* v. *Long Jim,* 227 U. S. 613, 622–623.

The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself. *United States* v. *Cook,* 19 Wall. 591. *British-American Oil Co.* v. *Board,* 299 U. S. 159, 164–165. For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. *Leavenworth, L. & G. R. Co.* v. *United States,* 92 U. S. 733, 742–743. *Beecher* v. *Wetherby,* 95 U. S. 517, 525. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. See

Holden v. *Joy,* 17 Wall. 211, 244. *Western Union Tel. Co.* v. *Pennsylvania R. Co.,* 195 U. S. 540, 557.

The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to retain for itself any beneficial interest in them. The words of the grant, coupled with the Government's agreement to exclude strangers, negative the idea that the United States retained beneficial ownership. The grant of right to members of the tribe severally to select and hold tracts on which to establish homes for themselves and families, and the restraint upon cession of land held in common or individually, suggest beneficial ownership in the tribe. As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe. The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48. *Worcester* v. *Georgia, supra,* 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the

treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them. The authority of the United States to prescribe title by which individual Indians may hold tracts selected by them within the reservation, to pass laws regulating alienation and descent and for the government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign.

United States v. *Cook, supra,* gives no support to the contention that in ascertaining just compensation for the Indian right taken, the value of mineral and timber resources in the reservation should be excluded. That case did not involve adjudication of the scope of Indian title to land, minerals or standing timber, but only the right of the United States to replevin logs cut and sold by a few unauthorized members of the tribe. We held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's right of occupancy in perpetuity did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant.

The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation.

Affirmed.

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

MR. JUSTICE REED dissents.

Syllabus.

UNITED STATES *v.* KLAMATH AND MOADOC TRIBES OF INDIANS ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 707. Argued April 1, 4, 1938.—Decided April 25, 1938.

1. In a treaty by which the Klamath and other tribes of Indians ceded land which they had held in immemorial possession, part was retained, "until otherwise directed by the President," to be set apart as a residence for the Indians and "held and regarded as an Indian reservation." Part of the reserved land was subsequently appropriated by the United States. *Held:*

   (1) That the words quoted did not detract from the tribes' right of occupancy. P. 122.

   (2) In ascertaining just compensation for the land appropriated, the value of the standing timber should be included. *Id.*

   (3) While the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others. P. 123.

   (4) The taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. *Id.*

2. Part of the unallotted portion of an Indian reservation was conveyed to a Road Company by the Secretary of the Interior under authority of Congress in exchange for a reconveyance of allotted land which had previously been conveyed by mistake. *Held* a valid exertion of the power of eminent domain, implying a promise by the Government to pay just compensation to the Indians. P. —.

   It was not a case of lands "wrongfully appropriated," as to which the Act of May 26, 1920, which first conferred jurisdiction in this case, confined the damages to value of the lands at time of appropriation. P. 124.

   Congress, by the Act of May 15, 1936, conferring additional jurisdiction in this case upon the Court of Claims, intended to grant to the Indians the right to have their claim for just compensation, under the Constitution, for the land taken, judicially determined

without regard to an earlier settlement and irrespective of the release. P. 125.

85 Ct. Cls. 451, affirmed.

APPEAL, under the special jurisdictional Act of May 15, 1936, from a judgment sustaining the Indians' claim to compensation for land taken by the United States. For an earlier phase, see 296 U. S. 244.

Assistant Attorney General McFarland, with whom *Solicitor General Jackson* and *Mr. C. W. Leaphart* were on the brief, for the United States.

Mr. G. Carroll Todd, with whom *Messrs. Daniel B. Henderson* and *T. Hardy Todd* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Congress, by Act of May 26, 1920,[1] gave to the lower court jurisdiction of claims of respondents against the United States. They sued to recover the value of 87,000 acres of land alleged to have been taken from them by the United States August 22, 1906. The Court of Claims made special findings of fact, stated its conclusion of law and dismissed the case. We affirmed on the ground that the Act did not confer jurisdiction of released claims and that this claim had been released. 296 U. S. 244. Then, by Act of May 15, 1936,[2] the Congress enacted "That in the suit numbered E–346 [this suit] heretofore instituted in the Court of Claims by the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians under an Act . . . approved May 26, 1920, jurisdiction is hereby conferred upon said court, and it is hereby authorized and directed, irrespective of any release or settlement, to re-

[1] 41 Stat. 623.

[2] 49 Stat. 1276.

instate and retry said case and to hear and determine the claims of the plaintiffs on the merits, and to enter judgment thereon upon the present pleadings, evidence, and findings of fact, with the right of appeal, rather than by certiorari, to the Supreme Court of the United States by either party: *Provided,* That any payment heretofore made to the said Indians by the United States in connection with any release or settlement shall be charged as an offset, but shall not be treated as an estoppel."

The findings show: In 1864 plaintiffs held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California. By an Act [3] of March 25 of that year the President was authorized to conclude with them a treaty for the purchase of the country they occupied. The treaty was made October 14 following.[4] A proviso sets apart a tract retained out of the country a part of which was ceded, to be held until otherwise directed by the President, as a residence for plaintiffs, with specified privileges. Rights of way for public roads were reserved.[5] Shortly before the treaty was made Congress granted Oregon, to aid in the construction of a military road, the odd-numbered sections for three in width on each side of the proposed road.[6] Oregon accepted the grant and assigned it to the road company which undertook to construct the road. Congress recognized the assignment.[7] Patents were issued to the State and to the road company for in all 420,240.67 acres, title to which was later acquired by a land company. Exclusive of right of way, 111,385 acres so acquired by that company were within the boundaries

[3] 13 Stat. 37.

[4] Ratified July 2, 1866; proclaimed February 17, 1870. 16 Stat. 707.

[5] 16 Stat. 708.

[6] Act of July 2, 1864, 13 Stat. 355.

[7] Act of June 18, 1874, 18 Stat. 80.

of the reservation and had been allotted in severalty to members of the tribe. The United States brought suit but failed to recover that area.[8] Congress by Act of June 21, 1906,[9] authorized the Secretary of the Interior to exchange unallotted lands in the reservation for the allotted lands by mistake earlier conveyed. He made an agreement with the land company pursuant to which, on August 22, 1906, it conveyed the allotted lands back to the United States and in return the latter conveyed to the company 87,000 acres of unallotted lands. That transfer was made without the knowledge or consent of plaintiffs and without giving them any compensation for the lands so taken from their reservation. Later, however, the United States paid them $108,750 for which they released their claim.[10] There was then upon the land 1,713,000,000 board feet of merchantable timber of the value of $1.50 per thousand; the value of the lands including timber was $2,980,000. From that amount the court subtracted the $108,750 and to the remainder added 5 per cent. per annum to date of judgment; from the total took the amount it found the United States entitled to set off against plaintiff's claim (Act of May 26, 1920, 41 Stat. 623, § 2), and as of June 7, 1937, gave judgment for the balance $5,313,347.32, with interest on a part of that amount until paid.

1. The United States contends that the lower court erred in including the value of the timber. The tract taken was a part of the reservation retained by plaintiffs out of the country held by them in immemorial posses-

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[8] *United States* v. *Dallas Road Co.*, 140 U. S. 599. *United States* v. *California & Oregon Land Co.*, 148 U. S. 31. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355.

[9] 34 Stat. 325.

[10] The release was held valid in *Klamath Indians* v. *United States*, 296 U. S. 244.

sion, from which was made the cession by the treaty of October 14, 1864. The clause declaring that the district retained should, until otherwise directed by the President, be set apart as a residence for the Indians and "held and regarded as an Indian reservation" clearly did not detract from the tribes' right of occupancy. The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the lands taken. *United States* v. *Shoshone Tribe, ante,* p. 111.

2. The United States also contends that the lower court erred in allowing interest against the United States on the unpaid value of the 87,000 acres from the time of the exchange to the date of the judgment, and to support that contention argues that there was no exercise of the power of eminent domain and that the jurisdictional Act of 1920 limited recovery to the value of the land on the date of the taking, without interest.

It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others. *Chippewa Indians* v. *United States,* 301 U. S. 358, 375, and cases cited. Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. *Jacobs* v. *United States,*

290 U. S. 13, 16–17, and cases cited. The lands here in question are not the allotted areas making up the 111,385 acres that the United States conveyed by mistake and through error in the conduct of litigation, as its counsel here says, failed to recover.[11] Plaintiffs seek compensation for the 87,000 acres given to the land company in exchange for the allotted areas which the latter then owned.

Having been informed of the failure of the United States to recover the allotted lands, Congress, by the Act of March 3, 1905, directed the Secretary of the Interior to ascertain "on what terms the said company will exchange such lands [the 111,385 acres of allotted lands] for other lands, not allotted to Indians, within the original boundaries of said reservation." [12] The Secretary having reported, the Congress by the Act of June 21, 1906 authorized him to exchange 87,000 acres of the tribes' lands for lands theretofore erroneously conveyed. The exchange having been consummated, Congress by Act of April 30, 1908 [13] appropriated $108,750 as compensation. That amount was paid plaintiffs in accordance with the Act; they gave the release here held valid, 296 U. S. 244. The Act of May 15, 1936 followed.

The United States argues that the rule of just compensation does not apply because "the tract was lost by mistake rather than taken by the power of eminent domain." But as to the 87,000 acres here involved there is no foundation for that assertion. Unquestionably Congress had power to direct the exchange and for that purpose to authorize expropriation of plaintiffs' lands. The validity of its enactments is not questioned. The taking was to enable the Government to discharge its obligation,

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[11] See footnote 8, *supra.*

[12] 33 Stat. 1033.

[13] 35 Stat. 70.

whether legal or merely moral is immaterial, to make restitution of the allotted lands. The taking was *in invitum,* specifically authorized by law, a valid exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the Government to pay plaintiffs just compensation. *Jacobs* v. *United States, supra.*

The provision of the Act of 1920 invoked by the United States is: "That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation. . . ." As shown above, the 87,000 acres were taken by valid exertion of the power of eminent domain. The taking was consummated pursuant to the Act of 1906; it was ratified by appropriation and payment under the Act of 1908. It implied a promise to pay just compensation. Clearly the lands in question were not "wrongfully appropriated."

Moreover the Congress by the Act of May 15, 1936 intended to grant to the plaintiffs the right to have their claim for just compensation under the Constitution for the 87,000 acres judicially determined without regard to the settlement and irrespective of the release.[14] It spe-

[14] A letter of the Secretary of the Interior to the Committee on Indian Affairs on the proposed Act of 1936 said in part: "The bill now here seeks to authorize 'effective judicial determination' of the claim of these Indians for the land taken from their reservation and given to the California & Oregon Land Co., which the courts have plainly indicated to have been for an inadequate consideration." H. Rep. No. 2354, 74th Cong., 2d Sess.

The Report of the House Committee on Indian Affairs stated: "The pending bill to amend the jurisdictional act is limited solely to the object of giving effect to this suggestion of the Supreme Court by granting the Klamath tribes the right to have their claim for

cifically directed the lower court to determine the claim of plaintiffs on the merits and to enter judgment thereon "upon the present pleadings, evidence and findings of fact." Unquestionably the findings of fact are sufficient to sustain the judgment.

Affirmed.

MR. JUSTICE STONE, MR. JUSTICE CARDOZO, and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BLACK concurs in the result.

GUARANTY TRUST CO. *v.* UNITED STATES.

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

No. 566. Argued March 28, 29, 1938.—Decided April 25, 1938.

1. The rule which exempts the United States and the States from the operation of statutes of limitations rests not upon any inherited notion of royal prerogative but upon the public policy of protecting the public rights, and thereby the citizen, from injury through negligence of public officers. P. 132.
2. The benefit of this rule does not extend to a foreign sovereign suing in a state or federal court. P. 133.

   In such cases, the reason for the rule—the considerations of public policy above mentioned—are absent.

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just compensation under the Constitution for the taking of the 87,000 acres of their lands judicially determined on its merits without regard to the grossly inequitable settlement heretofore made." H. Rep. No. 2354, 74th Cong., 2nd Sess.

The Report of the Senate Committee on Indian Affairs stated: "The purpose of the bill is to enable these Indian tribes to obtain just compensation for the taking of a part of their reservation in the State of Oregon by the Secretary of the Interior under authority of an Act of Congress approved June 21, 1906." S. Rep. No. 1749, 74th Cong., 2nd Sess.

3. The rights of a sovereign State are vested in the State rather than in any particular government which may purport to represent it, and suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state. P. 136.
4. What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of our government. The action of that department in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to decide for themselves its legal consequences in litigations pending before them. P. 137.
5. After the overthrow of the Imperial Russian Government, the United States recognized, March 22, 1917, the Provisional Government of Russia; and thereafter the United States continued to recognize the Provisional Government and to recognize, as its representatives in this country, its Ambassador and the Financial Attaché of its Embassy,—until November 16, 1933, when the Soviet Government, which on November 7, 1917, had overthrown the Provisional Government, was for the first time recognized by the United States. At that same time the United States, through an agreement between the President and a representative of the Soviet Government, took from that government an assignment of all "amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations . . ." The United States, as such assignee, then sued in a federal court in New York to recover from a New York bank the amount of a deposit which had stood to the credit of the Provisional Government. The bank set up the New York statute of limitations, claiming that in February, 1918, it had off-set the deposit against indebtedness due it by the Russian Government, and that on that date it had repudiated all liability on the deposit account, and that, prior to June 30, 1922, it had given due notice of such repudiation to both the Financial Attaché and the Ambassador of the Provisional Government, thus starting the running of the limitation period. *Held:*

(1) That such notice of repudiation, given to the then duly recognized diplomatic representatives, was notice to the Russian State. P. 139.

(2) That the later recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition. P. 140.

(3) That if the statutory period has run against the claim of the Russian Government, the claim of the United States, as assignee, is likewise barred since:

(a) Proof that the statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a preëxisting infirmity, the running of limitations against its assignor, which public policy does not forbid. P. 141.

(b) Assuming that the respective rights of the bank and the Soviet Government could have been altered, and the bank's right to plead the statute of limitations curtailed, by force of an executive agreement between the President and the Soviet Government, there is nothing in the agreement and assignment of November 16, 1933, purporting to enlarge the assigned rights in the hands of the United States, or to free it from the consequences of the failure of the Russian Government to prosecute its claim within the statutory period. P. 142.

(4) Even the language of a treaty will be construed, wherever reasonably possible, so as not to override state laws or to impair rights arising under them. P. 143.

91 F. 2d 898, reversed.

CERTIORARI, 302 U. S. 681, to review the reversal of a judgment dismissing the complaint in an action by the United States to recover from the present petitioner the amount of a bank deposit which the United States claimed as assignee of the Russian Government. The motion was based on the New York statute of limitations.

Mr. John W. Davis, with whom *Mr. Ralph M. Carson* was on the brief, for petitioner.

Assistant Attorney General Whitaker, with whom *Solicitor General Jackson,* and *Messrs. David E. Hudson, Paul A. Sweeney,* and *Edward J. Ennis* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

The principal questions for decision are whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, whether the assignment of November 16, 1933, by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations. A subsidiary question is whether in the circumstances of the case the running of the statute of limitations, if otherwise applicable, was affected by our nonrecognition of the Soviet Government during the interval of approximately sixteen years between recognition of the Provisional Government of Russia and recognition of its successor.

On July 15, 1916, the Imperial Russian Government opened a bank account with petitioner, the Guaranty Trust Company, a New York banking corporation. On March 16, 1917, the Imperial Government was overthrown and was succeeded by the Provisional Government of Russia which was recognized by the United States on March 22, 1917. On July 5, 1917, Mr. Boris Bakhmeteff was officially recognized by the President as the Ambassador of Russia. On July 12, 1917, the account being overdrawn, $5,000,000 was deposited in the account by Mr. Serge Ughet, Financial Attache of the Russian Embassy in the United States. On November 7, 1917, the Provisional Government was overthrown and was succeeded by the government of the Union of Soviet Socialist Republics, which will be referred to as the Soviet Government. At that time there remained on deposit in the account the sum of approximately $5,000,000. On November 28, 1917, the Soviet Government dismissed Bakhmeteff as Ambassador and Ughet as Financial At-

tache. But the United States continued to recognize Bakhmeteff as Ambassador until on June 30, 1922, he withdrew from his representation of the Russian Government. Thereafter, until November 16, 1933, it continued to recognize the Financial Attache, and after the retirement of Bakhmeteff as Ambassador it recognized the former as custodian of Russian property in the United States.

On November 16, 1933, the United States recognized the Soviet Government, and on that date took from it an assignment of all "amounts admitted to be due that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations . . ." After making demand upon the petitioner for payment of the balance of the account the United States, on Setember 21, 1934, brought the present suit in the district court for southern New York to recover the deposit. Petitioner then moved under the Conformity Act, 28 U. S. C. § 724; New York Civil Practice Act, § 307; and Rules 107 and 120 of the New York Rules of Civil Practice, to dismiss the complaint on the ground that the recovery was barred by the New York six year statute of limitations.

In support of the motion petitioner submitted numerous affidavits, two depositions, and other documentary proof tending to show that on February 25, 1918, it had applied the balance of the account as a credit against indebtedness alleged to be due to it by the Russian Government by reason of the latter's seizure of certain ruble deposit accounts of petitioner in Russian private banks; that on that date it had repudiated all liability on the deposit account; and that it had then given notice of such repudiation to the Financial Attache of the Russian Embassy and later both to the Financial Attache and to Bakhmeteff as Ambassador. The United States submitted affidavits and exhibits in opposition. The district court

found that petitioner had repudiated liability on the account on February 25, 1918; that it had given due notice of repudiation prior to June 30, 1922 to both the Financial Attache and Ambassador Bakhmeteff; and that recovery was barred by the applicable six year statute of limitations of New York. New York Civil Practice Act, § 48. The Court of Appeals for the second circuit reversed the judgment for petitioner, holding that the New York statute of limitations does not run against a foreign sovereign. 91 F. (2d) 898. Moved by the importance of the questions involved, we granted certiorari.

Respondent argues that the Soviet Government, in a suit brought in the federal courts, is not subject to the local statute of limitations, both because a foreign, like a domestic, sovereign is not subject to statutes of limitations, and its immunity as in the case of a domestic sovereign constitutes an implied exception to that statute and to the Conformity Act; and because in any case, since no suit to recover the deposit could have been maintained in New York by the Soviet Government prior to its recognition by the United States, and since according to New York law the statute does not run during the period when suit cannot be brought, the present suit is not barred. It is insisted further that even though the Soviet Government is bound by the local statute of limitations the United States is not so bound, both because the New York statute which bars the remedy but does not extinguish the right is not applicable to the United States, and because the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected. Finally, the Government assails the finding of fact of the district court that petitioner repudiated the liability upon the deposit account, and contends that notice of the repudiation given by petitioner to representa-

tives of the Provisional Government was ineffective to set the statute running against the Soviet Government and in favor of petitioner.

First. The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. See *Magdalen College Case,* 11 Co. Rep. 66b, 74b; Hobart, L. C. J. in *Sir Edward Coke's Case,* Godb. 289, 295; Bracton, De Legibus, Lib. ii, c. 5, § 7. But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, Ancient Law (10th ed., 1930) 32 *et seq.* "The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Story, J., in *United States* v. *Hoar,* Fed. Cas. No. 15,373, p. 330. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735; *United States* v. *Knight,* 14 Pet. 301, 315; *United States* v. *Thompson,* 98 U. S. 486, 489; *Fink* v. *O'Neil,* 106 U. S. 272, 281; *United States* v. *Nashville, C. & St. L.*

R. Co., 118 U. S. 120, 125. So complete has been its acceptance that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act. See *United States v. Thompson, supra.*

Whether the benefit of the rule should be extended to a foreign sovereign suing in a state or federal court is a question to which no conclusive answer is to be found in the authorities. Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country. The alleged immunity was doubted in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437, and in *Commissioners of the Sinking Fund* v. *Buckner*, 48 Fed. 533. It was rejected in *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329; 1 S. E. 740, and was disregarded in *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468; 6 N. E. 2d 407, where neither appellate court delivered an opinion.

The only support found by the court below for a different conclusion is a remark in the opinion of the Court in *United States* v. *Nashville, C. & St. L. R. Co., supra,* where its holding that the United States, suing in a federal court, is not subject to the local statute of limitations, was said to rest upon a great principle of public policy "applicable to all governments alike." The statement is but a paraphrase, which has frequently appeared in judicial opinion,[1] of Mr. Justice Story's statement in *United States* v. *Hoar, supra,* already quoted. His reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as "equally appli-

[1] *United States* v. *Knight*, 14 Pet. 301, 315; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *United States* v. *Thompson*, 98 U. S. 486, 490; *Fink* v. *O'Neil*, 106 U. S. 272, 281.

cable to all governments" was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and is therefore not to be discarded because of its former identity with the royal prerogative. We can find in that pronouncement and in its later versions no intimation that the policy underlying exemption of the domestic sovereign supports its extension to a foreign sovereign suing in our courts.

It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. See *The Exchange,* 7 Cranch 116; *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562, *Compania Espanola* v. *The Navemar,* 303 U. S. 68. But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire,* 11 Wall. 164, 167; *Russian S. F. S. Republic* v. *Cibrario,* 235 N. Y. 255; 139 N. E. 259. By voluntarily appearing in the rôle of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla,* 266 U. S. 328, 340, 341; *United States* v. *Stinson,* 197 U. S. 200, 205; *The Davis,* 10 Wall. 15; *The Siren,* 7 Wall. 152, 159.[2] As in the case of the domestic sovereign

[2] A foreign sovereign as suitor is subject to the local rules of the domestic forum as to costs, *Republic of Honduras* v. *Soto,* 112 N. Y. 310; 19 N. E. 845; *Emperor of Brazil* v. *Robinson,* 5 Dowl. Pr. 522; *Otho, King of Greece,* v. *Wright,* 6 Dowl. Pr. 12; *The Beatrice,* 36 L. J. Rep. Adm. (N. S.) 10; *Queen of Holland* v. *Drukker,* (1928) Ch. 877, 884, although the local soverign does not pay costs. *United States* v. *Verdier,* 164 U. S. 213, 219. The foreign sovereign suing as a plaintiff must give discovery. *Rothschild* v. *Queen of Portugal,* 3 Y. & C. Ex. 594, 596; *United States* v. *Wagner,* L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States,* L. R. 2 Eq. 659. A foreign

in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts. That this is the guiding principle sufficiently appears in the many instances in which courts have narrowly restricted the application of the rule *nullum tempus* in the case of the domestic sovereign.[3] It likewise appears from those cases which justify the rule as applied to the United States suing in a state court, on the ground that it is sovereign within the state and that invocation of the rule *nullum tempus* protects the public interest there as well as in every other state. *United States* v. *Beebe,* 127 U. S. 338; *Swearingen* v. *United States,* 11 Gill. & J. 373; *McNamee* v. *United States,* 11 Ark. 148; cf. *United States* v. *California,* 297 U. S. 175, 186.

We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy

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sovereign plaintiff "should so far as the thing can be done be put in the same position as a body corporate." *Republic of Costa Rica* v. *Erlanger,* L. R. 1 Ch. D. 171, 174; *Republic of Peru* v. *Weguelin,* L. R. 20 Eq. 140, 141; cf. *King of Spain* v. *Hullett,* 7 Bligh N. S. 359, 392.

[3] The presumption of a grant by lapse of time will be indulged against the domestic sovereign. *United States* v. *Chaves,* 159 U. S. 452, 464. The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. *Metropolitan R. Co.* v. *District of Columbia,* 132 U. S. 1; *Boone County* v. *Burlington & Missouri River R. Co.,* 139 U. S. 684, 693. It has been held not to relieve the sovereign from giving the notice required by local law to charge endorsers of negotiable paper, *United States* v. *Barker,* 12 Wheat. 559; cf. *Cooke* v. *United States,* 91 U. S. 389, 398; *Wilber National Bank* v. *United States,* 294 U. S. 120, 124, and in tax cases has been narrowly construed against the domestic sovereign. *Bowers* v. *New York & Albany Lighterage Co.* 273 U. S. 346, 350. Compare *United States* v. *Knight,* 14 Pet. 301; *Fink* v. *O'Neil,* 106 U. S. 272.

which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. *Bell* v. *Morrison,* 1 Pet. 351, 360; *M'Cluny* v. *Silliman,* 3 Pet. 270, 278; *Campbell* v. *Haverhill,* 155 U. S. 610, 617; *United States* v. *Oregon Lumber Co.,* 260 U. S. 290; *Brooklyn Bank* v. *Barnaby,* 197 N. Y. 210, 227; 90 N. E. 834; *Schmidt* v. *Merchants Despatch Transportation Co.,* 270 N. Y. 287, 302; 200 N. E. 824. Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents. We cannot say that the public interest of the forum goes so far.

We lay aside questions not presented here which might arise if the national government, in the conduct of its foreign affairs, by treaty or other appropriate action, should undertake to restrict the application of local statutes of limitations against foreign governments, or if the states in enacting them should discriminate against suits brought by a foreign government. We decide only that in the absence of such action the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants.

Second. Respondent, relying on the New York rules that the statute of limitations does not run against a suit to recover a bank account until liability upon it is repudiated, *Tillman* v. *Guaranty Trust Co.,* 253 N. Y. 295; 171 N. E. 61, and that the statute of limitations

does not run against a plaintiff who has no forum in which to assert his rights, *Oswego & Syracuse R. Co.* v. *State,* 226 N. Y. 351, 359, 362; 124 N. E. 8; *Cayuga County* v. *State,* 153 N. Y. 279, 291; 47 N. E. 288; *Parmenter* v. *State,* 135 N. Y. 154, 163; 31 N. E. 1035, argues that until recognition of the Soviet Government there was no person to whom notice of petitioner's repudiation could be given and no court in which suit could be maintained to recover the deposit.

It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition. *The Penza,* 277 Fed. 91; *The Rogdai,* 278 Fed. 294; *Russian S. F. S. Republic* v. *Cibrario,* 235 N. Y. 255; *Preobazhenski* v. *Cibrario,* 192 N. Y. Supp. 275. But the argument ignores the principle controlling here and recognized by the courts of New York that the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it, *The Sapphire, supra,* 168, and that suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state. *Jones* v. *United States,* 137 U. S. 202, 212; *Russian Government* v. *Lehigh Valley R. Co.,* 293 Fed. 133, 135, aff'd *sub nom. Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 409; *Matter of Lehigh Valley R. Co.,* 265 U. S. 573; *Russian S. F. S. Republic* v. *Cibrario, supra;* Moore, International Law Digest, §§ 75, 78.

What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its deter-

mination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them. *Jones* v. *United States, supra,* 212; *Agency of Canadian Car & F. Co.* v. *American Can Co.,* 258 Fed. 363; *Lehigh Valley R. Co.* v. *State of Russia, supra.*

We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917 to November 16, 1933, when the Soviet Government was recognized.[4] There was at all times during that period a recog-

[4] The United States accorded recognition to the Provisional Government March 16, 1917 and continued to recognize it until November 16, 1933, when the Soviet Government was recognized. During that period the United States declined to recognize the Soviet Government or to receive its accredited representative, and so certified in litigations pending in the federal courts. *The Penza, supra; The Rogdai, supra.* It recognized Mr. Bakhmeteff as Russian Ambassador from July 5, 1917 until June 30, 1922, when he retired, having designated Mr. Ughet as custodian of Russian property in the United States. Mr. Ughet, after his appointment as Financial Attache April 7, 1917, continued to be recognized as such by the United States until November 16, 1933. He was recognized by the United States as Charge d'Affaires ad interim, during the absence of the Ambassador from December 3, 1918 to July 31, 1919. Their diplomatic status as stated was certified in the present suit by the Secretary of State, who stated that he considered Mr. Ughet's status unaffected by the termination of the Ambassador's duties.

Their status was certified to by the Department on October 31, 1918 and July 2, 1919, respectively, in *Russian Government* v. *Lehigh Valley R. Co.,* 293 Fed. 133. Mr. Bakhmeteff's status as Ambassador was certified May 18, 1919 in *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363, 368; on April 6, 1920 in *The Rogdai,* 278 Fed. 294, 295; on June 24, 1919 in *The Penza,*

nized diplomatic representative of the Russian State to whom notice concerning its interests within the United States could be communicated, and to whom our courts were open for the purpose of prosecuting suits in behalf of the Russian State. In fact, during that period suits were brought in its behalf in both the federal and state courts, which consistently ruled that the recognized Ambassador and Financial Attache were authorized to maintain them.[5]

We do not stop to inquire what the "actual" authority of those diplomatic representatives may have been. When the question is of the running of the statute of limitations, it is enough that our courts have been open to suit on behalf of the Russian State in whom the right to sue upon the petitioner's present claim was vested, and that the political department of the Government has accorded recognition to a government of that state, received its diplomatic representatives, and extended to them the privilege of maintaining suit in our courts in behalf of their state. The right and opportunity to sue upon the claim against petitioner was not suspended; and notice of repudiation of the liability given to the duly recognized diplomatic representatives must, so far as our

277 Fed. 91, 93. Certificate with respect to both Mr. Bakhmeteff and Mr. Ughet was given February 19, 1923 and with respect to Mr. Ughet December 22, 1927. On the faith of the two last mentioned certificates the Court, in the *Lehigh Valley Railroad* case, *supra,* as stated by the Government's brief in the present case, ordered to be paid to Mr. Ughet approximately $1,000,000, of which more than $700,000 was paid to the United States Treasurer "on account of interest due on obligations of the Provisional Government of Russia by the Treasurer."

[5] *Russian Government* v. *Lehigh Valley R. Co.,* 293 Fed. 133; 293 Fed. 135, aff'd 21 F. (2d) 396; *State of Russia* v. *Bankers' Trust Co.,* 4 F. Supp. 417, 419, aff'd 83 F. (2d) 236. See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363.

own courts are concerned, be taken as notice to the state which they represented.

The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill* v. *Hernandez,* 168 U. S. 250; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304; *United States* v. *Belmont,* 301 U. S. 324; *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, 84, 85; 193 N. E. 897; *Luther* v. *Sagor & Co.,* [1921] 3 K. B. D. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure.* But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own Government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition

would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government* v. *Lehigh Valley R. Co., supra.* An application for writ of prohibition was denied by this Court. 265 U. S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on refinements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner.

As has already been noted, the rule *nullum tempus* rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights. But the circumstances of the present case admit of no appeal to such a policy. There has been no neglect or delay by the United States or its agents, and it has lost no rights by any lapse of time after the assignment. The question is whether the exemption of the United States

from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States* v. *Buford,* 3 Pet. 12, 30; *King* v. *Morrall,* 6 Price 24, 28, 30.

Assuming that the respective rights of petitioner and the Soviet Government could have been altered and that petitioner's right to plead the statute of limitations curtailed by force of an executive agreement between the President and the Soviet Government, we can find nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States, or to free it from the consequences of the failure of the Russian Government to prosecute its claim within the statutory period.

The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. So far as now relevant the document signed in behalf of the Soviet Government makes mention of "amounts admitted to be due or that may be found to be due it as the successor of prior governments or otherwise from American nationals, including corporations, companies, partnerships or associations." It purports to "release and assign all such amounts to the Government of the United States" and the Soviet Government agrees, preparatory to final settlement of claims between it and the United States and the claims of their nationals, "not to make any claims with

respect to . . . (b) Acts done or settlements made by or with the Government of the United States, or public officials of the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof." The relevant portion of the document signed by the President is expressed in the following paragraph:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due."

There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States* v. *Arredondo,* 6 Pet. 691, 748; *Haver* v. *Yaker,* 9 Wall. 32, 34; *Dooley* v. *United States,* 182 U. S. 222, 230; *Nielsen* v. *Johnson,* 279 U. S. 47, 52; *Todok* v. *Union State Bank,* 281 U. S. 449, 454. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations.

Fourth. Respondent assails the finding of the district court that there was an unqualified repudiation by petitioner of its liability on the account, and in support of its contention presents an elaborate review of the evidence. The evidence is said to establish that petitioner's

alleged repudiation was tentative and conditional, to await negotiations with a stable Russian government upon its recognition by the United States. If this contention be rejected, respondent insists that at least there is a conflict in the evidence and in the inferences which may be drawn from it which, under the local practice, should have been resolved by a full trial rather than summarily on motion. As these questions were not passed on by the Court of Appeals, the case will be remanded to that court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

UNITED STATES *v.* CAROLENE PRODUCTS CO.

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

No. 640. Argued April 6, 1938.—Decided April 25, 1938.

The Filled Milk Act of Congress of Mar. 4, 1923, defines the term Filled Milk as meaning any milk, cream, or skimmed milk, whether or not condensed or dried, etc., to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, dried, etc.; it declares that Filled Milk, as so defined, "is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public"; and it forbids and penalizes the shipment of such Filled Milk in interstate commerce. Defendant was indicted for shipping interstate certain packages of an article described in the indictment as a compound of condensed skimmed milk and coconut oil made in the imitation or semblance of condensed milk or cream, and further characterized by the indictment, in the words of the statute, as "an adulterated article of food, injurious to the public health." *Held:*

1. That upon its face, and as supported by judicial knowledge, including facts found in the reports of the congressional committees, the Act is presumptively within the scope of the power to regulate interstate commerce and consistent with due process. Demurrer to the indictment should have been overruled. *Hebe Co.* v. *Shaw,* 248 U. S. 297. P. 147.

2. It is no valid objection that the prohibition of the Act does not extend to oleomargarine or other butter substitutes in which vegetable fats or oils replace butter. P. 151.

3. The statutory characterization of filled milk as injurious to health and as a fraud upon the public may, for the purposes of this case, be considered as a declaration of legislative findings deemed to support the Act as a constitutional exertion of the legislative power, aiding informed judicial review by revealing the rationale of the legislation, as do the reports of legislative committees. P. 152.

7 F. Supp. 500, reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment.

Assistant Attorney General McMahon, with whom *Acting Solicitor General Bell,* and *Messrs. William W. Barron* and *Paul A. Freund* were on the brief, for the United States.

Mr. Geo. N. Murdock for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 (c. 262, 42 Stat. 1486, 21 U. S. C. §§ 61–63),[1] which prohibits the shipment in

[1] The relevant portions of the statute are as follows:

"Section 61. . . . (c) The term 'filled milk' means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether

interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Appellee was indicted in the district court for southern Illinois for violation of the Act by the shipment in interstate commerce of certain packages of "Milnut," a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the Act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, *United States* v. *Carolene Products Co.*, 7 F. Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in *Carolene Products Co.* v. *Evaporated Milk Assn.*, 93 F. (2d) 202.

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the

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or not condensed, evaporated, concentrated, powdered, dried, or desiccated. . . .

"Section 62. . . . It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to . . . ship or deliver for shipment in interstate or foreign commerce, any filled milk."

Section 63 imposes as penalties for violations "a fine of not more than $1,000 or imprisonment of not more than one year, or both . . ."

statute denies to it equal protection of the laws and, in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product "is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public."

First. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed," *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, and extends to the prohibition of shipments in such commerce. *Reid* v. *Colorado,* 187 U. S. 137; *Lottery Case,* 188 U. S. 321; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Hope* v. *United States,* 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420; *McCormick & Co.* v. *Brown,* 286 U. S. 131. The power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons* v. *Ogden, supra,* 196. Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Hope* v. *United States, supra,* or which contravene the policy of the state of their destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334. Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases* v. *United States,* 239 U. S. 510, 514; *Hamilton* v. *Kentucky*

Distilleries & Warehouse Co., 251 U. S. 146, 156. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in *Hebe Co.* v. *Shaw*, 248 U. S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the

House Committee on Agriculture, H. R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen. Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public.[2]

There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from

[2] The reports may be summarized as follows: There is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and in many sections of the country by their inability to read the labels placed on the containers. Large amounts of filled milk, much of it shipped and sold in bulk, are purchased by hotels and boarding houses, and by manufacturers of food products, such as ice cream, to whose customers labeling restrictions afford no protection.

a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.[3]

[3] There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet. See Dr. Henry C. Sherman, The Meaning of Vitamin A, in Science, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., The Newer Knowledge of Nutrition (1929 ed.), pp. 134, 170, 176, 177; Dr. A. S. Root, Food Vitamins (N. Car. State Board of Health, May 1931), p. 2; Dr. Henry C. Sherman, Chemistry of Food and Nutrition (1932), p. 367; Dr. Mary S. Rose, The Foundations of Nutrition (1933), p. 237.

When the Filled Milk Act was passed, eleven states had rigidly controlled the exploitation of filled milk, or forbidden it altogether. H. R. 365, 67th Cong., 1st Sess. Some thirty-five states have now adopted laws which in terms, or by their operation, prohibit the sale of filled milk. Ala. Agri. Code, 1927, § 51, Art. 8; Ariz. Rev. Code, 1936 Supp., § 943y; Pope's Ark. Dig. 1937, § 3103; Deering's Cal. Code, 1933 Supp., Tit. 149, Act 1943, p. 1302; Conn. Gen. Stat., 1930, § 2487, c. 135; Del. Rev. Code, 1935, § 649; Fla. Comp. Gen. Laws, 1927, §§ 3216, 7676; Ga. Code, 1933, § 42–511; Idaho Code, 1932, Tit. 36, §§ 502–504; Jones Ill. Stat. Ann., 1937 Supp., § 53.020 (1), (2), (3); Burns Ind. Stat., 1933, § 35–1203; Iowa Code, 1935, § 3062; Kan. Gen. Stat., 1935, c. 65, § 707; Md. Ann. Code, Art. 27, § 281; Mass. Ann. Laws, 1933, § 17–A, c. 94; Mich. Comp. Laws, 1929, § 5358; Mason's Minn. Stat., 1927, § 3926; Mo. Rev. Stat., 1929, §§ 12408–12413; Mont. Rev. Code, Anderson and McFarland, 1935, c. 240, § 2620.39; Neb. Comp. Stat., 1929, § 81–1022; N. H. Pub. L. 1926, v. 1, c. 163, § 37, p. 619; N. J. Comp. Stat., 1911–1924, § 81–8j, p. 1400; Cahill's N. Y. Cons. Laws, 1930, § 60, c. 1; N. D. Comp. Laws, 1913–1925, Pol. Code, c. 38, § 2855 (a) 1; Page's Ohio Gen. Code, § 12725; Purdon's Penna. Stat., 1936, Tit. 31, §§ 553, 582; S. D. Comp. Laws, 1929, c. 192, § 7926–0, p. 2493; Williams Tenn. Code, 1934, c. 15, §§ 6549, 6551; Vernon's Tex. Pen. Code, Tit. 12, c. 2, Art. 713a; Utah Rev. Stat., 1933, §§ 3–10–59, 3–10–60; Vt. Pub. L., 1933, Tit. 34, c. 303, § 7724, p. 1288; Va. 1936 Code, § 1197c; W. Va. 1932 Code, § 2036; Wis. Stat., 11th ed. 1931, c. 98, § 98.07, p. 1156; cf. N. Mex. Ann. Stat., 1929,

Here the prohibition of the statute is inoperative unless the product is "in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed." Whether in such circumstances the public would be adequately protected by the prohibition of false labels and false branding imposed by the Pure Food and Drugs Act, or whether it was necessary to go farther and prohibit a substitute food product thought to be injurious to health if used as a substitute when the two are not distinguishable, was a matter for the legislative judgment and not that of courts. *Hebe Co.* v. *Shaw, supra; South Carolina* v. *Barnwell Bros. Inc.,* 303 U. S. 177. It was upon this ground that the prohibition of the sale of oleomargarine made in imitation of butter was held not to infringe the Fourteenth Amendment in *Powell* v. *Pennsylvania,* 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238. Compare *McCray* v. *United States,* 195 U. S. 27, 63; *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192.

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 556; *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 661.

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§§ 25–104, 25–108. Three others have subjected its sale to rigid regulations. Colo. L. 1921, c. 30, § 1007, p. 440; Ore. 1930 Code, v. 2, c. XII, §§ 41–1208 to 41–1210; Remington's Wash. Rev. Stat., v. 7, Tit. 40, c. 13, §§ 6206, 6207, 6713, 6714, p. 360, *et seq.*

Third. We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[4] See *Metropolitan Casualty Ins. Co.* v.

[4] There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg* v. *California*, 283 U. S. 359, 369–370; *Lovell* v. *Griffin*, 303 U. S. 444, 452.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon* v. *Herndon*,

Brownell, 294 U. S. 580, 584, and cases cited. The present statutory findings affect appellee no more than the reports of the Congressional committees; and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation* v. *Sinclair,* 264 U. S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a partic-

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273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; on restraints upon the dissemination of information, see *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713–714, 718–720, 722; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Lovell* v. *Griffin, supra;* on interferences with political organizations, see *Stromberg* v. *California, supra,* 369; *Fiske* v. *Kansas,* 274 U. S. 380; *Whitney* v. *California,* 274 U. S. 357, 373–378; *Herndon* v. *Lowry,* 301 U. S. 242; and see Holmes, J., in *Gitlow* v. *New York,* 268 U. S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge* v. *Oregon,* 299 U. S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce* v. *Society of Sisters,* 268 U. S. 510, or national, *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Farrington* v. *Tokushige,* 273 U. S. 484, or racial minorities, *Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *South Carolina* v. *Barnwell Bros.,* 303 U. S. 177, 184, n. 2, and cases cited.

ular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 349, 351, 352; see *Whitney* v. *California*, 274 U. S. 357, 379; cf. *Morf* v. *Bingaman*, 298 U. S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511–512; *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177, 192–193. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. *Price* v. *Illinois*, 238 U. S. 446, 452; *Hebe Co.* v. *Shaw, supra*, 303; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *South Carolina* v. *Barnwell Bros., Inc., supra*, 191, citing *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 299.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled and the judgment will be

Reversed.

MR. JUSTICE BLACK concurs in the result and in all of the opinion except the part marked *"Third."*

MR. JUSTICE MCREYNOLDS thinks that the judgment should be affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER.

I concur in the result. Prima facie the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43. *Manley* v. *Georgia,* 279 U. S. 1, 6. The provisions on which the indictment rests should if possible be construed to avoid the serious question of constitutionality. *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, 307. *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 390. *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 472. *Richmond Co.* v. *United States,* 275 U. S. 331, 346. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 412–13. See *People* v. *Carolene Products Co.,* 345 Ill. 166. *Carolene Products Co.* v. *McLaughlin,* 365 Ill. 62; 5 N. E. 2d 447. *Carolene Products Co.* v. *Thomson,* 276 Mich. 172; 267 N. W. 608. *Carolene Products Co.* v. *Banning,* 131 Neb. 429; 268 N. W. 313. The allegation of the indictment that Milnut "is an adulterated article of food, injurious to the public health," tenders an issue of fact to be determined upon evidence.

UNITED STATES ET AL. *v.* PAN AMERICAN PETROLEUM CORP. ET AL.*

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

No. 514. Argued March 29, 30, 1938.—Decided April 25, 1938.

1. The Interstate Commerce Commission did not exceed the powers conferred upon it by the Interstate Commerce Act, in ordering carriers serving certain industrial plants to discontinue the practice of making allowances on the line-haul rates to the owners of the plants for moving, with plant facilities, cars between interchange tracks and points within the plants, the Commission having found, in respect of each of the plants involved, that the carrier's obligation of delivery was fulfilled by placing or receiving cars on the interchange tracks and that the moving and spotting of cars in the plants formed no part of the service covered by the line-haul rate. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. P. 158.
2. Examination of the record discloses that the Commission's findings and orders in each of the cases here involved were supported by substantial evidence. *Id.*
3. The value and weight of the evidence on questions of fact, and the inferences to be drawn therefrom, are for the Commission, and its determination thereof is conclusive. *Id.*

18 F. Supp. 624, reversed.

APPEALS from decrees of specially constituted District Courts, setting aside and enjoining the enforcement of orders of the Interstate Commerce Commission.

Mr. Daniel W. Knowlton, with whom *Acting Solicitor General Bell, Assistant Attorney General Jackson,* and *Messrs. Elmer B. Collins, Edward M. Reidy,* and *Nelson Thomas* were on the brief, for appellants.

Messrs. Luther M. Walter and *John S. Burchmore,* with whom *Mr. Nuel D. Belnap* was on the brief, for appellees.

*Together with No. 530, *United States et al.* v. *Humble Oil & Refining Co. et al.*, on appeal from the District Court of the United States for the Southern District of Texas.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These appeals are from decrees of specially constituted district courts, setting aside and enjoining the enforcement of orders of the Interstate Commerce Commission in nine cases which were consolidated for hearing and decided in a single opinion.[1] The orders of the Commission which were the subject of attack commanded the railroad or railroads serving industrial plants of the appellees to cease and desist from the payment of allowances for switching services performed by plant facilities. They resulted from a general report in which the Commission after investigation announced general conclusions respecting switching services by carriers in industrial plants, and payment of allowances out of the line-haul rate to an industry performing the service,[2] and subsequent supplemental reports with respect to specific plants.[3] The Commission held that, in the circumstances disclosed at each of the plants under consideration, the carriers' obligation of delivery was fulfilled by placing or receiving cars on interchange tracks and that the moving and spotting of cars in the industries' plants formed no part of the service covered by the line-haul rate. It concluded that the prac-

[1] 18 F. Supp. 624. A circuit judge and two district judges sat as a District Court for each of the districts to hear the cases.

[2] Ex parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11.

[3] Mexican Petroleum Corporation of La. Inc. Terminal Allowance, 209 I. C. C. 394; Celotex Company Terminal Allowance, 209 I. C. C. 764; Great Southern Lumber Company-Bogalusa Paper Company Terminal Allowance, 209 I. C. C. 793; Standard Oil Company of Louisiana Terminal Allowance, 209 I. C. C. 68; Humble Oil & Refining Co. Terminal Allowance, 209 I. C. C. 727; Magnolia Petroleum Company Terminal Allowance, 209 I. C. C. 93; Texas Company Terminal Allowance at Houston, Tex., 209 I. C. C. 767; Gulf Refining Company Terminal Allowance, 209 I. C. C. 756; Texas Company Terminal Allowances at Port Arthur, Texas, 213 I. C. C. 583.

tice of making an allowance out of the rate to the owner of the plant for the performance of the spotting service was unlawful and should be discontinued.

The appellees, in their complaints, asserted that in making its orders the Commission exceeded the powers conferred upon it by the Interstate Commerce Act. These contentions are the same as those considered in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and are foreclosed by the decision therein.

The appellees charged that the Commission's findings and orders were not supported by substantial evidence. The District Court held with them upon this point. We have examined the record and are of opinion that in each case there is substantial evidence to support the Commission's findings. No useful purpose will be served by a detailed recital of the evidence and it must suffice to say that, while the conditions in the various plants differed, in all of the cases the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main line tracks of the carriers concerned, and proofs as to the volume and nature of intra-plant car movements, the amount of engine service required and other relevant facts. The value and weight of the evidence given by railroad and plant executives, and the inferences to be drawn from it, were for the Commission. In some instances the inconvenience and delay to the carriers in performing plant services were more obvious than in others but we are unable to say that in any case the Commission's orders were not based upon substantial evidence. The orders should not have been set aside, and the decrees must be

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

Syllabus.

CROWN CORK & SEAL CO. *v.* FERDINAND GUTMANN CO.

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

No. 72. Argued December 13, 1937.—Decided May 2, 1938.

1. Review on certiorari is confined to the questions presented by the petition for the writ. P. 161.
2. Abandonment, as a defense in a suit for patent infringement, must be pleaded or noticed, under R. S. § 4920. P. 165.

   An applicant for patent does not abandon an invention by withdrawing the disclosure of it, and a corresponding claim, from an earlier application, when the same disclosure is kept continuously before the Patent Office through his successive divisional applications.

   The continuity so maintained shows an intention to retain, not to abandon, the invention.
3. W applied for and obtained patent for a method of applying "center spots" to the cork cushions of crown caps used to seal bottles containing beverages under pressure, the center spots serving to prevent contact of the liquid with the cork. The patented method required simultaneous application of pressure and heat to the center spot to make it stick to the cork cushion in the cap at the time of assembly. A disclosure of the means of applying the heat by preheating the crown caps was eliminated from the application before the patent issued, but was preserved in divisional applications. Before the patent issued, J filed application claiming this means of preheating and later obtained patent. A year thereafter, but more than two years after the date of his own patent, W copied J's claims in a divisional application, upon which, after interference proceedings, he was awarded a patent. *Held:* That, in the absence of intervening rights, the delay of more than two years needed no special excuse and did not invalidate the divisional patent. *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, distinguished. P. 165.
4. In the absence of abandonment or intervention of adverse rights, mere delay of not more than two years in filing divisional application after an intervening patent or publication, does not operate

to enlarge the patent monopoly beyond that contemplated by the patent law. R. S. § 4886. P. 167.

86 F. 2d 698, reversed.

CERTIORARI, 302 U. S. 664, to review the reversal of a decree, 14 F. Supp. 255, sustaining two patents and enjoining infringement.

Mr. John J. Darby, with whom *Mr. Thomas G. Haight* was on the brief, for petitioner.

Mr. William E. Warland, with whom *Mr. Nathaniel L. Leek* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner sued respondent in the district court for eastern New York to enjoin infringements of patents, two of which are here involved. One is Warth Reissue Patent, No. 19,117, dated March 20, 1934. The other is Warth Patent, No. 1,967,195, dated July 17, 1934, a divisional patent. Both relate to methods for applying small disks of paper or foil, known as center spots, to cork cushions of crown caps. These caps are used to seal bottles containing pressure beverages. The center spot prevents contact of the liquid with the cork. The district court adjudged both patents valid and infringed. 14 F. Supp. 255. The circuit court of appeals reversed, holding the reissue patent not infringed and the divisional one invalid because of laches in filing the application on which it was granted. 86 F. (2d) 698.

The questions presented by the petition for the writ, granted 302 U. S. 664, are these:

1. "Does this Court's decision in *Webster Co.* v. *Splitdorf Co.* [264 U. S. 463] mean that, even in the absence of intervening adverse rights, an excuse must be shown for a lapse of more than two years in presenting claims in

a divisional application regularly filed and prosecuted in accordance with patent office rules?"

2. "Where there has been more than two years delay in asserting specific claims in a divisional application, is it an excuse for the delay that there were claims in the parent patent which, on their face, covered and were reasonably believed to cover, the subject-matter of the divisional claims, even if a Court later interpreted the parent patent claims not to cover such subject-matter?"

Our consideration of the case will be limited to these questions. *Washington Coach Co.* v. *Labor Board,* 301 U. S. 142, 146. *Morehead* v. *N. Y. ex rel. Tipaldo,* 298 U. S. 587, 604, 605. *Clark* v. *Williard,* 294 U. S. 211, 216. *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242. The first calls for decision upon a single point. It specifically assumes the absence of intervening rights and that the application was appropriately made. There is no question as to the validity of either the original or reissue patents.

Warth filed his first application January 7, 1927, and his second November 7, 1930.[1] From these came the original patent, January 6, 1931. It was to correct an error in the specification that the reissue patent was granted. Before issue of the original patent Johnson, November 26, 1929, filed application on which a patent issued April 5, 1932. April 4, 1933, two years and three months after the original patent was granted Warth, he carved from his second application a divisional one in which he copied the claims of the Johnson patent. In the interference declared upon the conflict, the patent office held Warth's

[1] The first application extended to materials to be used in making center spots as well as to methods for applying them. The second application, because of a requirement of the patent office, omitted disclosures as to materials but included those as to methods that the first contained.

divisional application entitled to the filing date of his first one, and awarded the claims of the Johnson patent to him as prior inventor. These are the claims held too late by the circuit court of appeals.

The claims of the reissue patent involved are shown in the margin.[2] The important feature is simultaneous application of pressure and heat to the center spot to make it stick to the cork cushion in the cap. Neither these nor any other claims of the patent specify means to be employed to furnish the heat. The claims in suit of the divisional patent [3] cover means to supply heat to be ap-

[2] Claim 1. "The improved method of manufacturing caps of the type having an interior disc of cushion material provided on its exposed face with a center spot, which comprises providing spot material in strip form having one surface formed of an exposed continuous coating of water resistant adhesive which is normally hard at room temperature but becomes tacky upon the application of heat and having another surface to be exposed to the contents of a capped container, cutting from said strip a facing spot having one surface completely coated with said adhesive with a cap disposed beneath the portion of the strip from which the spot is cut, whereby the cutting operation positions the spot upon the cushion material with the coating between the spot and the cushion material, and upon assembly applying simultaneously to the spot pressure and sufficient heat to render the adhesive tacky, thereby causing the spot to adhere to the cushion material, and thereafter permitting the adhesive to cool and harden."

Claim 3 repeats the words of claim 1 and adds these words, "while subjecting the assembled unit to pressure."

[3] These claims are fully indicated immediately below. The insertions in brackets give equivalent terms used in the claims of the Reissue patent.

Claim 1. "The method of assembling linings [center spots] for sealing pads [cushion material] in receptacle closure caps, consisting in providing caps with sealing pads therein and a web of lining material arranged with an adhesive surface non-viscous at normal temperature, heating the pads in the caps, severing linings from the web of lining material and assembling the linings as they are severed from the web in the caps with the adhesive surface

plied to the center spots when subjected to pressure. The important feature is "heating the pads [cork cushions] in the caps" before placing the spots upon them.

The first application, January 7, 1927, stated: "It may be desirable to secure the metal foil spot in position, prior to the heat and pressure steps, sufficiently to prevent dislodgement of the spot during any interval between assembling and final sticking. This may be accomplished, for example, by preheating the assembled crown, to soften the coating as soon as the metal foil spot is deposited." That application contained claims, construed by the circuit court of appeals to be broad enough to cover that disclosure. The patent office called for drawings to illustrate means for carrying out the method claimed. Accordingly, Warth showed, by way of illustration, that heat might be furnished by the punch used to cut the spots from the adhesive material and place them upon the cork in the cap, where by the same stroke of the plunger, they might be subjected to pressure. When he filed the drawings, December 3, 1930, he canceled from the first application the statement just quoted and canceled the claims originally filed. The second application had already been filed. Both contained another statement: "In carrying out the invention according to what is now considered the best practice, the coating will be softened by heat after the crown is assembled. This may be accomplished in any suitable manner, as by a heated plunger or a plunger and heated table. The heat softens

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in contact with the heated pads to render the adhesive viscous and effect adhesion of the linings to the pads."

Claim 2 repeats the words of claim 1 and adds these words, "and then placing the linings in the caps under heat and pressure to effect an intimate adhesion between the linings and pads."

Claim 3 repeats the words of claim 1 and the addition of claim 2 and adds these words, "and then placing the linings assembled in the caps under pressure during the cooling thereof."

the coating and renders it adhesive. . . ." So far as concerns the question under consideration, it is broad enough to include means for supplying heat by the punch as shown by the drawings, and the preheating method claimed in the divisional application.

The district court found no adverse use of the preheating method prior to the filing date of the application for the reissue patent. The circuit court of appeals did not disturb that finding. It found that Warth's disclosure of the preheating method was continuously before the patent office from the date of his first application, but that there was no claim for the preheating method on file from December 3, 1930, until April 4, 1933, when he filed application for the divisional patent. It held, citing *Webster Co.* v. *Splitdorf Co., supra,* that *prima facie* the two year limit applies to divisional applications, and that an applicant who waits longer before claiming an invention disclosed in his patent must justify his delay by proof of some excuse. It said, 86 F. (2d) 702, "No such excuse appears here. Had Warth chosen to retain in his parent application broad generic claims which might cover the preheating method, then indeed the Splitdorf rule might not be applicable . . . But . . . for a period of more than two years Warth apparently did not wish to claim the preheating method, having deliberately canceled the preheating specification from his original application and shaped his claims so as to exclude it and his patent having been granted January 6, 1931. He made no claim for preheating until more than two years thereafter, namely, April 4, 1933. In the meantime a patent containing claims for the preheating method had been granted to Johnson on April 5, 1932, and it was Warth's discovery of this fact which stirred him to action. As in the *Splitdorf* case, had it not been for this competitor, Warth might never have considered the subject worth claiming as an invention." The court meant that Warth had really abandoned his inven-

tion. See *Western Electric Co.* v. *General Talking Pictures Co.,* 91 F. (2d) 922, 927.

But, as abandonment was not pleaded as a defense, R. S. § 4920, and as Warth's disclosure was continuously before the patent office, clearly without any significance adverse to the petitioner is the fact that Warth formally canceled one disclosure from his first application and with it claims thought by the circuit court of appeals broad enough to cover the disclosure. The continuity so maintained shows that Warth intended to retain, not to abandon, the disclosed invention. See *Godfrey* v. *Eames,* 1 *Wall.* 317, 325–326. *Clark Blade & Razor Co.* v. *Gillette Safety Razor Co.,* 194 Fed. 421, 422.

This case is not like *Webster Co.* v. *Splitdorf Co., supra.* In that case, there came here the question of the validity of claims of a patent issued to Kane in 1918. In 1910 Kane had filed his first application, on which patent issued in 1916. In 1913 a patent covering the same subject-matter issued to the Podlesaks, to whom a reissue patent was granted in 1915. Later in 1915, Kane filed a divisional application which copied the claims of the Podlesak patent. They were decided in favor of the Podlesaks. Thereafter, June 17, 1918, Kane amended his divisional application by adding claims which were allowed, and September 24, 1918, patent issued to Webster Electric Company, Kane's assignee. In 1915, it had brought the suit against the Splitdorf Company. October 25, 1918, it filed a supplemental bill bringing in claims of the patent issued September 24, 1918.

This Court pointed out (p. 465) that the claims in question "were for the first time presented to the Patent Office, by an amendment to a divisional application eight years and four months after the filing of the original application, five years after the date of the original Podlesak patent, disclosing the subject matter, and three years after the commencement of the present suit." We sug-

gested that it was doubtful whether the claims were not so enlarged as to preclude allowance under the original application; we found that Kane, deeming their subject-matter not invention, did not intend to assert them, and, prior to 1918, did not entertain an intention to have them covered by patent. During all of this time their subject matter was disclosed and in general use; Kane and his assignee simply stood by and awaited developments. It was upon the reasons so stated that this Court declared (p. 466) "We have no hestitation in saying that the delay was unreasonable, and, under the circumstances shown by the record, constitutes laches, by which the petitioner lost whatever rights it might otherwise have been entitled to."

Upon a review of earlier cases we condemned the lower court's statement (283 Fed. 83, 93) that *Chapman* v. *Wintroath,* 252 U. S. 126, fixed the time within which application for a divisional patent might be made at two years from date of the issue of the parent patent. We showed that the *Chapman* case held that an inventor, whose application disclosed but did not claim an invention later patented to another, was not required within one year after issue of the other patent, to file divisional application claiming the invention and so to raise issue of interference, but that, by analogy, the two-year period under R. S. § 4886 [4] applied rather than the one-year

[4] R. S. § 4886, as amended March 3, 1897 (29 Stat. 692): "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain

period of R. S. § 4894,[5] and that the opinion did not fix a hard and fast rule to be applied in every case of a divisional application. Then we said (p. 471): "Our conclusion, therefore, is that, in cases involving laches, equitable estoppel, or intervening private or public rights, the two-year time limit *prima facie* applies to divisional applications, and can only be avoided by proof of special circumstances justifying a longer delay. In other words, we follow in that respect the analogy furnished by the patent reissue cases." That statement is not directly applicable to the precise question of laches upon which the case turned, but was made in reference to the question arising upon the lower court's erroneous interpretation of *Chapman* v. *Wintroath.* See *Wagenhorst* v. *Hydraulic Steel Co.,* 27 F. (2d) 27, 29–30. *Wirebounds Patents Co.* v. *Saranac Corp.,* 37 F. (2d) 830, 840–841. *Utah Radio Products Co.* v. *Boudette,* 78 F. (2d) 793, 799. It is clear that, in the absence of intervening adverse rights, the decision in *Webster Co.* v. *Splitdorf Co.* does not mean that an excuse must be shown for a lapse

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a patent therefor." [The statute has since been amended, but not to change the two-year period. See 35 U. S. C. § 31.]

Cf. R. S. § 4887 (35 U. S. C. § 32), relating to inventions patented abroad; R. S. § 4897 (35 U. S. C. § 38), relating to renewal application after failure to comply with requirement as to payment of final fee; R. S. § 4920 (35 U. S. C. § 69), relating to defense of prior invention.

[5] R. S. § 4894, as amended March 3, 1897 (29 Stat. 693). "All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." [The statute has since been amended to reduce the period to six months. See 35 U. S. C. § 37.]

of more than two years in presenting the divisional application. Where there is no abandonment, mere delay in filing a divisional application for not more than two years after an intervening patent or publication, does not operate to enlarge the patent monopoly beyond that contemplated by the statute. By R. S. § 4886, delay in filing an application for not more than two years after an intervening patent or publication does not bar a patent unless the invention "is proved to have been abandoned." See *Wirebounds Patents Co.* v. *Saranac Corp.*, 37 F. (2d) 830, 840, 841; 65 F. (2d) 904, 905, 906. And, as none need be shown, there is no occasion to decide whether the facts stated in the second question are sufficient to constitute an excuse for the delay referred to.

As our decision is limited to the first question presented, the judgment of the circuit court of appeals will be reversed and the case will be remanded to that court for decision of the other issues in the case in accordance with this opinion.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

This Court declared in *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 466, 471:

"In suits to enforce reissue patents, the settled rule of this Court is that a delay for two years or more will 'invalidate the reissue, *unless the delay is accounted for and excused by special circumstances, which show it to have been not unreasonable.*' . . .

"Our conclusion, therefore, is that in cases involving *laches, equitable estoppel or intervening private or public rights,* the two-year limit *prima facie applies to divisional applications* and can only be avoided *by proof of special*

circumstances justifying a longer delay. In other words, we follow in that respect the analogy furnished by the patent reissue cases." (Italics supplied.)

The rule announced in the *Splitdorf* case was based upon a long line of decisions of this Court extending from *Miller* v. *Brass Co.,* 104 U. S. 350, decided in 1882.

The majority opinion abandons the principle of the *Splitdorf* case that either laches *or* equitable estoppel *or* intervening private rights *or* intervening public rights—in the absence of *proved special circumstances*—bars a divisional patent after a lapse of an unreasonable length of time—*prima facie* two years. It is now held that neither laches nor equitable estoppel may alone invalidate a patent without proof of "intervening adverse rights." The authorities relied on in the *Splitdorf* case emphasized the right of the public—apart from provable adverse use by individuals—to require an applicant to pursue his right to a patent diligently and without enlargement of claims *after filing an original application.*[1] "Any practice by the inventor and applicant for a patent through which he deliberately and without excuse postpones beyond the date of the actual invention, the beginning of the term of monopoly, and thus puts off the free public enjoyment of the useful invention, is an evasion of the statute and defeats its benevolent aim." [2]

There is a further departure from the *Splitdorf* case in the holding that two years delay in filing a divisional application after an intervening patent does not—*in the absence of actual abandonment of the invention*—bar the right to a "divisional" patent. Abandonment is but one of many grounds for invalidating a patent. Equitable

[1] See, *Miller* v. *Brass Co.,* 104 U. S. 350, 355; *James* v. *Campbell,* 104 U. S. 356, 371; *Mahn* v. *Harwood,* 112 U. S. 354, 360; *Ives* v. *Sargent,* 119 U. S. 652, 662; *Topliff* v. *Topliff,* 145 U. S. 156, 170, 171; *Wollensak* v. *Sargent & Co.,* 151 U. S. 221, 228.

[2] *Woodbridge* v. *United States,* 263 U. S. 50, 56.

estoppel, intervening public rights, or unjustified and unexplained laches were considered in the *Splitdorf* case and cases there relied on to be individually sufficient bars, without proof of abandonment. Unjustified delay and abandonment are separate defenses. If proof of abandonment is to be a prerequisite, laches as a separate defense is destroyed, although it has been recognized for more than fifty years. Unreasonable delay which serves to postpone the beginning of the seventeen year monopoly limitation, not only is possible without abandonment of the invention, but is highly probable. With the destruction of the defense of laches the public loses the benefit of the principle that "An inventor *cannot without cause* hold his application pending during a long period of years, leaving the public uncertain, whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventions." [3]

The Court of Appeals following this settled principle—now abandoned—said: [4] "We think they [claims in the patent] are invalid for *laches in filing the application for them.* [Citing *Webster Co.* v. *Splitdorf Co.*]. . . . These circumstances [facts of this case] invite operation of the two-year limitation designed to protect the public against obtaining in effect an extension of a patentee's monopoly *by apathy and unexcused delay* in bringing forward by divisional or reissue applications claims broader than those originally sought." (Italics supplied.)

While "divisional" applications have never been expressly authorized by statute the courts have long recognized their use as a part of Patent Office procedure. Petitioner's patent which the Court of Appeals found barred by laches was granted on a "divisional" application. Patent Office regulations which have limited each application for a patent to a single invention and have re-

[3] *Planing-Machine Co.* v. *Keith*, 101 U. S. 479, 485.

[4] 86 F. (2d) 698, 702.

quired a "division" of an application containing claims for two separate and distinct inventions, apparently gave rise to the procedural device of "divisional applications." The Court of Appeals of the District of Columbia acting in a special appellate capacity [5] and the Patent Office, have treated a "divisional," properly used, in some respects, as a substitute for an amendment. In accordance with this conception "divisionals" have been for certain purposes, treated as "continuations" of original applications and given the priority of original applications. The logical conclusion was reached that after an original application merged in a patent, a "divisional" application could not be attached to, or considered as a "continuation" of it, because "there was nothing to be continued." [6] After a patent is granted it passes "beyond the control and jurisdiction" of the Patent Office; the proceedings are closed and the application can neither be amended nor serve as the basis for a new "divisional" or "continuing" application.[7]

Here an application for a process patent was filed in 1927. November, 1930, in response to Patent Office re-

[5] *Frasch* v. *Moore,* 211 U. S. 1, 9, 10; *Butterworth* v. *Hoe,* 112 U. S. 50, 60.

[6] *In re Spitteler,* 31 App. D. C. 271, 274, 275. ". . . 'it is well established that for one application to be a division, within the meaning of the law, of another, the two must at some time be co-pending,' . . . *Sarfert* v. *Meyer,* 1902 C. D. 30; *In re Spitteler,* 31 App. D. C. 271, 1908 C. D. 374; . . . *Wainwright* v. *Parker,* 32 App. D. C. 431, 1909 C. D. 379. . . .

". . . An application cannot be considered as a continuance of a patent granted prior to the filing thereof, since after the application has eventuated into a patent there is nothing left pending before the Patent Office upon which it could act or to which the later application could attach. *In re Spitteler,* 31 App. D. C. 271, 134 O. G. 1301; *Wainwright* v. *Parker,* 32 App. D. C. 431, 142 O. G. 1115, 1909 C. D. 379." *Fessenden* v. *Wilson,* 48 F. (2d) 422, 424.

[7] See, *McCormick Machine Co.* v. *Aultman,* 169 U. S. 606, 608, 609.

quirement, a "divisional" application was filed for a *product* patent. January, 1931, a process patent was granted on the original application. More than two years after the original application had merged into a process patent another application designated as a "divisional" was filed (April 4, 1933), for a second process patent—here involved. The Court of Appeals found this delay of six years to be without justification or excuse. Disregarding the previously recognized requirement that justification and excuse must be proven for such delay, the majority now hold that an applicant can, for six years, delay his claim for an alleged discovery without excuse, justification, or reason for the delay. This is permitted despite the fact that unclaimed disclosure of the alleged invention had been made in the 1927 process application and in the 1930 product application.

Congress—given the power by the Constitution—has fixed the statutory limit of a patent monopoly at seventeen years.[8] By the procedural device of a "divisional" application, designed to protect rights granted an inventor by statute, petitioner has carved for itself priority monopoly rights, beginning in 1927 and lasting until 1951—twenty-four years, or seven years more than Congress has authorized.

In the remedy of reissue provided by statute for applicants whose claims fail to protect their entire discoveries,[9] Congress has been alert to protect the public from such an extension of monopoly. A reissue patent must be based on oath that an applicant's original patent failed to cover its actual invention as a result of accident, inadvertence or mistake, and runs only *for the unexpired portion of a seventeen year patent grant.* The use of "divisionals" or "continuations," no longer subject to the defense of laches

[8] 35 U. S. C., c. 2, § 40.

[9] 35 U. S. C., c. 2, § 64.

or unreasonable delay, will permit an applicant to obtain, by a nonstatutory procedural device, monopoly privileges denied by the reissue statute.

The essential additional claim in petitioner's 1934 "divisional" patent was only mentioned in the 1927 original application and the 1930 "divisional" application by way of casual suggestion and incidental illustration.[10] Even this casual suggestion was stricken from the 1927 application in December, 1930. These suggestive illustrations did not constitute parts of the inventions which the 1927 and 1930 applications sought to cover or secure.[11] The speculative suggestions—from separate applications for different inventions—are pieced together and held sufficient to "continue" the 1927 application (after its merger in a patent) and the 1930 application, as support for the retroactive operation of a claim made for the first time in

[10] The essential additional claim of the 1934 divisional process patent was for "preheating" cork used in making bottle caps. The incidental reference to preheating in the 1927 application was as follows:

"It *may* be *desirable* to secure the metal foil spot in position, prior to the heat and pressure steps, sufficiently to prevent dislodgment of the spot during any interval between assembling and final sticking. This *may be accomplished, for example,* by preheating the assembled crown, to soften the coating as soon as the metal foil spot is deposited. Or the coating *may be softened* by moistening slightly with a solvent, such as benzol. In either case the coating becomes tacky enough to hold the metal foil from getting out of position during ordinary passage through assembling apparatus."

The 1930 divisional application for a product patent merely suggested that *"It may be desirable* to secure the spot in position, prior to the heat and pressure steps, sufficiently to prevent dislodgement of the spot during any interval between assembling and final sticking. *This may be accomplished,* for example, by preheating the assembled crown, to soften the coating, as soon as the metal foil is deposited." (Italics supplied.)

[11] Cf., *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.,* 150 U. S. 38, 42, 43.

1933. As a result of the destruction of the defense of laches in applying for "divisional" applications, those familiar with a given field of industry may now insert speculative conjectures as disclosures in various applications and permit them to lie dormant until a competitor reduces speculation to practicality. Then, by the device of a "divisional," or if need be, as here, by "divisional" on "divisional," such a competitor can be pursued with infringement suits and harassed into surrendering his business to an ingeniously dilatory applicant.[12] Thus, sweeping, indefinite and unclaimed disclosures, and adroit use of "divisionals"—which laches and unreasonable delay are no longer sufficient to bar—are permitted to extend a patent's statutory life and to increase a patentee's reward beyond that granted by Congress.

" 'The patent laws are founded in a large public policy to promote the progress of science and the useful arts. The public, therefore, is a most material party to, and should be duly considered in, every application for a patent. . . . But the arts and sciences will certainly not be promoted by giving encouragement to inventors to withhold and conceal their inventions for an indefinite time, or to a time when they may use and apply their inventions to their own exclusive advantage, irrespective of the public benefit, and certainly not if the inventor is allowed to conceal his invention to be brought forward in some after time to thwart and defeat a more diligent and active inventor, who has placed the benefit of his invention within the reach and knowledge of the public.' " [13]

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[12] Cf., *Atlantic Works* v. *Brady*, 107 U. S. 192, 200.

[13] *Woodbridge* v. *United States*, *supra*, 61.

GENERAL TALKING PICTURES CORP. *v.* WESTERN ELECTRIC CO. ET AL.

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

No. 357. Argued December 13, 14, 1937.—Decided May 2, 1938.

1. Review by certiorari is confined to questions specifically brought forward by the petition for the writ. P. 177.

   The supporting brief is not a part of the petition for this purpose; specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decision of the matter involved. P. 178.
2. A writ of certiorari will not be granted in a patent case to bring up questions of acquiescence and estoppel dependent on questions of fact, as to which there were concurrent findings below; nor to review questions of anticipation and invention as to which there is no conflict between decisions of the Circuit Courts of Appeals. P. 178.
3. The owner of patents in vacuum tube amplifiers used the inventions commercially, through its exclusively licensed subsidiaries, in the business of making talking-picture equipment embodying the inventions and supplying the equipment to theaters. It also granted non-exclusive licenses to others expressly limited to the making and selling of the patented amplifiers for private uses, namely, for radio broadcast reception, radio amateur reception, and radio experimental reception. One of the non-exclusive licensees made the patented amplifiers and sold them to a talking pictures corporation, knowing that the purchaser would include them in talking-picture equipment to be leased to theaters. Both parties knew the restrictions of the vendor's license and intentionally disregarded notices stating those restrictions, which were affixed to the articles. *Held*, that the restrictions of the vendor's license were valid under the patent law; that the purchaser was not "a purchaser in the ordinary channels of trade"; that the sales were not sales under the patent, but were without authority from the patent-owner; and that both vendor and purchaser were guilty of infringement. P. 179.

   The effect of the license notice is not considered.

4. The concurrent findings of the two courts below, as to two of the patents involved in this litigation, that there was no public use of the inventions prior to the dates of divisional applications on which the patents issued, are supported by evidence and accepted by this Court. P. 182.
5. Inventions, disclosed but not claimed in applications for patent, were subsequently claimed and patented through continuation applications voluntarily filed by the applicant. The patentee's use, which was the only "public use," was for less than two years prior to the original applications but for more than two years prior to the continuation applications. *Held* that the continuation applications were in time, no adverse rights having intervened more than two years before they were filed, and the effective dates of the claims therein were the dates of the original applications. R. S. § 4886. *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159. P. 182.

91 F. 2d 922, affirmed.

CERTIORARI, 302 U. S. 674, to review the affirmance of decrees sustaining patents, enjoining infringement, and ordering accountings, in three suits that were heard together. On May 31, a rehearing was ordered upon the first two of the questions stated on p. 177 of this opinion.

Messrs. Samuel E. Darby, Jr. and *Ephraim Berliner* for petitioner.

Mr. Merrell E. Clark, with whom *Mr. Henry R. Ashton* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Three suits were brought by respondents against petitioner in the district court for the southern district of New York to restrain infringements, based on different patents for inventions in vacuum tube amplifiers which have been used in wire and radio telephony, talking motion pictures, and other fields. In all there were in suit seven patents. The cases were tried together and are treated as one. The lower courts held one of the patents invalid, and that ruling is not challenged here. They con-

curred in holding six of the patents valid and infringed by petitioner. 16 F. Supp. 293; 91 F. (2d) 922. This Court granted a writ of certiorari.

Under the caption "Questions Presented" the petition for writ of certiorari submits the following:

"1. Can the owner of a patent, by means thereof, restrict the use made of a device manufactured under the patent, after the device has passed into the hands of a purchaser in the ordinary channels of trade, and full consideration paid therefor?

"2. Can a patent owner, merely by a 'license notice' attached to a device made under the patent, and sold in the ordinary channels of trade, place an enforceable restriction on the purchaser thereof as to the use to which the purchaser may put the device?

"3. Can an inventor who has filed an application for patent, showing and describing but not claiming certain inventions, obtain a valid patent for said inventions by voluntarily filing a 'divisional' or 'continuation' application for said unclaimed inventions more than two years subsequent to public use of the said unclaimed inventions by him or his assignee or licensee?"

The brief supporting the petition contains specifications of error relating to decision of two other questions. One is whether, by acceptance and retention of royalties paid by the licensed manufacturer, respondents acquiesced in the infringement and are estopped from maintaining the suit. The other is whether the patents upheld are invalid because of anticipation by, or want of invention over, the prior patented art. That brief is confined to the three questions definitely stated in the petition. But petitioner's brief on the merits extends to the additional questions reflected by the specification of errors.

1. Our consideration of the case will be limited to the questions specifically brought forward by the petition.

Rule 38, paragraph 2, contains the following. "The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. . . ." Evidently petitioner, by the "Questions Presented" intended to state the issues it deemed to arise on its "statement of the matter involved," for neither the petition nor supporting brief purport to apply for review of any other question. Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought. The specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decision of the matter involved.

There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508. *United States* v. *Johnston*, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14. *United States* v. *McGowan*, 290 U. S. 592. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. There is evidence to support them. Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to

them there is no conflict between decisions of circuit courts of appeals. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393. *Keller* v. *Adams-Campbell Co.,* 264 U. S. 314, 319–320. Cf. *Stilz* v. *United States,* 269 U. S. 144, 147–148. The writ did not issue to bring up either of these questions. *Crowell* v. *Benson,* 285 U. S. 22, 65.

One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ.

2. The respondent American Telephone & Telegraph Co. owns the patents. Amplifiers having these inventions are used in different fields. One, known as the commercial field, includes talking picture equipment for theaters. Another, called the private field, embraces radio broadcast reception, radio amateur reception, and radio experimental reception. The other respondents are subsidiaries of the Telephone Company and exclusive licensees in the commercial field of recording and reproducing sound; during the time of the infringement alleged, they were engaged in making and supplying to theaters talking picture equipment including amplifiers embodying the inventions covered by the patents in suit. The petitioner also furnished to theaters talking picture equipment including amplifiers which embody the invention covered by the patents in suit. Respondents' charge is that by so doing petitioner infringes them.

The American Transformer Company was one of a number of manufacturers holding non-exclusive licenses limited to the manufacture and sale of the amplifiers for private use, as distinguished from commercial use. These licenses were granted by the Radio Corporation, acting for itself and the respondent Telephone Company, and

were assented to by the latter. The Transformer Company's license was expressly confined to the right to manufacture and sell the patented amplifiers for radio amateur reception, radio experimenal reception, and home broadcast reception. It had no right to sell the amplifiers for use in theaters as a part of talking picture equipment.

Nevertheless, it knowingly did sell the amplifiers in controversy to petitioner for that use. Petitioner admits that the Transformer Company knew that the amplifiers it sold to petitioner were to be used in the motion picture industry. The petitioner, when purchasing from the Transformer Company for that use, had actual knowledge that the latter had no license to make such a sale. In compliance with a requirement of the license, the Transformer Company affixed to amplifiers sold by it under the license a notice stating in substance that the apparatus was licensed only for radio amateur, experimental and broadcast reception under the patents in question. To the amplifiers sold to petitioner outside the scope of the license, it also affixed notices in the form described, but they were intended by both parties to be disregarded.

Petitioner puts its first question in affirmative form: "The owner of a patent cannot, by means of the patent, restrict the use made of a device manufactured under the patent after the device has passed into the hands of a purchaser in the ordinary channels of trade and full consideration paid therefor." But that proposition ignores controlling facts. The patent owner did not sell to petitioner the amplifiers in question or authorize the Transformer Company to sell them or any amplifiers for use in theaters or any other commercial use. The sales made by the Transformer Company to petitioner were outside the scope of its license and not under the patent. Both parties knew that fact at the time of the transactions.

There is no ground for the assumption that petitioner was "a purchaser in the ordinary channels of trade."

The Transformer Company was not an assignee; it did not own the patents or any interest in them; it was a mere licensee under a non-exclusive license, amounting to no more than "a mere waiver of the right to sue." *De Forest Co.* v. *United States,* 273 U. S. 236, 242. Pertinent words of the license are these: "To manufacture . . . and to sell only for radio amateur reception, radio experimental reception and radio broadcast reception. . . ." Patent owners may grant licenses extending to all uses or limited to use in a defined field. *Rubber Company* v. *Goodyear,* 9 Wall. 788, 799–800. *Gamewell Fire-Alarm Telegraph Co.* v. *Brooklyn,* 14 Fed. 255. *Dorsey Rake Co.* v. *Bradley Co.,* Fed. Cas. No. 4,015, 7 Fed. Cas. 946, 947. Robinson on Patents, §§ 808, 824. Unquestionably, the owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly. *Bement* v. *National Harrow Co.,* 186 U. S. 70, 93. *United States* v. *General Electric Co.,* 272 U. S. 476, 489. There is here no attempt on the part of the patent owner to extend the scope of the monopoly beyond that contemplated by the patent statute. Cf. *Carbice Corp.* v. *American Patents Corp.,* 283 U. S. 27, 33. *Leitch Mfg. Co.* v. *Barber Co.,* 302 U. S. 458. There is no warrant for treating the sales of amplifiers to petitioner as if made under the patents or the authority of their owner. R. S. §§ 4884 and 4898 (35 U. S. C. §§ 40 and 47). *Moore* v. *Marsh,* 7 Wall. 515, 521. *Waterman* v. *Mackenzie,* 138 U. S. 252, 256. *Gayler* v. *Wilder,* 10 How. 477, 494. *United States* v. *General Electric Co., supra.* Robinson on Patents, §§ 762, 763, 792, 806 *et seq.*

The Transformer Company could not convey to petitioner what both knew it was not authorized to sell. *Mitchell* v. *Hawley,* 16 Wall. 544, 550. By knowingly making the sales to petitioner outside the scope of its

license, the Transformer Company infringed the patents embodied in the amplifiers. *Rubber Co.* v. *Goodyear, supra. Bement* v. *National Harrow Co., supra. United States* v. *General Electric Co., supra. Vulcan Mfg. Co.* v. *Maytag Co.,* 73 F. (2d) 136, 139. *L. E. Waterman Co.* v. *Kline,* 234 Fed. 891, 893. *Porter Needle Co.* v. *Nat. Needle Co.,* 17 Fed. 536. Petitioner, having with knowledge of the facts bought at sales constituting infringement, did itself infringe the patents embodied in the amplifiers when it leased them for use as talking picture equipment in theaters. *Mitchell* v. *Hawley, ubi supra. American Cotton-Tie Supply Co.* v. *Bullard,* Fed. Cas. No. 294, 1 Fed. Cas. 625, 629, 630. See Robinson on Patents, § 824. See *Holiday* v. *Mattheson,* 24 Fed. 185, 186. *General Electric Co.* v. *Continental Lamp Works,* 280 Fed. 846, 851. As petitioner at the time it bought the amplifiers knew that the sales constituted infringement of the patents embodied in them, petitioner's second question, as to effect of the license notice, need not be considered.

3. Petitioner's affirmative statement of its third question is: "An inventor who has filed an application for patent showing and describing, but not claiming, certain inventions cannot obtain a valid patent for said inventions by voluntarily filing a 'divisional' or 'continuation' application for said unclaimed inventions more than two years subsequent to public use of the said unclaimed inventions by him or his assignee or licensee." It makes that contention as to four patents: Arnold Patent No. 1,403,475, dated January 17, 1922; Arnold Patent No. 1,465,332, dated April 21, 1923; Arnold Patent No. 1,329,283, dated January 27, 1920; and Arnold Patent No. 1,448,550, dated March 13, 1923.

The district court and circuit court of appeals found that there was no public use of either of the inventions of the first two patents prior to the filing dates of the di-

visional applications upon which they issued. These findings were made upon adequate evidence and petitioner's contentions as to them will not be considered here.

The subjects matter of the claims of the other two patents were disclosed in the original applications and were claimed in the continuation applications upon which they issued. The patentee's use was the only "public use" of the inventions covered by them. And that did not precede by as much as two years the filing of the original applications. The effective dates of the claims of the continuation applications are those of the original applications. In the absence of intervening adverse rights for more than two years prior to the continuation applications, they were in time.* R. S. § 4886 (35 U. S. C. § 31). *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159.

Affirmed.

MR. JUSTICE ROBERTS, MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

The decisions in this case and *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159, will inevitably result in a sweeping expansion of the statutory boundaries constitutionally fixed by Congress to limit the scope and duration of patent monopolies.

The area of the patent monopoly is expanded by the holding that the exclusive right granted an inventor to "make, use and vend" his patented commercial device, permits the inventor's corporate assignee (and other "patent pool" participants) to control how, and where the

* This sentence of the opinion is reported as amended by Order of May 16, 1938, *post,* p. 546.

device can be used by a purchaser who bought it in the open market.[1]

Petitioner bought amplifying tubes from the American Transformer Company, a licensee authorized to "manufacture . . . and sell only for radio amateur reception, radio experimental reception and radio broadcast reception." The devices are of a standard and uniform type generally useful in many "fields."

We are not here concerned with the right of respondents under the contract with the licensee, American Transformer Company. Respondents do not—in fact, could not—rely on the contract made with the Transformer Company, in this suit against petitioner which in no way was a party to that contract. If the Transformer Company violated its contract respondents' remedy was by suit against the Transformer Company for the breach. No question of malicious interference with contractual interests is presented. Respondents insist only that under their patents, they have the right to control the use of these widely used tubes in the hands of purchasers from one authorized by respondents to manufacture and sell them.

The mere fact that the purchaser of a standard and uniform piece of electrical equipment has knowledge that his vendor has contracted with an owner of a patent on the equipment not to sell the equipment for certain agreed purposes does not enlarge the scope or effect of the patent

[1] The patented device here is an amplifying tube, and the opinion of the District Judge stated: "The amplifying devices required tubes which the defendant procured in the open market by purchase from authorized distributors; each tube carton bore a license notice reading as follows:

'License Notice.

'In connection with devices it sells, Radio Corporation of America has rights under patents having claims (a) on the devices themselves and (b) on combination of the devices with other devices or elements, as for example in various circuits and hookups.' "

monopoly. The patent statute only gives the patentee the exclusive right to make, use and vend his patented article.

Where a licensee—authorized to manufacture and sell—contracts with the patentee to attach a notice to each patented article (a machine) of "the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent," this Court has said: "The statutes relating to patents do not provide for any such notice and . . . [the patentee] can derive no aid from them . . . [in a suit against a purchaser from the licensee]. . . .

"The extent to which the use of the patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and the purchaser or licensee is a question outside the patent law and with it we are not here concerned." [2]

A patentee has no right under the patent laws to fix the resale price of his patented article [3] or to require that specified unpatented materials be used in conjunction with it.[4] The exclusive right to vend does not—any more than the exclusive right to use—empower a patentee to extend his monopoly into the country's channels of trade after manufacture and sale which passes title. It is not contended that petitioner did not obtain title to the tubes.

The patent statute which permits a patentee to "make, use and vend" confers no power to fix and restrict the uses to which a merchantable commodity can be put after

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[2] *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 509; see *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

[3] *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; cf. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339.

[4] *Motion Picture Co.* v. *Universal Film Co., supra; Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458.

it has been bought in the open market from one who was granted authority to manufacture and sell it. Neither the right to make, nor the right to use, nor the right to sell a chattel, includes the right—derived from patent monopoly apart from contract—to control the use of the same chattel by another who has purchased it. A license to sell a widely used merchantable chattel must be as to prospective purchasers—if anything—a transfer of the patentee's entire right to sell; it cannot—as to non-contracting parties—restrict the use of ordinary articles of purchase bought in the open market. "The words used in the statute are few, simple and familiar, . . . and their meaning would seem not to be doubtful if we can avoid reading into them that which they really do not contain." [5] Petitioner is held liable for using an ordinary vacuum amplifying tube bought from one who had title and the right to sell. Notice to petitioner that the vendor was violating *its* (the vendor's) contract with respondents gave the latter no right *under the patent* and imposed no responsibility *under the patent.* Petitioner became the owner of the tubes.

At this time a great portion of the common articles of commerce and trade is patented. A large part of the machinery and equipment used in producing goods throughout the country is patented. Many small parts essential to the operation of machinery are patented. Patented articles are everywhere. Those who acquire control of numerous patents, covering wide fields of industry and business, can—by virtue of their patents—wield tremendous influence on the commercial life of the nation. If the exclusive patent privilege to "make, use and vend" includes the further privilege after sale, to control—apart from contract—the use of all patented merchantable commodities, a still more sweeping power can be exercised by patent owners. This record indi-

[5] *Motion Picture Co.* v. *Universal Film Co., supra,* at 510.

cates the possible extent of a power to direct and censor the ultimate use of the multitudinous patented articles with which the nation's daily life is concerned.

This record shows that the General Electric Company system, the Radio Corporation system, and the American Telephone and Telegraph Company system are participants in a "patent pool." This "patent pool" controls respondents' patents. The record discloses that this "patent pool" operates under cross licensing agreements, in the United States and in foreign countries. It appears that the General Electric Company and the Radio Corporation have "agreed that the Radio Corporation shall not resell patented articles except as a part of the radio system," and that the Radio Corporation "agrees to use care not to enter with any patent device, process or system into the *field* of the General Electric Company or to encourage or aid others to do so." Throughout the entire agreement appears the manifest purpose of the "patent pool" participants to protect for each other certain allocated "fields" in the production, sale and distribution of modern electrical necessities used in everything involving modern communications. Although the patent laws contemplate and authorize but one patent monopoly for one invention, many separate patents authorizing single patent monopolies are merged in this "patent pool." Thus, all these separate patent monopolies are combined and in many respects are made to function as one. The record shows that from this larger combination—completely outside the conception in the patent statutes of single and separate monopolies—allotments of sub-monopolies are made in the respective "fields," from which emanate in turn other sub-monopolies. This Court has previously directed attention to the tendency of such combinations to stimulate patent law abuses, in the following language: "It was not until the time came in which the full possibilities seem first to have been appreciated of uniting, in one, many branches of business through corporate organiza-

tion and of gathering great profits in small payments, which are not realized or resented, from many, rather than smaller or even equal profits in larger payments, which are felt and may be refused, from a few, that it came to be thought that the 'right to use . . . the invention' of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent and not by its terms made a part of the thing patented." [6]

Articles manufactured under the patents thus controlled are widely used in the modern electrical field. The exclusive privilege to exercise the unrestrained power to determine the ultimate uses of all these important merchantable articles sold in the open market, is a power I do not believe Congress has conferred. A power so far reaching—apart from contract—has not been expressly granted in any statute, and should not be read into the law by implication.

Second. The numerous patents acquired by respondents all relate to claimed inventions made between 1912 and 1916; yet, some of these patents do not expire until 1940. Patent No. 1448550 illustrates most of the patents involved. It is designated as the "continuation" of two

[6] *Motion Picture Co.* v. *Universal Film Co. supra,* 513–514.

In the agreement between the General Electric Company and the American Telephone and Telegraph Company, this appears:

"ARTICLE VIII.

"Acquisition of Patent Rights.

"Neither party shall acquire from others rights to do under United States patents or inventions, or rights to use secret processes, applicable to *the fields of the other party, of such limited character* that the other party does not, by the operation of this agreement, receive licenses thereunder of the scope and within the respective fields herein set forth, unless the party proposing *to acquire such rights* shall first have given the other party an opportunity to be represented in the negotiations and thereby to acquire rights for its field."

earlier applications filed September 3, 1915 and November 2, 1915. February 3, 1919—more than four years after respondents' commercial use—the "continuation" application was filed and March 13, 1923, the patent was granted. By this process of "divisionals" or "continuations" a seventeen year patent monopoly is permitted to begin in 1923, theoretically based on original applications which were filed in 1915.

Congress has provided that two years' public use of an invention prior to application bars the right to patent [7] and no patent rights are awarded for disclosures in an application which are not claimed.[8] Here, however, approval is given patents for inventions—as the District Court found and the record shows—publicly used for more than two years before applications *actually claiming* the invention were filed. This approval is based on the fact that disclosures (unclaimed) were made in prior and separate applications which had not been preceded by two years' public use. "Divisional" or "continuation" applications—unauthorized by any statute—are permitted to give priority from the date of original applications, in effect barring all other inventions from that date and nullifying the statute of two years' public use. Thus for years respondents obtained no patent on their inventions for lack of claim. No one else could safely obtain a patent because of the certainty that respondents would later claim under a "divisional" or "continuation."

The statute provides no exception of public use by the inventor and, if he uses his *completed* invention in the ordinary conduct of his business—for more than two

[7] 35 U. S. C., c. 2, § 31.

[8] Cf., *The Corn-Planter Patent*, 23 Wall. 181, 224; *Miller* v. *Brass Co.*, 104 U. S. 350, 352; *McClain* v. *Ortmayer*, 141 U. S. 419, 423, 424; *Buffington's Iron Building Co.* v. *Eustis*, 65 Fed. 804, 807; *Ely Norris Safe Co.* v. *Mosler Safe Co.*, 62 F. (2d) 524, 526.

years prior to his application—the discovery is abandoned to the public and he cannot thereafter obtain a patent.[9] Such an exception—grafted onto the statute—would be directly contrary to its aim and purpose, and would enable inventors to obtain all the benefits of monopoly by simply making unclaimed disclosures, blanketing the field, and waiting until someone else attempted to *claim* a patent on the same invention. Then, by means of "divisional" or "continuation" applications, patent could be obtained. No such expansion of the patent statutes is justified.[10] I believe the judgment of the Court of Appeals should be reversed.

[9] "A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent; and yet, during that period in which its use by another would have defeated its right, he himself used it, for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?" *Smith & Griggs Mfg. Co.* v. *Sprague*, 123 U. S. 249, 257; *International Tooth Crown Co.* v. *Gaylord*, 140 U. S. 55; see *A. Schrader's Sons, Inc.* v. *Wein Sales Corp.*, 9 F. (2d) 306, 208.

[10] Cf., "The patent law was designed for the public benefit, as well as for the benefit of inventors. . . .

" . . . A term of fourteen [now seventeen] years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor; but if he may delay an application for his patent, at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him." *Shaw* v. *Cooper*, 7 Pet. 292, 320, 322.

PACIFIC NATIONAL CO. *v.* WELCH, FORMER COLLECTOR OF INTERNAL REVENUE.

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

No. 528. Argued March 3, 1938.—Decided May 2, 1938.

A taxpayer who, in his income tax return for 1928, reported income from sales of property according to the deferred payment method, although he might have used the installment method, is not entitled, upon a claim for refund, after the time for filing the return has expired, to have the income computed according to the installment method, at least where it is not shown that the deferred payment method, rightly applied, does not clearly reflect his income. P. 192.

91 F. 2d 590, affirmed.

CERTIORARI, 302 U. S. 679, to review the affirmance of a judgment rejecting a claim for refund of income taxes.

Mr. Donald V. Hunter, with whom *Mr. Melvin D. Wilson* was on the brief, for petitioner.

Mr. Edward J. Ennis, with whom *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch, F. E. Youngman,* and *Stephen M. Farrand* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

March 14, 1929, petitioner filed its income tax return for 1928. The return reported $137,007.17 as profit resulting from sales of lots in that year. That figure was arrived at by adding to the cash paid in 1928, on account of the sales, the amounts later to be paid, and by deducting from the total the cost of lots and improvements and expenses of the sales.

In 1931 petitioner filed a claim for refund of the entire tax on the ground that the sales had been made on the installment basis, but the profits had been reported as if the sales were for cash, and that this was erroneous. The claim was rejected. Petitioner sued; trial by jury having been waived, the district court made findings of fact and held that petitioner reported income as authorized by the Revenue Act of 1928 and applicable regulations, and thereby made an election which became binding on the expiration of the time allowed for filing the return. Accordingly it gave judgment for respondent. Upon the same ground the circuit court of appeals affirmed. 91 F. (2d) 590. The decision below being in conflict with that of the Court of Claims in *Kaplan* v. *United States,* 18 F. Supp. 965, we granted a writ of certiorari.

Under the applicable statutes and regulations, petitioner could have chosen either of two methods for the ascertainment and report of gain or loss on the sales. The Revenue Act of 1928, 45 Stat. 791, establishes both. Defining one, the "deferred payment method," it declares that gross income includes profits from sales, § 22 (a); regulates the computation of gain or loss, § 22 (e); defines gain to be the excess of the amount realized over the basis, §§ 111 (a), 113; and provides that the "amount realized" shall be the sum of any money received plus the fair market value of property (other than money) received, § 111 (c). Regulations 74, Art. 352. Defining the other, the "installment method," it provides that, in the case of a casual sale or other casual disposition of personal property for a price exceeding $1000 or in the case of sale or other disposition of real property, if payments received during the taxable year in which the sale was made do not exceed 40 per cent. of the selling price, the income may, under regulations prescribed, be returned on the installment method (§ 44 (b)); i. e., the taxpayer may return

in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed bears to total contract price. See § 44 (a).

Regulations 74 permit the vendor to return income from installment sales on the straight accrual or cash receipts basis; when so reported the sales are treated as deferred payment sales not on the installment plan. Art. 353. In ascertaining the amount of profit or loss from that class of sales, the obligations of the purchaser to the vendor are taken at their fair market value; if they have none, the payments in cash or other property having a fair market value shall be applied against and reduce the basis of the property sold, and if in excess of such basis, shall be taxable to the extent of the excess. Gain or loss is realized when the obligations are disposed of or satisfied, the amount being the difference between the reduced basis and the amount realized therefor. Art. 354.

The question is whether, having filed a return according to the deferred payment method, the taxpayer by filing claim for refund is entitled to have the profit from the sales computed on the installment method.

Petitioner contends that the installment method alone discloses its income from the sales of lots and that the deferred payment method failed clearly to reflect income.

Conceding that its return might have been made in accordance with either method, petitioner says that, being ignorant of both, it treated the sales as if made for cash at figures mentioned in the contracts. Its argument, therefore, rests upon the assertion, which we assume to be true, that the promises of purchasers to pay installments were worth less than face value. But that fact has no bearing upon the question whether proper appli-

cation of the deferred payment method would clearly reflect income, for that method permits installments to be taken at market value and, if they have no market value, allows postponement of ascertainment of gain or loss until realized. While petitioner's return may have been an inept application of the deferred payment method, there is nothing in it or the statement of claim for refund that gives any support to the idea that, if rightly applied, that method would not clearly reflect income.

The parties agree that, if allowed to change to the installment method, petitioner would be entitled to a refund in some amount. But that fact has no tendency to discredit the deferred payment method as inapplicable. The amount of the tax for the year in question is only one of many considerations that may be taken into account by the taxpayer when deciding which method to employ. The one that will produce a higher tax may be preferable because of probable effect on amount of taxes in later years. In case of overstatement and overpayment, the taxpayer may obtain refund calculated according to the method on which the return was made. Change from one method to the other, as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns (§ 53 (a)) to include the period allowed for recovering overpayments (§ 322 (b)). There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in question according to the deferred payment method, petitioner

made an election that is binding upon it and the commissioner.*

Affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

UNITED STATES *v.* KAPLAN.

CERTIORARI TO THE COURT OF CLAIMS.

No. 667. Argued March 3, 4, 1938.—Decided May 2, 1938.

Decided upon the authority of *Pacific National Co.* v. *Welch, ante,* p. 191.
18 F. Supp. 965, reversed.

CERTIORARI, 303 U. S. 629, to review a judgment in favor of the taxpayer in a suit for refund of income taxes.

Mr. Edward J. Ennis, with whom *Acting Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *F. E. Youngman* were on the brief, for the United States.

Mr. Llewellyn A. Luce for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent and his wife in a joint return of income tax for 1929 reported a profit of $194,000 from the sale of 25

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* *Commissioner* v. *Moore,* 48 F. (2d) 526, 528, certiorari denied 284 U. S. 620. *Marks* v. *United States,* 18 F. Supp. 911, 913. Sylvia S. Strauss, 33 B. T. A. 855, affirmed 87 F. (2d) 1018. Max Viault, 36 B. T. A. 430, 431. Sarah Briarly, 29 B. T. A. 256, 258. Louis Werner Saw Mill Co., 26 B. T. A. 141, 144–145. Liberty Realty Corp., 26 B. T. A. 1119. Morgan Rundel, 21 B. T. A. 1019. Johnson Realty Trust, 21 B. T. A. 1333. Cf. *United States* v. *Pettigrew,* 81 F. (2d) 666; *Rose* v. *Grant,* 39 F. (2d) 340; *Alameda Inv. Co.* v. *McLaughlin,* 33 F. (2d) 120; *Buttolph* v. *Commissioner,* 29 F. (2d)

shares of the stock of "No. 1100 Park Avenue," and disclosed tax of $2,084.20, which was paid. The taxable income was less than the profit in question. It resulted from the sale by him, April 11, 1929, for a net price of $240,000 of stock bought in 1928 for $46,000. The buyer agreed to pay $25,000 cash and the balance in installments of $1,875 a month. For 1930, respondent and his wife filed a return showing no taxable income. For 1931 and 1932, respondent filed no returns. In 1932 he filed a claim for refund of the entire 1929 income tax. The ground for the claim was that he was entitled to report the sale on the installment basis. The findings indicate that the deferred payments were worth less than face value; after respondent and his wife (to whom he assigned the contract) had received $55,000, they agreed to accept $75,000 more as full payment. The commissioner rejected the claim and this suit followed. The Court of Claims gave respondent judgment. 18 F. Supp. 965. This Court granted a writ of certiorari because of conflict between the decision and that of the circuit court of appeals for the ninth circuit in *Pacific National Co.* v. *Welch,* 91 F. (2d) 590, this day affirmed, *ante,* p. 191. The question here presented is the same as the one decided in that case. The judgment of the court below must be

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

695; *Safety Electric Products Co.* v. *Helvering,* 70 F. (2d) 439; *Dr. Pepper Bottling Co.* v. *Commissioner,* 69 F. (2d) 768; *Radiant Glass Co.* v. *Burnet,* 60 App. D. C. 351; 54 F. (2d) 718.

ARKANSAS FUEL OIL CO. *v.* LOUISIANA EX REL. MUSLOW.

APPEAL FROM THE COURT OF APPEAL, SECOND CIRCUIT, OF LOUISIANA.

No. 760. Argued April 7, 1938.—Decided May 2, 1938.

1. A statute of Louisiana provides that a person who has produced oil under a lease granted by the last record owner holding under a deed sufficient in terms to transfer title, shall, in the absence of a suit to test title, be presumed to be the true owner of the oil; that it shall be unlawful for a purchaser of oil from such a person to withhold payment therefor; and that a purchaser making payment to such a person shall be fully protected against all other claimants. *Held* that, upon the facts of this case, a purchaser thus required to make payment was not deprived of any rights under the Constitution of the United States. P. 198.

   Though the purchaser here claimed that it would be left liable to the "true owner," it appeared that there had elapsed nearly eleven years since the deed was made to the last record owner, and four years since the oil was purchased and delivered; it did not appear that there was any other claimant, nor that the purchaser had tendered payment into court for the benefit of the "true owner," as it might have done under the state law.
2. A constitutional question will not be decided unless its decision be necessary on the record before the Court. P. 202.

176 So. 686, affirmed.

APPEAL from the affirmance of a judgment sustaining a judgment in favor of the relator in an action to recover the value of oil sold and delivered.

Mr. Robert Roberts, Jr., with whom *Mr. H. C. Walker, Jr.* was on the brief, for appellant.

Mr. John B. Files submitted on brief for appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellant (defendant below) challenges Act 64 of 1934 of Louisiana on the ground that the Act "if enforced

. . . , in the manner relied upon . . . , would require . . . [appellant] to pay to . . . [appellee] the value of property which did not belong and never has belonged to . . . [appellee], thereby leaving [appellant] responsible and liable to the true owner of such property for the value thereof, and in that manner *depriving* . . . [appellant] *of its property without due process of law,* and denying to it the equal protection of the laws contrary to the provisions and requirements in the Constitutions of the United States and of the State of Louisiana."

The Act (the pertinent part of which is set out below)[1] provides that a purchaser of oil can extinguish the indebtedness for the oil (as against all other parties) by paying the person who drilled and sold it under a lease from the last "record owner," if the recorded instrument

[1] ". . . any person, firm or corporation that has actually drilled or opened on any land in this State, *under a mineral lease granted by the last record owner,* as aforesaid, of such land or of the minerals therein or thereunder if the mineral rights in and to said land have been alienated, who holds under an instrument sufficient in terms to transfer the title to such real property, any well or mine producing oil, gas or other minerals shall be presumed to be holding under lease from the true owner of such land or mineral rights and the lessor, royalty owner, lessee or producer, or persons holding from them shall be entitled to all oil, gas or other minerals so produced, or to the revenues or proceeds derived therefrom, unless and until a suit testing the title of the land or mineral rights embraced in said lease is filed in the district court of the parish wherein is located said real property. A duly recorded mineral lease *from such last record owner* shall be full and sufficient authority for any purchaser of oil, gas or other minerals produced by the well or mine aforesaid to make payment of the price of said products to any party in interest under said mineral lease, in the absence of the aforementioned suit to test title or of receipt, by such purchaser, of due notification by registered mail of its filing, and any payment so made shall fully protect the purchaser making the same; and so far as said purchaser is concerned as against all other parties the producer of such oil, gas or other minerals shall be conclusively presumed to be the true and lawful owner thereof."

of conveyance is sufficient to pass title in Louisiana, and in the absence of any suit filed to test the title of the land or oil or due notice by registered mail of the filing of such suit. Section 3 authorized purchasers to delay payment for purchases previously made until a lapse of sixty days after effective date of the Act (August 1, 1934), and denied protection to purchasers who paid the "last record" owner before the expiration of that period. The Louisiana Court of Appeal decided this sixty-day period was in effect a short statute of limitations as against any possible owners not shown of record.

The District Court of Caddo Parish rendered judgment for appellee. The Louisiana Court of Appeal, Second Circuit, sustained [2] and the Supreme Court of Louisiana denied certiorari. The presiding judge of the Louisiana Court of Appeal granted an appeal to this Court under authority of 28 U. S. C. § 344 (a).

The record discloses that:

May 24, 1927, Ackerman Oil Company, a corporation, by its President and Secretary, executed a deed to A. C. Best and Sherman G. Spurr for the land in question, which was duly recorded as provided by Louisiana law. April 18, 1933, Best and Spurr executed an oil lease to Hyman Muslow (appellee) under which the owners would receive ⅛ of the oil produced and Muslow ⅞. Thereafter, Muslow entered upon the leased land; equipped a well; contracted to sell oil to The Louisiana Oil Refining Corporation; [3] laid a mile and a half pipe-line to appellant's line and, between July, 1933, and September, 1934, delivered oil to appellant under the contract of sale. May 20, 1935,

[2] *State* v. *Louisiana Oil Rfg. Co.*, 176 So. 686.

[3] The Louisiana Oil Refining Corporation went through reorganization proceedings under § 77–B of the Bankruptcy Act after suit was originally filed against it by Muslow. The Arkansas Fuel Oil Co. succeeded to its assets and liabilities and was substituted as defendant.

Muslow filed suit under the 1934 Act for mandamus to require payment for the oil. An alternative writ of mandamus was issued returnable May 28, 1935, on which date the Company filed petition in bankruptcy under § 77-B of the National Bankruptcy Act. Appellant later answered and did not question that it owed someone $445.00 for the oil, but asserted that the conveyance to Best and Spurr was not translative of title to the oil due to inadequate consideration and lack of authority on the part of the corporate officers who signed the deed. Denial was made that Best and Spurr were the true owners of the land, on the same grounds. The courts of Louisiana decided these questions against appellant. Appellant also alleged that ". . . the said lands, having been forfeited to the State of Louisiana for non-payment of taxes on July 31, 1915, as appears from the forfeiture . . . are the property of the State of Louisiana." Concerning the statute under attack, the Court of Appeal of Louisiana has said:[4]

"We experience little difficulty in determining the legislative intent in adopting this Act. It supplied a long-felt need, and in its operative effect will serve to prevent imposition upon and unjust discrimination against those whom it was intended to protect. The Act establishes a rule of conduct for the protection of lessors, their assignees under oil and gas leases, and also a rule of security and safety for lessees and those holding under or purchasing from them. . . . The Act was designed also to protect those persons whose rights arose from or are based upon contracts with the last record owner of the land covered thereby, and to those who deal with or acquire from such persons."

Appellant contends that this law as applied would enable Muslow to recover the value of the oil delivered to

[4] *State* v. *Hope Producing Co.*, 167 So. 506, 510.

appellant "which . . . [Muslow] did not own" and that appellant would also be left responsible to the true owner of the oil. The court below said that "Over eight years had elapsed when this suit was filed and the company, [transferor in the deed of record] *the only person to complain,* had not raised its voice in protest of its officers' actions." (Italics supplied.) Although nearly eleven years have elapsed since deed was made to Best and Spurr and almost four years since appellant purchased, received and did not pay for the oil, the record does not disclose that there has been any other claimant or purported owner of the land nor does it show any effort by appellant to pay the money into court for the benefit of a "true owner," as it might under Louisiana law.[5] The only suggestion appellant has made as to any owner not of "record" was that the property belonged to the State of Louisiana. That State—alleged by appellant to be the true owner of the land from which the oil was obtained—passed the 1934 Act and its courts have held that payment to Muslow will relieve appellant of the indebtedness. Appellant seeks to escape payment to Muslow for the oil which it purchased in 1934 on the ground that such payment would not discharge the indebtedness to a "true owner"—alleged to be the State of Louisiana. The Louisiana Court of Appeal speaking in this case has declared that the statute "protects the purchaser in paying the price to the one from whom the oil has been purchased; and, *under the express declarations of the Act,* no recourse may thereafter be had by any third person or adverse claimant against such buyer." Since no adverse claimant to the land has appeared in eleven years, it is clear under all the circumstances of this case that payment for the oil bought from

[5]Acts of La., No. 123, 1922; La. Gen. Stat. (Dart) § 1556–63; cf. *Shell Petroleum Corp.* v. *Carter,* 187 La. 382; 175 So. 1; see *Cassard* v. *Woolworth,* 165 La. 571, 575; 115 So. 755.

Muslow in 1933 and 1934 will not deprive appellant of any rights under the Federal Constitution.

"It is a matter of common occurrence—indeed, it is almost the undeviating rule of the courts, both state and Federal—not to decide constitutional questions [of the validity of a State Act] until the necessity for such decision arises in the record before the court." *Baker* v. *Grice,* 169 U. S. 284, 292. We see no such necessity here. The judgment appealed from is

Affirmed.

MR. JUSTICE STONE concurs in the result.

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

RUHLIN ET AL. *v.* NEW YORK LIFE INSURANCE CO.

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

No. 596. Argued March 10, 1938.—Decided May 2, 1938.

1. Where an insurance policy by its terms is incontestable after a time limited except for nonpayment of premium and "except as to provisions and conditions relating to disability and double indemnity benefits," the question whether the latter exception embraces, and excludes from the limitation, the right of the insurer to rescind the agreement to pay disability and double indemnity benefits because of fraud in the application, is not a question of "general law" which a federal court may determine independently, but a question of state law which the federal court must determine in accordance with the decisions of the appropriate state court. *Erie Railroad Co.* v. *Tompkins, ante,* p. 64. P. 204.
2. The doctrine of *Erie Railroad Co.* v. *Tompkins* is applicable to a question of construction of a contract arising in a suit in equity. P. 205.
3. Conflict among the Circuit Courts of Appeals on questions of state law is not of itself a reason for granting a writ of certiorari. P. 206.

4. The petition in this case did not show, as a basis for certiorari, that the important question of local law involved was decided below "in a way probably in conflict with applicable local decisions," or that the decision was "probably untenable" and therefore probably in conflict with the state law as yet undeclared by the highest court of the State. Rule 38 (5) (b).
5. Where a suit dependent on the construction of an insurance policy was presented and decided below on the mistaken assumption that the construction was a question of "general" or "federal" law, this Court, on certiorari, declined to decide upon the rule of state law applicable, but vacated the judgment and remanded the cause to the District Court, for further proceedings in conformity with the opinion and with directions to permit such amendments of the pleadings as might be necessary for that purpose. P. 206.

93 F. 2d 416, reversed.

CERTIORARI, 302 U. S. 681, to review the affirmance of an interlocutory decree enjoining the institution of actions on certain insurance policies, including an action in a state court, pending the determination of a suit to cancel the policies in part, for fraud.

Mr. Charles H. Sachs, with whom *Mr. Charles J. Margiotti* was on the brief, for petitioners.

Mr. William H. Eckert, with whom *Mr. Louis H. Cooke* was on the brief, for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

On February 14, 1935, the New York Life Insurance Company, respondent here, filed its bill of complaint in the District Court for Western Pennsylvania to rescind, because of certain misrepresentations, the disability and double indemnity provisions in five policies issued on the life of defendant John G. Ruhlin, and made in favor of the other defendants as beneficiaries.

The bill alleged that the plaintiff is a mutual life insurance company incorporated under the laws of the State of New York and lawfully engaged in business in Pitts-

burgh, Pa.; that the defendants are temporarily living in Pennsylvania, though plaintiff does not know where their legal residence is; that on December 1, 1928, plaintiff wrote two policies of life insurance on the life of John G. Ruhlin, in the face amounts of $10,000 and $5,000; that on July 7, 1930, it wrote three additional, similar policies in the face amount of $4,000 each; that certain questions in the applications were answered falsely and fraudulently by the insured; that on November 1, 1934, John G. Ruhlin presented a claim for total and permanent disability benefits under each of the five policies. The Company tendered into court the sum of $1,045.42, the aggregate amount of premiums paid for disability and double indemnity benefits, and prayed that the disability and double indemnity provisions be rescinded, and for other relief not material here.

The defendants filed a motion to dismiss the complaint on the ground that the policies had become incontestable, since the suit was brought more than two years after the date of each policy involved. The "incontestability clause" of each of the policies reads as follows:

"Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The District Court overruled the motion to dismiss. The Circuit Court of Appeals affirmed the order, holding that, in view of their express terms, the incontestability clauses had no application to liability for disability and double indemnity benefits. It recognized that its decision was contrary to that reached by the Circuit Court of Appeals for the Ninth Circuit, *New York Life Ins. Co.* v. *Kaufman*, 78 F. (2d) 398, and by the Circuit Court of Appeals for the Fourth Circuit, *New York Life Ins. Co.* v. *Truesdale*, 79 F. (2d) 481, which had held that the exception in the

incontestability clause related only to provisions and conditions actually set forth in the policy itself, compare *Stroehmann* v. *Mutual Life Ins. Co.,* 300 U. S. 435, and that fraud was not mentioned in any of those provisions. Ruhlin petitioned for certiorari, asserting the conflict of circuits. The Company filed a memorandum admitting the conflict, and raising no objection to the granting of the writ. Because of the conflict of circuits, the Court granted certiorari.

It was stated in *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet. 495, 511, that questions concerning the proper construction of contracts of insurance are "questions of general commercial law," and that state decisions on the subject, though entitled to great respect, "cannot conclude the judgment of this court." A limitation was put on this doctrine in *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335, 340. Putting aside all questions of power, the Court interpreted a specific provision of an insurance contract in accordance with the decision of the highest court of the State of Virginia, where delivery was made. "All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being." The decision in *Erie R. Co.* v. *Tompkins, ante,* p. 64, goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity. Compare *Mason* v. *United States,* 260 U. S. 545, 557, 558.

Had *Erie R. Co.* v. *Tompkins* been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of cer-

tiorari. Rule 38 (5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that "a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Since jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given to this Court in order "to secure uniformity of decision," *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. E. g., *Aschenbrenner* v. *U. S. Fidelity & G. Co.,* 292 U. S. 80, 82; *Stroehmann* v. *Mutual Life Ins. Co.,* 300 U. S. 435, 440. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." No such showing was attempted by the petition. Nor was it contended that the decision below was "probably untenable" and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

No decision at the present time could reconcile any "conflict of circuits," or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. However, we shall not dismiss the writ of certiorari as improvidently granted. In view of the fact that the question in the case was regarded below, both by the courts and by counsel, as one of "general" or "federal" law, the

interest of justice requires that the judgment be vacated and the cause remanded for the enforcement of the applicable principles of state law. See *Villa* v. *Van Schaick,* 299 U. S. 152, 155–156; *Duke Power Co.* v. *Greenwood County,* 299 U. S. 259, 267–268; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21.

It is true that the Circuit Court of Appeals, in rendering judgment on reargument, said (see 93 F. (2d) 416, 417):

"Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg *v.* New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 152; Manhattan Life Insurance Co. *v.* Schwartz, 274 N. Y. 374, 9 N. E. 2d 16; Guise *v.* New York Life Ins. Co., [127 Pa. Super. 127,] 191 Atl. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley *v.* New York Life Insurance Co., 7 Cal. 2d 269, [70 P. 2d 602] and the opinion of Judge Coughlin in the case of New York Life Insurance Co. *v.* Thomas, 27 D. & C. 215, but are not persuaded that the learned District Judge erred. Since the company is domiciled in New York and the insured lives in Pennsylvania and 'all that is here for our consideration is the meaning, the tacit implications, of a particular set of words,' 'for the sake of harmony and to avoid confusion' we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. *v.* Johnson, 293 U. S. 340; Trainor *v.* Aetna Casualty Company, 290 U. S. 47, 54."

It is not necessary here to consider whether, in the determination of the substantive Pennsylvania rule, the Circuit Court of Appeals was correct in declining to fol-

low the *nisi prius Thomas* case, directly in point, and in applying the *Guise* case, which was decided by an intermediate appellate court (127 Pa. Super. 127; 191 A. 626), and not the supreme court of the state as the court below stated, and which involved a defense of coverage, available even under an ordinary incontestability clause as the opinion in the *Guise* case clearly states (127 Pa. Super. at 133; 191 A. 626).[1]

A different case might have been presented, and the facts and authorities developed in another fashion, if the parties had had in mind from the first the rule the Pennsylvania court would have applied. The pleadings might have shown in what place the policy was delivered,[2] and perhaps other facts attending the making of the insurance contract. It may be noted that petitioner's brief asserts, without record reference, that the applications for the first two policies were made in Pennsylvania, and the applications for the remaining three policies were made in Ohio. But as the record stands, we know only that at the time of bringing suit the respondent Company was incorporated in New York, and lawfully engaged in business in Pittsburgh, and that the defendants were then temporarily living in Pennsylvania.

Application of the "State law" to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tomp-*

[1] The Superior Court said (127 Pa. Super. at 133; 191 A. 626):

"An examination of the clauses discloses that the disability provisions of the policies are expressly excluded from their operation. Even if that exemption had not been inserted, the clauses would not have prevented the interposition of the defense here set up. *Mayer* v. *Prudential Life Insurance Company of America,* 121 Pa. Superior Ct. 475, 184 A. 267."

[2] Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. at 339. We do not now determine which principle must be enforced if the Pennsylvania courts follow a different conflict of laws rule.

kins, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of "general" law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of "local" law.

The judgment is vacated and the cause remanded to the District Court, for further proceedings in conformity with this opinion, with directions to permit such amendments of the pleadings as may be necessary for that purpose.

Judgment vacated.

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

PETROLEUM EXPLORATION, INC. *v.* PUBLIC SERVICE COMMISSION ET AL.

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

No. 705. Argued April 4, 5, 1938.—Decided May 2, 1938.

1. The Act of May 14, 1934, restricting the jurisdiction of the federal courts to enjoin enforcement of orders of state commissions affecting public utility rates, is inapplicable to an order of a commission commanding a corporation to produce evidence on a certain date, made without notice or hearing. P. 214.
2. In a suit to enjoin as unconstitutional a projected inquiry by a state agency into the reasonableness of the rates of a gas company, the expense to the company of complying with the order by showing the original and historical costs of its properties, cost of reproduction as a going concern, and other elements of value recog-

nized by law in fixing rates, is part of the amount or value in controversy. P. 215.

3. The objection that a suit is not within equity jurisdiction because of the existence of a plain, adequate and complete remedy at law (Jud. Code § 267) may be taken by trial or appellate court *sua sponte*. P. 216.
4. The adequate legal remedy which will defeat equity jurisdiction must be a remedy available in the federal court. P. 217.
5. A gas corporation owning very valuable property and doing a large business sought in a federal court to enjoin a state commission from carrying on proceedings to fix the company's rates, in alleged excess of the commission's jurisdiction and in violation of the company's constitutional rights. *Held*, that a loss of $25,000, in preparing and presenting the company's case before the commission, would not constitute irreparable injury justifying equitable intervention. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. P. 218.

   When the only ground for interfering with the state procedure is the reasonable cost of preparing for a hearing, there is no occasion for equitable intervention. P. 221.

12 F. Supp. 254, affirmed.

APPEAL from a decree of the District Court of three judges which dismissed a bill for an injunction.

Mr. W. J. Brennan, with whom *Messrs. Edward C. O'Rear, Allen Prewitt*, and *Charles N. Kimball* were on the brief, for appellant.

Mr. J. W. Jones, Assistant Attorney General of Kentucky, for appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This is an appeal from a final decree dismissing appellant's bill of complaint for want of jurisdiction in equity. It was entered by the United States District Court for the Eastern District of Kentucky sitting with three judges under Judicial Code, § 266. 21 F. Supp. 254. The appellant sought to enjoin the Public Service Commission of

Kentucky from prosecuting an investigation of wholesale rates for gas marketed by contract in Kentucky by appellant, on the ground that any regulation of the rates charged by appellant to its customers would be beyond the statutory power of the Commission, since the appellant was not a public utility, and would result in a deprivation of property without due process, a denial of equal protection of the laws, and a violation of the contracts clause of the Federal and State Constitutions, affecting contracts entered into prior to the passage of the regulatory act [1] of the General Assembly of Kentucky. As grounds for equitable relief, it was alleged that there was no adequate remedy and that irreparable injury would be inflicted upon appellant by the large expense entailed in preparation for the investigation.

Appellant is a corporation solely of the State of Maine, engaged in the production and purchase of natural gas at various fields in Kentucky and the transmission of that gas through wholly intrastate pipe lines to distributing agencies at the "city gates" of various municipalities of that Commonwealth. Appellant sells to three distributing agencies: a partnership, a corporation entirely free of connection with appellant, and a corporation in which appellant owns a dominant interest. It offers to sell and sells its commodity by separate contracts only to the distributing agencies named in the bill. All of these agencies, with one immaterial exception, are the owners of unexpired franchises purchased from the respective municipalities which they serve. Either by these franchises or by supplementary contract, the rates are fixed for retail sales of gas. Acting pursuant to statutory provisions authorizing investigations of the rates of defined utilities, the Public Service Commission of Kentucky issued on May 29, 1937, an order, pertinent provisions of which

[1] Acts of 1934, c. 145, as amended by Acts of 1936, c. 92.

are set forth in the margin,[2] reciting that appellant is an operating utility subject to the Commission's jurisdiction, setting a date for a public hearing, and ordering appellant

[2] "Notice of Investigation and Order to Show Cause.

"Whereas, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"Whereas, The Commission has found under Sections 3952–1–12–13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"Whereas, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"Whereas, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine-Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"Whereas, Authority to initiate this investigation is vested in the Commission by Sections 3952–12–13, and 14 of the Kentucky Statutes,

"Now, Therefore, Notice is Hereby Given, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"Whereas, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary,

"Now, Therefore, it is Ordered:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit

to appear at such hearing and present evidence of the reasonableness of its rates and charges, and also to make its records available for examination.

Appellant filed a plea to the Commission's jurisdiction, in substance setting up the objections subsequently urged in the bill under consideration. The Commission overruled this plea and reset the investigation for hearing on the merits. The appellant filed an application for a rehearing of this order. Though the Commission has not formally passed upon this application it admits that it intended and threatened to proceed with the investigation, determine and fix a fair rate for appellant's gas, and that it would have so proceeded but for the temporary restraining order obtained by appellant upon the filing of the bill in question.

Appellant's bill alleged that it was the obvious purpose of the Commission to lower appellant's rates, that these rates were not subject to the regulatory jurisdiction of the Commission, that any reduction would violate the Fourteenth Amendment, and impair the obligations of its contracts, in contravention of the contracts clauses of the State and Federal Constitutions. It was further alleged that the investigation, and the orders entered therein, are unlawful and unreasonable, and, if further prosecuted,

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for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable."

[Sections 2 and 3 omitted here relate to a requirement for the submission of information on contracts between appellant and other parties. Existence of such contracts was denied by appellant, and no evidence to establish them was offered.]

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"Notice is Hereby Given to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937."

would put appellant to considerable unlawful and needless expense. The Commission filed an answer asserting that appellant was subject to its regulatory jurisdiction. It denied any purpose on its part to attempt to lower the contract price which appellant charged the distributing agencies but averred that it would institute and conduct a special investigation and proceeding to determine a fair and reasonable price or rate to be charged by appellant and to fix said price or rate.

The majority opinion of the District Court held that as the order challenged could be enforced only by judicial proceedings, there existed no immediately threatened irreparable injury or damage to the appellant within the equity jurisdiction of the District Court. Without any consideration of the merits, the bill was dismissed. The assignments of error attack this conclusion. We affirm the decree of the District Court.

First. The point is made by appellees that injunction is prohibited by the Johnson Act of May 14, 1934, c. 283, § 1, 48 Stat. 775, 28 U. S. C. § 41 (1). This act withdraws from the district courts jurisdiction of any suit to enjoin the enforcement of any order of a state administrative commission where such order "(1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." The Johnson Act does not apply here because the order complained of, i. e., that of May 29, 1937, was entered without notice or hearing. Though it is entitled a "Notice of Investigation and Order to Show Cause," which would be an appropriate method of initiating an investigation, in fact the order commands appellant to produce certain evidence on a designated date, and not merely to show cause on that date why evi-

dence should not be produced. The order of June 29, 1937, overruling the plea to the jurisdiction, is not final but is pending on an application for rehearing.

Second. This proceeding was begun under the provisions of § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1). Jurisdiction was challenged by the Commission on the ground that the value of the matter in controversy was not in excess of $3,000. To show the requisite amount, appellant alleged that it would be necessary to expend $25,000 to present the evidence required by the order. It was found by the District Court from the testimony at the trial that "the expense to plaintiff of complying with said orders would be more than $3,000.00 in employing appraisers, geologists, engineers, accountants, etc., to show the original and historical cost of its properties, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes."

The purpose of this proceeding is to stop the investigation of the rates under the order issued. Since the necessary expense of producing the information demanded by the order exceeds the jurisdictional amount, the value of the matter in controversy is at least this sum. This purpose or object is analogous to those sought in injunctions to restrain a continuing trespass, where the value of the matter in controversy includes the cost of remedying the condition as part of the value of the matter in controversy, namely, the prevention of interference with plaintiff's rights.[3] Other examples are found in a suit to enjoin the enforcement of a tax statute, where the

[3] *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125. The pleadings and proof in the present case do not in terms raise the question of the value of the right to conduct business free of interference by the Commission. *Scott* v. *Donald*, 165 U. S. 107; cf. *Glenwood Light Co.* v. *Mutual Light Co., supra*, 124.

amount of the tax is the value of the matter in controversy,[4] and in a suit to enjoin enforcement of an order to install and maintain a track, where the value of the matter in controversy is the cost of compliance.[5] Where "expenses incident to compliance" with a regulatory statute exceed $3,000, the jurisdiction is clear.[6] There is no contention here either that the Commission's order left appellant with any less expensive alternative, or that the worth of appellant's entire business is less than $3,000. In undertaking to enjoin this investigation, the cost incident to making a showing required by the Commission is not collateral or incidental to the purpose of the injunction, but a threatened expense from which relief is sought. Whether such irrecoverable cost is an irreparable injury against which equity will protect is considered later in this opinion. The District Court had jurisdiction of the cause, as a federal court.

Third. We next consider whether the suit must be dismissed pursuant to § 267 of the Judicial Code, 28 U. S. C. § 384, which declares that no suit in equity shall be sustained "where a plain, adequate, and complete remedy may be had at law." Though this contention was not raised below by the Commission, "either the trial court or the appellate may, of its own motion, take the objection." [7] For determination of the adequacy of this rem-

[4] *Healy* v. *Ratta,* 292 U. S. 263.

[5] *Western & Atlantic R. Co.* v. *Railroad Commission,* 261 U. S. 264.

[6] *Packard* v. *Banton,* 264 U. S. 140, 142, 143.

[7] See *Twist* v. *Prairie Oil & Gas Co.,* 274 U. S. 684, 690. Although the objection does not go to the jurisdiction of the court as a federal court and may be waived and not considered if not timely raised (*Reynes* v. *Dumont,* 130 U. S. 354, 395), if it be obvious that there is an adequate remedy at law, the court acts *sua sponte* to preserve the courts of equity as a forum for extraordinary relief, in accordance with the legislative direction of § 267 of the Judicial Code. *Parker* v. *Winnipiseogee Lake Cotton & Woolen Co.,* 2 Black 545, 550; *Wright* v. *Ellison,* 1 Wall. 16, 22; *Oelrichs* v. *Spain,* 15

edy we must here assume the allegations of appellant that, unless an injunction is granted, irreparable injury will flow from its compliance with the order of May 29.

It is settled that no adequate remedy at law exists, so as to deprive federal courts of equity jurisdiction, unless it is available in the federal courts.[8] If appellant ignores the Commission's order, action for recovery of penalties for the violation of the order may be instituted by the Commonwealth of Kentucky. Ky. Stat. Ann. (Carroll's 8th ed., Baldwin's 1936 revision) §§ 3952–13 and –61. But this proceeding could neither be begun nor removed to the federal court. Apart from the difficulty of maintaining such an action in the federal courts, in view of its penal nature, the State would be proceeding as plaintiff to enforce its laws; its complaint would not be grounded on the Constitution or laws of the United States, and there would not be diversity of citizenship, the States not being "citizens" within the Judicial Code.[9] There is equitable jurisdiction to enjoin the proposed investigation of appellant's rates, if the order of May 29, quoted above, carries a threat of imminent, irreparable injury.

Fourth. The bill asks injunctive relief to restrain the Commission from further prosecuting the "investigation" into the price of gas sold under appellants contracts to the distributing agencies. Two decisions dealing with

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Wall. 211, 228; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 486; *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121, 123, 128. Cf. *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160. It is a question of "whether the case is one for the peculiar type of relief" granted by courts of equity. *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 69.

[8] *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 69, and cases cited; *Chicago, B. & Q. R. Co.* v. *Osborne,* 265 U. S. 14, 16.

[9] *Postal Tel. Cable Co.* v. *Alabama,* 155 U. S. 482, 487; *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48, 63; *Arkansas* v. *Kansas & Texas Coal Co.,* 183 U. S. 185, 188; *City Bank Co.* v. *Schnader,* 291 U. S. 24, 29.

orders for furnishing information have recently been handed down by this Court.[10] In both cases this Court dealt with the merits of the respective orders, determining that there was no constitutional basis for saying that "any person is immune from giving information appropriate to a legislative or judicial inquiry." Here there is no need to consider the validity of the challenged order. To justify the use of the extraordinary power of a court of equity something more must be involved than an application of a statute in an unconstitutional manner against complainant. There must be an allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction.[11] The one most frequently relied upon in constitutional cases, and pleaded here, is irreparable injury.[12] To furnish the information required by the order will cost $25,000, arising from the necessity of preparing for the hearing on rates. Is this irrecoverable expense a threatened irreparable injury which a court of equity will guard against by injunction? Whether or not equitable relief will be granted rests in the sound discretion of the court.[13]

It is true that the injury which flows from the threat of enforcement of an allegedly unconstitutional, regulatory state statute with penalties so heavy as to forbid the risk of challenge in proceedings to enforce it, has been generally recognized as irreparable and sufficient to justify an

[10] *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 306; *Arkansas Louisiana Gas Co.* v. *Department of Public Utilities*, *ante*, p. 61.

[11] *Dows* v. *Chicago*, 11 Wall. 108; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81; *McChord* v. *Louisville & Nashville R. Co.*, 183 U. S. 483, 495; *Shelton* v. *Platt*, 139 U. S. 591, 596; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 281.

[12] See Irreparable Injury in Constitutional Cases, 46 Yale Law Journal 255 (1936).

[13] *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 70.

injunction.[14] The Commission urges that since there is ample opportunity for the appellant to contest in a state court any effort to regulate or punish for disobedience of orders, with ultimate review by this Court, there is no irreparable injury, and that the dangers of lowered rates and threatened punishments can be overcome by opposition when an effort is made to enforce them. The case of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, where an effort was made to secure an injunction against enforcement of a Federal Trade Commission order to produce information, has been cited as a precedent. There were heavy penalties for violation of that order [15] but the opinion discussed the issues from the standpoint of failure to exhaust administrative remedy.[16] Appellant here insists that it is compelled to choose between compliance, at a heavy cost, or non-compliance with obvious risks of severe, though non-recurring and non-cumulative, penalties; [17] and that to stand by sub-

[14] *Ex parte Young*, 209 U. S. 123, 165; *Terrace* v. *Thompson*, 263 U. S. 197, 215, 216; *Packard* v. *Banton*, 264 U. S. 140, 143.

[15] §§ 9 and 10 of the Act of September 26, 1914, c. 311, 38 Stat. 722, 15 U. S. C. §§ 49, 50.

[16] Cf. *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699.

[17] Ky. Stat. Ann. § 3952–61 provides: "*Penalties.*—Every officer, agent or employee of any utility as enumerated in section 1 hereof, or other person who shall willfully violate any provisions of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand ($1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal

jects appellant to the further risk that the Commission will fix its rates on the Commission's evidence alone.[18] We may assume, without deciding, that the risk of these penalties would be sufficiently great to require the interposition of a court of equity to protect appellant against a regulatory order.

Compliance with this order, however, subjects appellant only to an expense in preparing for and carrying out an investigation. It is not suggested that the expense is disproportionate to the business of appellant, valued by the District Court as in excess of $1,500,000, and involving sales of about one billion cubic feet per annum, at a price of $350,000. No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk for non-compliance does

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such utility shall forfeit and pay into the treasury a sum not less than twenty-five ($25.00) dollars, nor more than one thousand ($1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility." There is also provision for proceedings by mandamus or injunction to compel obedience to the orders of the Commission. Ky. Stat. Ann. § 3952–13.

The minority opinion below construed this as follows: "When the violator is an individual, the penalties for failure to comply with the orders of the Public Service Commission are not more than $1,000, or confinement in jail for not more than six months, or both, and if a corporation, not less than $25 or more than $1,000 for each violation, the enforcement thereof to be by the Franklin circuit court of the commonwealth of Kentucky." 21 F. Supp. 254, at 259.

The appellant argues in this Court that failure to produce the evidence may subject it to a fine and its officers and agents to criminal penalties. Neither the majority below nor the Commission in this Court expresses a contrary view.

[18] Ky. Stat. Ann. § 3952–14.

not justify the injunction. It is not the sort of irreparable injury against which equity protects.[19]

The weight to be given complaints of irrecoverable and irreparable cost and damage in proceedings to enjoin hearings, initiated by a federal governmental agency in a matter alleged by complainants to be beyond the agency's powers, was considered in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. In an effort to enjoin hearings by the National Labor Relations Board, the Corporation alleged (see 303 U. S. at 47):

"that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations."

Further allegations pointed out similar substantial damages in preceding investigations. See Note 4 *idem.* While other grounds were factors in our conclusion to reverse the decree for an injunction, we said (p. 51):

"Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

It may be suggested that in the *Bethlehem Shipbuilding* case the employer had not presented to the Board its contention of constitutional immunity, and that proof of that immunity would have constituted no greater injury if presented to the Board than the courts, whereas here the appellant has already been overruled by the Commission on the question of appellant's constitutional immunity, and so would be subject to greater expense by presenting further evidence on another matter before the

[19] Cf. *Lawrence* v. *St. Louis-S. F. Ry. Co.*, 274 U. S. 588, 592.

Commission than by proceeding in an equity court and there contesting the Commission's jurisdiction. This was the argument presented to the Court, but not discussed, in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 85–86. The situation is still controlled by the abiding and fundamental principle of this aspect of the *Bethlehem Shipbuilding* case, that the expense and annoyance of litigation is "part of the social burden of living under government." [20] The authority in other courts is in accord.[21]

Fifth. Our conclusion that this is not a threatened injury justifying intervention is strengthened by a balancing of conveniences. By the process of injunction the federal courts are asked to stop at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that Commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the

[20] *Bradley Lumber Co.* v. *Labor Board,* 84 F. (2d) 97, 100 (C. C. A. 5).

Whether expense, in this instance, may be avoided by a challenge of the interlocutory orders of the Commission on the plea of appellant to the jurisdiction (see Ky. Stat. Ann. § 3952–44), is not within our province to decide.

[21] The suggestion that an administrative agency be enjoined from further, and expensive, proceedings after its allegedly erroneous determination of jurisdiction was considered and rejected in *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 48–49 (C. C. A. 8); *Pittsburgh & W. Va. Ry. Co.* v. *Interstate Commerce Comm'n,* 52 App. D. C. 40; 280 Fed. 1014, 1015–6; *Paramino Lumber Co.* v. *Marshall,* 18 F. Supp. 645, 647 (D. Wash.). Compare *State ex rel. Carrau* v. *Superior Court,* 30 Wash. 700; 71 P. 648; *Edward Hines Yellow Pine Trustees* v. *Knox,* 144 Miss. 560, 572–573; 108 So. 907.

state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant.[22] "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state." [23] The Kentucky statute in question contains detailed provisions for hearings and judicial review.[24] These include notice, procedural rules before the Commission, right to counsel, production of evidence, service of orders, rehearing, process for parties and witnesses, depositions, record of proceedings, review of orders by court and appeal to the state court of last resort. The compulsory and punitive powers of the Commission are exercised through judicial process. When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention.

Affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE STONE concurs, except that he expresses no opinion on the applicability of the Johnson Act.

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

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[22] *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *Matthews* v. *Rodgers*, 284 U. S. 521, 525; cf. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338.

[23] *Hawks* v. *Hamill*, 288 U. S. 52, 61.

[24] Ky. Stat. Ann. §§ 3952–33 to –51 inclusive.

Syllabus.

LONE STAR GAS CO. *v.* TEXAS ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 313. Argued March 28, 1938.—Decided May 16, 1938.

1. A special issue submitted to a jury as to whether a gas rate fixed by a Texas commission was "unreasonable and unjust" to the defendant gas company,—*held* tantamount to the issue of confiscation, in view of instructions given the jury on the meaning of "fair return" and "unreasonable and unjust." Cf. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 141. P. 231.
2. Under the Texas law, the Court of Civil Appeals is without authority to substitute findings made by itself for the determinations of a jury in a rate case. P. 231.
3. A Texas corporation produced and purchased gas in Texas and Oklahoma which it piped and disposed of to distributing companies, closely affiliated with itself through stock ownership. The distributors sold it to consumers in Texas cities. Most of it was procured and transported entirely in Texas; but some, moving from Texas, was piped for a distance in Oklahoma and back into Texas, while a lesser proportion was procured in Oklahoma and piped into Texas. This last portion, after reaching Texas, was run through extraction plants, leaving the residue of it changed in composition and thermic value; much of it was stored there; and, in passing through the pipeline system, it was commingled with the Texas gas and divided and redivided until tracing or identification by volume at any "city gate" delivery was made impossible; at various points before delivery its pressure was reduced and the gas expanded. The company also sold gas in Oklahoma. A Texas commission having before it proceedings involving the reasonableness of the rates charged by the distributors to Texas consumers, found it necessary to determine what would be a reasonable charge for the gas delivered to the distributors by the pipeline company at the "city gates," and in so doing made an order fixing the charge based on all of the property and operations of the pipeline company considered as an integrated whole. *Held:*

   (1) That the order was not invalid under the commerce clause.

   (a) It did not attempt to regulate the interstate transportation. P. 236.

(b) It could not be regarded in the circumstances as regulating sales and deliveries in interstate commerce. *Id.*

(c) The distributors and the pipeline company were but arms of the same organization doing an intrastate business in Texas, and the commission was entitled to ascertain and determine what was a reasonable charge for the gas supplied through this organization to consumers within the State. P. 237.

(d) The fact that one of the pipe lines cut across a corner of another State did not make it any the less a part of a system serving Texas gas to communities in Texas; and the commission, in taking account of this line as part of the property on which the intrastate pipeline rate should be based, was not regulating, or imposing any burden upon, interstate commerce or conflicting with any federal regulation. P. 238.

(e) The manner in which the gas purchased in and piped from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in the pipeline company's intrastate business, and the commission was entitled to consider it in fixing the rate. P. 238.

(2) This was not a case where the segregation of intrastate and interstate properties and businesses was essential in order to confine the exercise of state power to its own province. Cf. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 148, 149. P. 241.

(3) The commission having considered all the pipeline company's properties and operations as an integrated system in fixing the Texas rate, the company was entitled to introduce evidence to overcome the commission's findings, on the same basis, in an effort to prove the rate confiscatory; and the company having succeeded in this and won a judgment holding the rate confiscatory, it was error for the appellate court to reverse the judgment and uphold the rate because the company had failed to make a proper segregation of interstate and intrastate properties and business. P. 240.

86 S. W. 2d 484, 506, reversed.

APPEAL from a judgment of the Court of Civil Appeals of Texas which sustained a rate on gas, fixed by the Railroad Commission, therein reversing a judgment to the contrary, adjudging the rate confiscatory, in an action brought by the Commission to enforce it.

Messrs. Charles L. Black and *Marshall Newcomb,* with whom *Messrs. Roy C. Coffee, Ogden K. Shannon,* and *Ben H. Powell* were on the brief, for appellant.

Messrs. Alfred M. Scott, Assistant Attorney General of Texas, and *Edward H. Lange,* with whom *Mr. William McCraw,* Attorney General of Texas, was on the brief, for appellees.

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

The Railroad Commission of Texas brought this action, under Article 6059 of the Revised Civil Statutes of Texas, to enforce the Commission's order of September 13, 1933, prescribing the rate for domestic gas supplied by appellant, Lone Star Gas Company, to distributing companies in Texas. The rate was fixed at not to exceed 32 cents per thousand cubic feet instead of the existing charge of 40 cents. The District Court of Travis County, upon the verdict of a jury finding the prescribed rate to be unreasonable, denied relief and enjoined the Commission and the state officials from enforcing the Commission's order. The Court of Civil Appeals reversed the judgment and held the order to be valid. 86 S. W. (2d) 484. Rehearing was denied. 86 S. W. (2d) 506. The Supreme Court of the State refused writ of error and the case comes here on appeal.

Appellant, a Texas Corporation, operates about 4,000 miles of pipe lines located in Texas and Oklahoma through which it transports natural gas to the "city gates" of about 300 cities and towns in those States and sells and delivers the gas in wholesale quantities to distributing companies. The latter companies, with two exceptions, are affiliated with appellant, being subsidiaries of the same parent corporation. One of appellant's pipe lines extends from a gas field in Wheeler County, Texas, a part

of the Texas Panhandle field, crosses the southwestern corner of Oklahoma, is tapped for gas delivered at Hollis, Oklahoma, and returning into Texas runs generally in a southeasterly direction to various Texas points. At Oklaunion, Texas, the line is tapped by a branch line which extends northward into Oklahoma and supplies certain cities in that State. At Petrolia, Texas, the line is joined by lines coming from Oklahoma.

The Commission dealt solely with the rate for the gas delivered in Texas. This consisted (1) of gas produced or purchased in Texas and transported and delivered entirely within that State, being upwards of 70 per cent. of the total; (2) that produced or purchased in Oklahoma and transported through appellant's lines into Texas which, on appellant's calculation, amounted at the average of the five-year period 1929–1933 to about 11 per cent. of the total; and (3) that produced or purchased in the Panhandle field in Wheeler County, Texas, amounting on the same computation to about 17 per cent. of the total.

The Commission gave a full hearing in which appellant participated. The Commission treated appellant's properties as an integrated system, and in that way "considered the Oklahoma properties and operations and the effect thereof on the revenues and expenditures within Texas," fixing the rate "for application within the jurisdiction of Texas." Appellant made no objection to that course. The Commission determined the rate base as of December 31, 1931, at $46,246,617.53, being $4,674,285.91 for production properties and $41,572,331.62 for transmission properties. The Commission considered appellant's revenues and expenses for a six-year period, 1927 to 1932, and made the rate on the basis of six per cent. as a minimum fair rate of return.

Appellant brought suit in the federal court, attacking the rate on constitutional grounds, but that court stayed its proceedings when the present action was brought by

the Commission. In this action appellant first submitted pleas to the jurisdiction of the state court, and pleas in abatement, which were overruled. In its answer appellant attacked the rate order upon the grounds (1) that transportation and sales to local distributing companies through high pressure lines "of gas produced in Wheeler County, Texas, and transported into and through Oklahoma and back into Texas without interruption" constituted interstate commerce, and that the order violated the commerce clause of the Federal Constitution; and that the same was true of the gas produced or purchased by appellant in Oklahoma and transported in high pressure lines to Texas for sale and delivery there; and (2) that the prescribed rate was confiscatory and repugnant to the due process clause of the Fourteenth Amendment.

The trial on the merits, before a jury, was begun on June 11, 1934, and was entirely *de novo*. The State introduced in evidence the Commission's order (to which appellant unsuccessfully objected as being void in its entirety because applicable to its interstate business), the stay order granted by the federal court, and a stipulation that the prescribed rate had not been put into effect. The record of evidence before the Commission was offered but was not received. On this formal proof the State rested. Appellant moved for a directed verdict which was denied and appellant then went forward with its evidence. The report and findings of the Commission upon which the order was based were introduced. In rebuttal of the Commission's findings, appellant submitted an appraisal of its properties as an integrated operating system as of January 1, 1933. That appraisal was voluminous, showing $73,983,405.57 as the cost of reproduction new. Evidence was offered as to the amount to be deducted for accrued depreciation and on that basis the fair value was claimed to be $69,738,021.16. The appraisal was later brought down to May 1, 1934, showing an increase in ma-

terial and construction costs between January 1, 1933, and May 1, 1934, of $1,579,381.72. The book costs of the properties were also introduced, ranging from $47,776,749.63, on December 31, 1931, to $49,858,751.23 as of April 30, 1934. Appellant claimed that the books understated the actual costs. There was evidence with respect to the annual accruals to provide for depreciation, depletion and amortization. The operating expenses and revenues were shown for the years 1931, 1932 and 1933, and for the twelve months ending April 30, 1934. In this evidence there was no segregation of appellant's properties or operations as between Texas and Oklahoma or between intrastate and interstate business, appellant insisting that it was entitled to attack the Commission's order upon the same inclusive basis which the Commission had used.

The State insisted that if appellant wished to maintain as a defense that the order was invalid because it sought to regulate operations which were exempt from state control, appellant should make a segregation, first as between its admittedly intrastate operations and those claimed to be interstate, and second, as between Texas and Oklahoma properties and operations. After the voluminous evidence above mentioned had been taken, appellant, still contending that such an issue was not properly raised as the action under the Texas statute was in the nature of an appeal from the Commission's order which was indivisible, presented evidence based upon "a segregation of its 'integrated operating system' as between interstate and intrastate commerce." Appellant states that this segregation was based "upon the actual use of its properties in the two classes of commerce." The fair value of its intrastate property was thus claimed to be $38,350,882.32 and the net amount available at the Commission's rate for return on intrastate deliveries of gas as less than four per cent. In this segregation appellant's line used in trans-

porting gas from Wheeler County, Texas, in the Panhandle field, through Oklahoma and thence into Texas, was allocated to interstate operations.

In rebuttal, the State offered evidence based upon a different method of segregating appellant's properties and operations. This method proceeded upon the basis of geographical location, that is, there were allocated to Oklahoma and Texas respectively the properties physically located in each State and the revenues and expenses were divided on the same geographical basis. In that way the properties allocated to Texas were valued at $40,256,862.39, and the net revenue which would be available at the Commission's rate was estimated to be, for the last two years of the accounting period, nearly seven per cent. Appellant complains of this appraisal upon the ground that it excluded the production properties located in Texas which appellant claimed had an actual cost of $5,191,539.42 as of March 31, 1934, and that the State substituted therefor an arbitrary and inadequate annual allowance on the basis of the field price for the volume of gas produced.

When the evidence was closed, each party moved that a verdict be directed in its favor and both motions were denied. The court gave to the jury a series of instructions embracing definitions of the terms of "fair return," "fair value," "used and useful"—as applying to the property actually used by appellant in the production, transportation, sale and delivery of natural gas to its customers and also to the property acquired in good faith and held by appellant for use in the reasonably near future in order to enable it to furnish adequate and uninterrupted service—"operating expenses," "annual depreciation," "reproduction cost new," and "going value." The jury were instructed that the burden of proof was upon the defendant (appellant) "to show by clear and satisfactory evidence" that the rate fixed by the Commission's order was "un-

reasonable and unjust as to it," and the court explained that by that phrase was meant that the rate prescribed in the Commission's order "was so low as to have not provided for a fair return upon the fair value of defendant's property used and useful in supplying the service furnished by said defendant." With these instructions the court submitted to the jury a single special issue as follows:

"Do you find from the evidence in this case that, as applied to points in Texas, the order of the Railroad Commission of Texas, bearing date of September 13, 1933, providing for a rate of not exceeding 32 cents per thousand cubic feet of gas sold to the distributing companies at the gates of points served, is unreasonable and unjust as to the defendant, Lone Star Gas Company? Answer this question 'yes' or 'no' ".

The jury answered the question "yes." Judgment was entered accordingly enjoining the enforcement of the Commission's rate.

In view of the definition of "fair return" and "unreasonable and unjust" in the court's instructions, we are of the opinion that the issue for the jury to determine was in substance whether the rate was confiscatory. We so regarded a like submission in the case of *United Gas Public Service Co.* v. *Texas,* 303 U. S. 123. There the jury's verdict sustained the rate but that fact does not alter the nature of the issue submitted.

Under the state practice the issues of fact were determined in the trial court and on the appeal the Court of Civil Appeals had no authority to make findings of fact. "Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court." *Post* v. *State,* 106 Tex. 500, 501; 171 S. W. 707; *United Gas Public Service Co.* v. *Texas, supra.*

The Court of Civil Appeals held that the burden was heavily upon the Company (appellant here) to show by clear and satisfactory evidence that the 32-cent rate would not afford a reasonable rate of return on the property used in the Texas public service, that the Company did not meet "this burden and quantum of proof," and that the trial court erred in overruling the State's motions for an instructed verdict. The court viewed the appeal as presenting two main divisions, (1) certain constitutional objections to the rate order, and (2) the legal sufficiency of the evidence to show that the order was confiscatory or unreasonable and unjust. Under the first division, the court considered that there were three constitutional objections, (a) interference with interstate commerce, (b) interference with the right to contract, and (c) confiscation of property. The court sustained the jurisdiction of the Commission to deal with the operations of appellant and its corporate affiliates in Texas as "a single and integrated business enterprise." On the first two issues above-mentioned the court ruled in favor of the State, and on the confiscation issue the court considered that the question whether the prescribed rate would yield a fair return was one of fact and passed to the consideration of the legal sufficiency of the evidence.

Holding that the rate fixed by the Commission was presumed to be valid, and referring to the authorities as to the scope of judicial review, the court set forth the five primary factors essential to the correct determination of the issue, viz., the present fair value of the property of the Company used in the public service, the reasonable annual allowance for depreciation, the reasonably necessary operating expenses, the reasonable operating revenues, and the reasonable rate of return.

But in dealing with the evidence upon these questions, the court applied a different criterion from that adopted by the Commission. The court held that it was necessary

to segregate the property used in Texas, as well as that used conjointly in Texas and Oklahoma. The court spoke definitely upon this point, saying—

"Since appellee [appellant here] was engaged in the integrated business of producing, purchasing, transporting and selling natural gas to the distributing companies at the city gates of some 300 cities and towns in Texas and Oklahoma, it became necessary to allocate or segregate the property used in Texas as well as that used conjointly in both states, in order to determine the fair value of the property used in the Texas public service, the annual depreciation thereof and the Texas operating expenses and revenue."

The court then set forth the different methods of segregation which the parties had adopted. The court said that the State's method allocated "to Texas operations, or to intrastate commerce the value of all property located within the physical boundary of Texas." The "short section" of pipe line "from Texas Panhandle field across the corner of Oklahoma and back into Texas was also allocated to Texas operations." "Gas sales adjustment" was made by which "Texas or intrastate operations" were charged with the net amount of Oklahoma produced gas for the six-year period 1929 to 1934. The court observed that "no charge against Oklahoma or interstate operations was made for the use of the transmission lines and for equipment within Texas; the effect of which was to give free transportation in Texas of all Oklahoma produced gas." Texas and Oklahoma expenses and revenues "were allocated in general accord with the segregation of the physical properties." The court stated that under that method the fair value "of the property undepreciated used in Texas public service was $40,256,862.39" according to the calculations of the State's experts; and that after deducting operating expenses and annual depreciation "there remained for the last two years of the accounting period,

being the two lowest revenue years," Texas net revenue "which would yield a return of 6.74% and 6.76% respectively."

The court then referred to the method of segregation used by the Company by which all the gas produced or purchased in the Texas Panhandle field and transported into Texas, and all Oklahoma produced gas, were allocated to interstate commerce; that the allocation was made by a determination of the specific gravity of the Oklahoma and Texas Panhandle gas on the one hand and the West Texas gas with which it was commingled in pipe lines on the other; that the Company had allocated operating expenses and revenue between the two States upon substantially the same basis; and that in this manner the fair value of the property used in the Texas public service on the basis of reproduction cost new, less depreciation, was said to be $38,350,882.32. The court held that gas from the Texas Panhandle field did not move in interstate commerce and hence that the testimony of the Company's experts was based upon an erroneous assumption and "proved nothing material to this case"; that the Company had offered no other proof upon a correct segregation or allocation of the property, and that the trial court had erred in refusing the State's motion for an instructed verdict and for a judgment declaring the rate order "to be valid in every respect."

The court's specific ruling upon this point is shown by the following statement of its conclusion:

"The burden was upon appellee to show by clear and satisfactory evidence a proper segregation of interstate and intrastate properties and business, and to show the value of the property employed in intrastate business or commerce and the compensation it would receive under the rate complained of upon such valuation. Having failed to make a proper segregation of interstate and intrastate properties, appellee did not adduce the quantum

and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust."

The court adverted to the effect of the difference in theory in the two methods of segregation "with respect to the fair value of the property used in Texas public service, the annual depreciation thereof, and particularly as to the operating expenses and revenues." The court characterized the annual depreciation allowances as speculative and plainly excessive. The court said that with respect to operating expenses, except as to a few controverted items, and with respect to revenues, there was no substantial difference in the testimony "as to totals of both Texas and Oklahoma for the years of the accounting period" but that the same controversy arose "as to a proper segregation of such expenses and revenues to each State"; and since, as already pointed out, the Company had "failed to make proper segregation of the expenses and revenues, it failed to prove its case."

The court then criticised certain items of operating expenses as contrary to the actual experiences of the Company or so large as to be excessive upon their face, referring in particular to the items of "federal taxes," management fees charged by the holding corporation, new business expenses, canceled and surrendered leases, regulatory commission and general expenses, and going value. The court also took the view that no reason existed why a six per cent. rate of return should be declared confiscatory.

That the judgment of reversal was rested upon the proposition that there was a failure of proof on the issue of confiscation by reason of the fact that the Company had failed to make a proper segregation of its interstate and intrastate properties and operations is fully confirmed by the further opinion of the court in denying the Company's motion for a rehearing, when the court said:

"We held that as a matter of law appellee failed to establish by clear and satisfactory evidence the ultimate

fact issue, to wit: Whether the rate fixed by the Commission was so low as not to afford a reasonable return on the fair value of the property used in the Texas public service. Appellee was afforded a seven months hearing before the Commission and a three months trial on appeal to the court. It made no segregation as between its Texas and Oklahoma properties and operations; and did not prove the fair value of the property used in the Texas public service. The question of the value of such property determines the reasonableness of the rate and probably, in the ultimate analysis, adequacy of service and principles of financing."

The Court added that the valuation of such public service property was in the main a matter of estimate or opinion; that a scientific standard of absolute value was unattainable; and that because of this uncertainty, except where the evidence clearly shows gross over or under valuation, or "mistake, inequality or fraud" in the appraisal, the finding of value by an administrative commission is generally given finality and that this especially was the rule in the absence of an actual test under the new rate.

First. We agree with the state court that the Commission's order did not violate the constitutional rights of appellant under the commerce clause.

The Commission did not attempt to regulate the interstate transportation of gas. Compare *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617; *Western Union Telegraph Co.* v. *Speight,* 254 U. S. 17; *Missouri Pacific R. Co.* v. *Stroud,* 267 U. S. 404. Nor, in view of the circumstances in the instant case, can it be said that the Commission was undertaking to regulate sales and deliveries of gas in interstate commerce. Compare *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298; *Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U. S. 550; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465; *State Tax Commission* v. *Interstate Natural*

Gas Co., 284 U. S. 41; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561. The distributing companies in Texas, with the exception of those at Waxahachie and Gainesville (the amount of deliveries there being negligible in comparison with appellant's total gas business), are appellant's affiliates. The Lone Star Gas Corporation, organized in Delaware, holds more than 99 per cent. of the capital stock of appellant and owns or controls a like proportion of the capital stock of the distributing companies. Thus, the latter companies and appellant are but arms of the same organization doing an intrastate business in Texas and the Commission was entitled to ascertain and determine what was a reasonable charge for the gas supplied through this organization to consumers within the State. *Western Distributing Co.* v. *Public Service Commission*, 285 U. S. 119, 124; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 295; *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 239. It appears that there were pending before the Commission proceedings involving the reasonableness of the rates charged by the distributing companies to consumers in many communities in Texas, and in relation to those proceedings the Commission found it necessary to determine what would be a reasonable charge for the gas delivered by appellant to the distributing companies at the "city gates." It was obviously to the convenience of both the Commission and appellant that this essential factor should be ascertained in a single proceeding and the Commission's investigation, which led to the order now in question, was undertaken to that end. We think that appellant's sales and deliveries of gas in Texas to the distributing companies must be regarded as an essential part of the intrastate business in the conduct of which the appellant and the distributing companies were virtual departments of the same enterprise.

Appellant's pipe line from the Texas Panhandle field in Wheeler County led from production properties in Texas to distributing points in the same State. The fact that the line cut across a corner of Oklahoma did not make it any the less a part of the system serving Texas gas to communities in Texas. In ascertaining what would be a reasonable rate of charge for this Texas gas supplied to Texas consumers, it was not only fair but manifestly necessary to take into account the value of the production properties in Texas from which the gas was taken and also the value of the transmission line by which the gas was brought to the city gates of the Texas communities. It is futile to contend that in making its calculations on that basis, the Commission was regulating interstate transportation or imposing any burden upon interstate commerce. The *Hanley, Speight* and *Stroud* cases, *supra,* upon which appellant relies, are not in point. In seeking to assure a just determination of a reasonable charge for the sales and deliveries in the intrastate business in Texas, the State was protecting its local interests and its action was not in conflict with any federal regulation. *Minnesota Rate Cases,* 230 U. S. 352, 402.

We think that the value of the pipe line from the Texas Panhandle field was properly included by the Commission in the rate base.

With respect to the gas produced or purchased by appellant in Oklahoma and transported by its pipe lines to Texas, the state court observed that the Oklahoma gas was run through extraction plants in Texas, leaving the residue gas changed in its composition and with its heating value lowered; that large amounts of the Oklahoma gas were run through and stored in wells in Texas; that, passing into appellant's pipe line system, that gas was commingled with Texas gas and divided and redivided until it was impossible to trace or identify it by

volume at any city gate of delivery; that at various points before delivery its pressure was reduced and the gas allowed to expand; and that the amount of Oklahoma gas as a whole was negligible in comparison with the amount of the Texas gas with which it was mixed. Appellant refers to the testimony of its witness that the composition of the gas, after certain heavy hydro-carbons were removed at the gasoline plants, remained practically the same, that its forward movement was not stopped, and that not all of the gas coming from Oklahoma was stored in Texas. Appellant also contends that the state court erred in saying that only about four per cent. of its total gas came from Oklahoma, insisting that the correct figure was about eleven per cent. The discrepancy is apparently explained by the fact that the state court's figure was taken from the results of the year 1933 while that of the appellant is for the five years of its accounting period. It would seem, however, that the amount of the gas transported from Oklahoma into Texas was at a diminishing rate. Aside from that, we think that the proved manner in which the gas from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in appellant's intrastate business and that the Commission was entitled so to consider it in fixing its rate.

It is in this light that the inclusion by the Commission in its calculations of appellant's producing properties in Oklahoma and its transmission lines to Texas must be considered. The purpose of these calculations was to give proper credit to appellant for its investment and operating expenses in determining a rate for the gas sold and delivered in Texas. The Commission did not attempt to fix a rate for gas supplied to Oklahoma communities and did not impinge upon the jurisdiction of Oklahoma. There is no ground for concluding that the Commission's

method of calculation either created any burden upon interstate commerce or operated to appellant's injury in relation to its intrastate business in Texas. Not only is the contrary a fair inference from the fact that appellant raised no objection to this method before the Commission, but the State points to the evidence which appears to show that the Oklahoma operations were more expensive than those in Texas and that the Commission's calculations actually produced a result more favorable to appellant than one which would have followed any segregation. Appellant does not successfully meet this contention.

Second. Concluding that appellant had no tenable objection to the method adopted by the Commission in treating appellant's property as an integrated operating system, and making its findings as to value, expenses, and revenues accordingly, for the purpose of determining the fair rate for the gas sold and delivered in Texas, we come to the issue of confiscation.

The Commission's order was presumptively valid, as the state court held, but it was open to attack in this action under the state statute. Appellant was entitled to present evidence to rebut the Commission's findings of value, operating expenses, revenues and return, upon which the order rested. Appellant presented much testimony and elaborate statistical data for that purpose, treating its property and business as the Commission had treated them. Appellant claimed that this evidence showed a far higher value for its properties than the Commission had allowed and that the rate imposed was confiscatory. The trial court submitted that evidence to the jury, under a proper instruction as to the burden of proof resting upon appellant, and the jury found in appellant's favor.

The Court of Civil Appeals reversed the judgment upon a distinct ground. That was that appellant had not sus-

tained its burden of proof because it had failed to make "a proper segregation of interstate and intrastate properties and business." Thus, the necessity for that segregation was made the criterion. That is clearly shown both from the court's main opinion and its opinion upon rehearing from which we have quoted. "Having failed to make a proper segregation of interstate and intrastate properties," said the court, "appellee [appellant here] did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust."

We think that this ruling as to the necessity of segregation, and that the sufficiency of appellant's evidence should be determined by that criterion, was erroneous. This was not a case where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province. Compare *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 148, 149. Here, as we have seen, the Commission in its method of dealing with the property and business of appellant as an integrated operating system did not transcend the limits of the state's jurisdiction or apply an improper criterion in its determinations. But if in the circumstances shown the Commission was entitled to make its findings with respect to appellant's property and business upon the basis it adopted in order to fix a fair rate for the sales and deliveries in Texas, appellant was entitled to assail those findings upon the same basis. If the findings of the Commission as to value and other basic elements were to be taken as presumptively correct and appellant could not succeed save by overcoming those determinations by clear and convincing proof, appellant could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the sufficiency of its evidence ascertained by the criterion which the Commission had prop-

erly used in the same manner in reaching its conclusion as to the Texas rate. Neither the fact that appellant, because of the insistence of the State that the property and business should be segregated, finally introduced evidence for that purpose, nor the inadequacy of its method of segregation, could detract from the force of the proof it had already submitted in direct rebuttal of the Commission's findings. The effort at segregation came after voluminous testimony had been taken which fully presented appellant's case with respect to the value of its property and the result of its operations as an integrated system and the bearing of this evidence upon the contested rate. This proof could not be ignored because of a futile attempt, in response to the State's pressure, to find an alternative ground to support the attack upon the Commission's order. The first and primary ground remained and the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury.

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

Reversed.

MR. JUSTICE BLACK dissents.

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

Syllabus.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. *v.* DONNELLY GARMENT CO. ET AL.

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

No. 801. Argued April 27, 1938.—Decided May 16, 1938.

1. A suit by an employer and a union of his employees to enjoin another labor organization from picketing, boycotting and other interferences with his business, upon the ground that the acts complained of are in furtherance of a conspiracy in violation of the Sherman Anti-Trust and Clayton Acts, is triable before a single district judge, and a decree of interlocutory injunction granted therein is appealable to the Circuit Court of Appeals and not directly to this Court. P. 247.
2. The provision of § 3 of the Act of Aug. 24, 1937, for a determination by three judges and direct appeal to this Court, does not apply where an Act of Congress is merely "drawn in question"; but only where there is an application to restrain enforcement of an Act of Congress. P. 248.

   In the present case, the contention of plaintiffs that the Norris-LaGuardia Act (limiting jurisdiction to issue injunctions in labor disputes) was not applicable to the conduct of defendants and would be invalid if otherwise interpreted, was but an anticipation of a defense and did not constitute an application for injunction in any proper sense of the term as used in § 3.
3. This Court in cases of decrees purporting to have been entered under § 3 of the Act of Aug. 24, 1937, has jurisdiction to determine whether the court below has acted within the authority conferred by the statute and to make such corrective order as may be appropriate to the enforcement of the limitations which the statute imposes. Where appeal has erroneously been taken to this Court and the time for appeal to the Circuit Court of Appeals has expired, the decree will be vacated and the cause remanded to the District Court for further proceedings to be taken independently of that section. P. 251.

Decree in 21 F. Supp. 807 vacated.

APPEAL from a decree of the District Court, three judges sitting, denying a motion to dismiss, and granting an interlocutory injunction. The suit, brought by the Donnelly Garment Company, in which the Donnelly Garment Workers' Union joined as plaintiff, was to enjoin the International Union from perpetrating alleged violations of the Sherman and Clayton Acts. For opinions below, see 21 F. Supp. 807, 814, 817; 20 *id.* 767.

Mr. Frank P. Walsh, with whom *Messrs. Jerome Walsh* and *Roy W. Rucker* were on the brief, for appellants.

Messrs. James A. Reed, Robert J. Ingraham, and *William S. Hogset* were on a brief for appellees Donnelly Garment Co. and Donnelly Garment Sales Co.

Messrs. Frank E. Tyler and *Alfred N. Gossett* were on a brief for Donnelly Garment Workers' Union.

PER CURIAM.

This is a direct appeal to this Court from a decree of the District Court, three judges sitting, denying a motion to dismiss the complaint and granting an interlocutory injunction. The question arises whether such an appeal lies.

Appellants rely upon the Act of August 24, 1937, c. 754, 50 Stat. 751. Section 3 of that Act, the full text of which is quoted in the margin,[1] provides that "no interlocutory

[1] The first three sections of the Act of August 24, 1937, are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall

or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Consti-

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certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act.

"Sec. 2. In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

"Sec. 3. No interlocutory or permanent injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of

tution of the United States" shall be granted by a district court "unless the application for the same" shall be heard and determined by three judges. When there is an application for such an injunction, three judges are to be con-

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the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section,

vened and the hearing of the application is to be expedited. An appeal may be taken directly to this Court from a decree "granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

We are of the opinion that the instant case does not fall within these provisions. This is not a suit to restrain the enforcement of an Act of Congress and no application was made for such an injunction.

This suit was brought on July 5, 1937, by the appellees, Donnelly Garment Company and Donnelly Garment Sales Company, to obtain an injunction restraining the appellants, International Ladies' Garment Workers' Union, its officers and agents, from committing certain acts alleged to be in furtherance of a conspiracy in violation of the Sherman Anti-Trust Act and the Clayton Act (15 U. S. C., c. 1). The conduct sought to be restrained consisted of picketing, boycotting and certain interferences with plaintiffs' business, their employees and customers. Appellee, Donnelly Garment Workers' Union and its representatives were permitted to intervene and sought similar relief. Their petition in intervention alleged that the defendants [appellants] had not been and were not engaged in a labor dispute within the meaning of the Act of Congress of March 23, 1932, c. 90, 47 Stat. 70, known as the Norris-LaGuardia Act, nor within the meaning of the Act of Congress of July 5, 1935, c. 372, 49 Stat. 449, known as the National Labor Relations Act, and that no labor dispute was involved in this litigation. They

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the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

further stated that "if the actions and course of conduct of the defendants" were construed to be a "labor dispute" within the meaning of those statutes, the latter would be unconstitutional, as so interpreted, because in contravention of the Fifth Amendment of the Constitution of the United States and of Article II, § 30, of the Constitution of the State of Missouri. By their amended bill of complaint, appellees, the original plaintiffs, made similar allegations as to the inapplicability of the Norris-LaGuardia Act and its invalidity if held applicable.

On the presentation of the bill, the District Judge granted a temporary restraining order enjoining the defendants' conduct of which complaint was made. A motion to dissolve the restraining order and to dismiss the complaint was denied on August 13, 1937. 20 F. Supp. 767. After the passage of the Act of August 24, 1937, the District Judge certified to the Attorney General that the constitutionality of the Norris-LaGuardia Act and of the National Labor Relations Act had been "drawn in question." On the request of the District Judge, a court of three judges was constituted. The motion of the defendants to dismiss the bill and to vacate the temporary restraining order and the motion of the plaintiffs for an interlocutory injunction restraining the defendants from committing the alleged unlawful acts in pursuance of a conspiracy in violation of the Anti-Trust Acts, were then heard. The motion to dismiss was denied and the interlocutory injunction was granted as prayed. 21 F. Supp. 807.

There was no application before the District Court for an injunction restraining the enforcement of any Act of Congress. In considering the application for an injunction restraining defendants from picketing, boycotting, etc., the District Court found that the ground of defense was the defendants' contention that the Norris-LaGuardia Act deprived the District Court of jurisdiction. The

court held that that Act had no application to the controversy and that it was unnecessary to resolve the constitutional question presented as to its validity. *Id.*, pp. 811, 814.

The Act of August 24, 1937, carefully distinguishes between the different situations to which its provisions are addressed. Section 1 applies "whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question" in any court of the United States in any suit or proceeding to which the United States, or its agency, officer or employee as such, is not a party. The fact that such a question is involved must be certified to the Attorney General and the United States must be permitted to intervene with all the rights of a party. To make that provision applicable it is enough that a question as to the constitutionality of an Act of Congress is involved, however it may arise. The question may be raised by any party and the section is not limited to cases where an injunction is sought to restrain the enforcement of the Act. Apart from providing for intervention, and the right of the United States to present evidence and argument, § 1 does not require any change in procedure in the hearing of the cause or in relation to appeal.

Section 2 applies to a suit or proceeding in which the United States, or its agency, officer or employee as such, is a party or in which the United States has intervened and in which "the decision is against the constitutionality of any Act of Congress." In that event, an appeal may be taken directly to this Court. That section applies, however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the Act. That section does not require a court of three judges, and no provision is made for a direct appeal to this Court if the decision is in favor of the constitutionality of the Act.

The provision in § 3 for a determination by three judges and for a direct appeal to this Court is limited to the particular class of cases there described. Section 3 does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. The careful choice of language in the different sections of the Act points clearly to a distinction in categories. Had Congress intended the provision in § 3, for three judges and direct appeal, to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase "drawn in question," as in the first section of the Act. While there are some variations in text, the provision in § 3 has a manifest analogy to that of § 266 of the Judicial Code (28 U. S. C. 380) providing for three judges and a direct appeal to this Court in case of an application for an injunction restraining the enforcement of a state statute by restraining the action of state officers. That provision is hinged on an application for injunction, and not on the mere drawing in question of the constitutionality of a state enactment. Compare *Smith* v. *Wilson,* 273 U. S. 388, 391; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10, 15.

The entire procedure prescribed in § 3 turns on the presentation of an application for an injunction to restrain the enforcement of a federal statute. It is when "such application" is presented to a judge that the participation of two other judges is to be requested. It is "such application" which is not to be heard or determined before at least five days' notice to the Attorney General. The judge to whom "the application is made" may grant a temporary restraining order, and the court "at the time of hearing such application" may continue the temporary stay. And it is the hearing "upon any such application

for an interlocutory or permanent injunction" that is to be given precedence and expedited. Appeal is to be taken directly to this Court where the decree grants or denies "an interlocutory or permanent injunction in such case."

The contention of plaintiffs that the Norris-LaGuardia Act was not applicable to the conduct of defendants and would be invalid if otherwise interpreted was but an anticipation of a defense and did not constitute an application for injunction in any proper sense of the term as used in § 3. The only application for an injunction was one to restrain the defendants from committing acts in pursuance of the alleged conspiracy in violation of the Anti-Trust Acts. The statute did not require a decision by three judges upon that application or authorize a direct appeal to this Court.

But although the merits cannot be reviewed here, this Court, by virtue of its appellate jurisdiction in cases of decrees purporting to be entered under the Act of August 24, 1937, as in cases of decrees purporting to be entered under § 266 of the Judicial Code, necessarily has jurisdiction to determine whether the court below has acted within the authority conferred by the statute and to make such corrective order as may be appropriate to the enforcement of the limitations which the statute imposes. We have said that such a case is analogous to those in which this Court, finding that the court below has acted without jurisdiction, exercises its appellate jurisdiction to correct the improper action. *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 18; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; *Wall* v. *McNee*, 296 U. S. 547; *United States* v. *Corrick*, 298 U. S. 435, 440. As appellants by mistakenly appealing directly to this Court have lost their opportunity to have the decree reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired, our

appropriate action, without passing upon the merits, is to vacate the decree below and to remand the cause to the District Court for further proceedings to be taken independently of § 3 of the Act of August 24, 1937. *Gully* v. *Interstate Natural Gas Co., supra; Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra.*

Judgment vacated.

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

CALIFORNIA WATER SERVICE CO. ET AL. *v.* CITY OF REDDING ET AL.

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

No. 976. Motion to dismiss.—Decided May 16, 1938.

1. A suit before a district court of three judges, convened under § 3, Act of Aug. 24, 1937, to enjoin enforcement of federal statutes on the ground of unconstitutionality, is without jurisdiction, if no substantial federal question is presented; and in the absence of such question the court can not proceed to the determination of local questions but must dismiss the bill. P. 254.
2. Lack of a substantial federal question which thus defeats the jurisdiction of the district court may appear from a decision of this Court in another case rendered after the filing of the bill in the district court and after presentation of a motion for preliminary injunction. P. 255.
3. A water service company sued to enjoin a city from receiving a grant of federal funds under Title II of the National Industrial Recovery Act, and from using proceeds of city bonds, for the purpose of constructing a municipal water plant, claiming that the grant was in violation of the federal Constitution and federal statutes, and the bond issue in violation of the Constitution and statutes of California. *Held,* that in view of this Court's later decision in *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, there was no substantial federal question; and that the question of the bond issue was distinct and local. P. 255.

22 F. Supp. 641, affirmed.

APPEAL from a decree of the District Court of three judges, dismissing a bill for an injunction.

Messrs. Warren Olney, Jr., A. Crawford Greene, Seth W. Richardson, and *Francis Carr* were on a brief for appellants.

Messrs. George Herrington and *W. H. Orrick* were on a brief for appellees.

PER CURIAM.

This suit was brought by appellants, California Water Service Company and Carlo Veglia, to enjoin the City of Redding, California, from receiving a grant of $162,000, allotted by the Federal Administrator of Public Works under Title II of the National Industrial Recovery Act and supplemental legislation,[1] to aid the City in the construction of a municipal water works system; and also to enjoin the City from expending the proceeds of the sale of $200,000 of the City's bonds for the purpose of constructing such a plant. The bill of complaint alleged that the grant of federal funds and the legislation said to authorize it were invalid under the Federal Constitution (Article I, §§ 1, 8 and 9; Article II, §§ 1 and 3; and the Tenth Amendment), and also that the grant was in violation of the federal statutes cited. The suit was brought prior to the decision of this Court in the case of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464. The bond issue of the City was alleged to be invalid under the constitution and statutes of California.

Temporary and permanent injunctions were sought and the District Court, composed of three judges, convened under § 3 of the Act of August 24, 1937 (50 Stat. 751, 752), decided that the bill of complaint stated no cause

[1] Acts of June 6, 1933, c. 90, 48 Stat. 200–210; April 8, 1935, c. 48, 49 Stat. 115, 119; June 29, 1937, c. 401, §§ 201–207, 50 Stat. 352.

of action within the cognizance of the court. The temporary restraining order was dissolved and the complaint was dismissed. The case comes here on appeal. Appellees move to dismiss or affirm.

The District Court held that the federal question sought to be raised was identical with that presented in *Alabama Power Co.* v. *Ickes, supra;* that the asserted distinction that the proposed action of defendants, the Federal Administrator not being a party, was motivated by a desire or purpose to injure or coerce the plaintiff Company, was of no avail, as the City was free to bargain with the plaintiff and to construct a rival system if the plaintiff chose not to sell its plant and the motive actuating the City in the exercise of its rights was immaterial. See *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145. In the absence of a substantial federal question, the court ruled that the charge that the bonds of the City were invalid under the state law presented a purely local issue which the court was not required to consider.

We are of the opinion that these rulings were correct. We have held that § 266 of the Judicial Code does not apply unless there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described. It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable. *Ex parte Buder,* 271 U. S. 461, 467; *Ex parte Poresky,* 290 U. S. 30. We think that a similar rule governs proceedings under § 3 of the Act of August 24, 1937, as to the participation of three judges in passing upon applications for injunctions restraining the en-

forcement of federal statutes upon the ground of constitutional invalidity. Had the decisions in the cases of *Alabama Power Co.* v. *Ickes, supra,* and of *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485, been rendered prior to the filing of the bill of complaint in the instant case, no substantial federal question would have been presented. The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105, 106. And, here, although the bill of complaint had been previously filed, and a motion for an interlocutory injunction presented, it was apparent after our decisions in the cases cited that the federal question was without substance and it became the duty of the District Court to dismiss the bill of complaint upon that ground.

In *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 391, we had occasion to observe that "the three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay"; that "that procedure, designed for a specific class of cases, sharply defined, should not be lightly extended"; and that restrictions placed upon appellate review in this Court "would likewise be measurably impaired were groundless allegations thus to suffice." We concluded that "when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed."

It is also clear that the presentation of a local question in the instant case as to the invalidity of the City's bonds under the state law did not suffice to save jurisdiction. While, if the court had jurisdiction by reason of the presence of a substantial federal question, it could

proceed to pass upon the local issue (*Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 303; *Davis* v. *Wallace,* 257 U. S. 478, 482; *Sterling* v. *Constantin,* 287 U. S. 378, 393, 394; *Railroad Commission* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 391), it was the presence of the federal question which gave the court that authority, and in its absence, through lack of substance, the court was not entitled to go further. In *Norumbega Co.* v. *Bennett,* 290 U. S. 598, the District Court of three judges, considering that a federal constitutional question was involved, passed upon the question of the construction of the state statute and, denying a motion to dismiss for lack of jurisdiction, dismissed the bill of complaint for want of equity. 3 F. Supp. 500, 502. This Court reversed the decree and remanded the cause with directions to dismiss the bill of complaint for the want of jurisdiction because of the absence of a substantial federal question.

We think that the Act of August 24, 1937, did not contemplate that a court of three judges should be convened, or, if convened, should continue to act, merely for the decision of a local question where no substantial federal question is involved. We agree with the District Court that the attempt to blend the contention as to the validity of the bond issue under state law with the question as to the authority to make the federal grant under the federal statutes, so as to give the former the aspect of a federal question, is unavailing. The local question and the federal question are distinct. See *Hurn* v. *Oursler,* 289 U. S. 238, 245, 246.

The court below rightly dismissed the bill of complaint and the motion to affirm its decree is granted.

Affirmed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

FEDERAL TRADE COMMISSION *v.* GOODYEAR TIRE & RUBBER CO.

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

No. 756. Argued April 25, 1938.—Decided May 16, 1938.

1. The amendment, June 16, 1936, of § 2 of the Clayton Act, with respect to permissibility of price discriminations based on quantities sold, was not intended to affect orders of the Federal Trade Commission issued before the effective date of the amendment. P. 258.
2. Abandonment of a price arrangement found illegal and ordered discontinued by the Federal Trade Commission, does not deprive respondent of the right to have the legality of the practice and the validity of the order determined on review by the Circuit Court of Appeals. The controversy does not become moot. P. 260.

92 F. 2d 677, 679, reversed.

CERTIORARI, 303 U. S. 631, to review a judgment setting aside an order of the Federal Trade Commission.

Mr. Hugh B. Cox, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, W. T. Kelley,* and *Pgad B. Morehouse* were on the brief, for petitioner.

Messrs. William B. Cockley and *Grover Higgins* were on a brief for respondent.

PER CURIAM.

In September, 1933, the Federal Trade Commission charged respondent, The Goodyear Tire & Rubber Company, with the violation of § 2 of the Clayton Act (15 U. S. C. 13) in selling tires, tubes, etc. to Sears, Roebuck & Company at discriminatory prices. Respondent, invok-

ing the first proviso in § 2,[1] contended that its contracts with Sears, Roebuck & Company for sales involving lower net prices than those charged to independent dealers were made because of the great difference in the quantities sold. After hearing, the Commission ruled that it did not consider a difference in price to be on account of quantity unless it was based on a difference in cost and was reasonably related to and approximately no more than that difference. In March, 1936, the Commission issued an order requiring respondent to desist from discriminations in prices as described.

Pending the hearing in the Circuit Court of Appeals of respondent's petition for review, the Congress amended § 2 of the Clayton Act. Act of June 19, 1936, c. 592, 49 Stat. 1526. The first proviso was amended to read as follows:

"*Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

Thereupon, respondent informed the Circuit Court of Appeals that in view of this provision respondent had ceased to manufacture tires for Sears, Roebuck & Company under the terms of its existing contract; that, to dispose of the stock on hand, the parties had made a new price arrangement designed to conform to the new law; and that within the year all transactions between re-

[1] That proviso, in the original Act, was as follows:

"*Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodities sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; . . ."

spondent and Sears, Roebuck & Company ceased and obligations were terminated by mutual releases. 92 F. 2d 677, 679.

Considering that there was no controversy between the parties as to the illegal character of respondent's practices under the amended Act, the Circuit Court of Appeals concluded that the case had become moot. In that view the court set aside the order of the Commission and remanded the case "but without direction to the Commission to dismiss the complaint and without prejudice to its filing a supplemental complaint in the original proceeding if under § 2 of the amendatory act this may now be done" as to which the court expressed no opinion. *Id.*, p. 681.

Both the Commission and the respondent contended below, and contend here, that the case has not become moot. While they disagree in their reasoning, they come to the same conclusion upon this point, and both ask that the case be remanded to the Circuit Court of Appeals with directions to determine it upon the merits. We think that their conclusion is correct and that the remand should be made.

Section 11 of the Clayton Act (15 U. S. C. 21) provides that whenever the Commission has reason to believe that any person is violating or has violated the provisions of the Act, and upon hearing so finds, the Commission shall issue an order requiring such person to cease and desist from such violations. In case of failure to obey its order, the Commission may apply to the Circuit Court of Appeals for enforcement. And anyone required to cease and desist from a violation charged may seek review in the Circuit Court of Appeals, praying that the order be set aside. The provisions of the Act of June 19, 1936, show clearly that the orders of the Commission entered before its passage are to remain in effect. Section 2 of that Act provides that nothing therein contained shall "affect

rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act."

Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 309, 310; *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 514–516; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261; *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 F. 853, 859, 860; *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. 2d 673, 686, 687. The Commission, reciting its findings and the conclusion that respondent had violated the Act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined, or the Commission of its right to have its order maintained if validly made.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for a determination of the merits.

Reversed.

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

NEW YORK LIFE INSURANCE CO. *v.* JACKSON ET AL.

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

No. 869. Decided May 16, 1938.

Questions of the construction of an insurance policy are to be decided by the federal courts in accordance with the applicable principles of state law. *Erie Railroad Co.* v. *Tompkins, ante,* p. 64.

Certiorari granted; 94 F. 2d 288, vacated.

PETITION for certiorari to review a judgment enforcing an insurance policy, on a cross bill, in a suit to set it aside.

Messrs. Rudolph J. Kramer, Bruce A. Campbell, and *Louis H. Cooke* were on a brief for petitioner.

Mr. Arthur J. Freund entered an appearance for respondents.

PER CURIAM.

This suit was brought by petitioner, New York Life Insurance Company, to cancel the reinstatement of an insurance policy upon the ground that it was obtained by fraud. The defendants, the insured and the beneficiary, denied the responsibility of the insured for any misrepre-

sentations by reason of his mental incapacity at the time. They also filed a cross bill seeking the payment of the monthly disability benefits for which the policy provided. Decree was rendered in favor of defendants on their cross bill. The decree declared void the reinstatement of the policy but held it to be in full force from the date of its issue. The Circuit Court of Appeals affirmed. 94 F. 2d 288.

The stipulation of facts stated that the insured at the time of the issue of the policy in 1927 was a resident of Missouri and that the policy was delivered to the insured in that State. Findings of the District Court followed the stipulation.

The Circuit Court of Appeals considered the question whether under the provisions of the policy the insurer was liable for disability benefits to the insured who became totally and permanently disabled during the period of grace following the date on which a semi-annual premium payment fell due where the premium was not paid until after the expiration of the period of grace. The court considered the question as one of general law. Its decision should have been made according to the applicable principles of the state law which governed the interpretation of the policy. *Erie R. Co.* v. *Tompkins, ante,* p. 64; *Ruhlin* v. *New York Life Insurance Co., ante,* p. 202.

Certiorari is granted, the judgment of the Circuit Court of Appeals is vacated, and the cause is remanded to that court for further proceedings in conformity with this opinion.

Judgment vacated.

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

ROSENTHAL *v.* NEW YORK LIFE INSURANCE CO.

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

No. 924. Decided May 16, 1938.

Questions concerning reinstatement, lapse, contestability and extension of insurance policies are to be decided by the federal courts in accordance with the applicable state law. *Erie Railroad* v. *Tompkins, ante,* p. 64.

Certiorari granted; 94 F. 2d 675, vacated.

PETITION for certiorari to review affirmance of a decree canceling insurance reinstatements for fraud and dismissing counterclaims.

Mr. Douglas W. Robert was on a brief for petitioner.

Messrs. James C. Jones, Lon O. Hocker, and *James C. Jones, Jr.* were on a brief for respondent.

PER CURIAM.

Respondent, New York Life Insurance Company, brought this suit to cancel two reinstatements of an insurance policy upon the ground that they were fraudulently procured. The Circuit Court of Appeals, affirming with modification a decree of the District Court, held that the agreement by which a lapsed policy is reinstated is a new agreement, as regards the effect of the incontestable clause in the policy, and that clause runs from the date of the reinstatement where the defense is fraud in its procurement; and, further, that the extended insurance under the policy in question was to be calculated from the anniversary date of the issue of the policy and not from the anniversary date of the payment of the first premium. 94 F. 2d 675.

The District Court found that the policy was issued upon the joint lives of residents of Missouri and was applied for and delivered to the insured in that State. The Circuit Court of Appeals decided the questions, as above stated, as matters of general law according to the view of the court as to the weight of authority. Petitioner sought a rehearing upon the ground, among others, that the interpretation of the policy was governed by the law of Missouri. Rehearing was denied.

While respondent contends that the decision below is not in conflict with the local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court. *Erie R. Co.* v. *Tompkins, ante,* p. 64; *Ruhlin* v. *New York Life Insurance Co., ante,* p. 202.

Certiorari is granted, the judgment of the Circuit Court of Appeals is vacated, and the cause is remanded to that court for further proceedings in conformity with this opinion.

Judgment vacated.

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

LANG, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 919. Argued April 28, 1938.—Decided May 16, 1938.

1. Under § 301 (g) Revenue Act, 1926, and T. R. 70, Arts. 25 and 28, promulgated thereunder, only one-half of the insurance (in excess of the $40,000 exemption) collected on policies issued on the life of a decedent after his marriage and payable to his wife, is to be

reckoned as part of his gross estate, where the marriage was governed by the community law of the State of Washington and all of the premiums were paid from the community property. P. 267.

2. The ruling is the same, where the facts are as above stated except that the beneficiaries of the policies were the children of the marriage. *Id.*
3. But where the policy was issued before the marriage, and the premiums were paid in part from the husband's funds and in part from community funds, the wife being the beneficiary named in the policy, the amount to be reckoned as part of the husband's gross estate, is the amount collected diminished by one-half of that proportion of it which the premiums satisfied with community funds bear to all premiums paid. *Id.*
4. The definition in T. R. 70, Arts. 25 and 28, of the expression "policies taken out by the decedent upon his own life," found in the Revenue Act of 1926, having been contained in earlier regulations under earlier revenue Acts using the same expression, must be treated (nothing else appearing) as approved by Congress. P. 268.

Response to questions certified in relation to an estate tax assessment upheld by the Board of Tax Appeals, 34 B. T. A. 337, and on review by the court below.

Mr. H. B. Jones, with whom *Mr. Robert E. Bronson* was on the brief, for Richard E. Lang, Executor, et al.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the Commissioner.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Ralph W. Smith, L. A. Luce, Claude I. Parker, J. Everett Blum, Martin Gang,* and *Robert E. Kopp,* on behalf of Vee Wolf Roberts, Administratrix, and by *Messrs. J. Blanc Monroe, Monte M. Lemann,* and *J. Raburn Monroe,* both in support of Lang et al.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Circuit Court of Appeals has certified propositions of law concerning which instructions are desired for decision of a pending cause. U. S. C., Title 28, § 346.

In 1905 Julius C. Lang married in the State of Washington, where community property laws have long obtained, and both parties continued to be domiciled there until he died in 1929. At his death seventeen policies of insurance upon his life—totaling above $200,000.00—were in force. Each policy required advanced payment of one premium. Fourteen specified the wife as sole beneficiary; children were the beneficiaries in three. Three of those payable to the wife were obtained by the assured prior to marriage and early premium payments upon them came from his separate property; later ones from community funds. Application for fourteen policies followed the marriage and all premiums thereon were paid from community funds.

The Commissioner of Internal Revenue ruled that under § 302 (g), Revenue Act 1926, c. 27, 44 Stat. 9, the entire proceeds from all policies should be reckoned as part of the assured's gross estate subject to the permitted exemption of $40,000, and made an assessment accordingly. The Board of Tax Appeals affirmed.

The exemption is not controverted and by admission each policy permitted the assured to change the beneficiary. The point for consideration is whether all or any portion of the proceeds of a policy, premiums on which were paid out of community funds, must be treated as part of the decedent's gross estate.

The court below concluded that the laws of Washington establish a community between spouses which is a separate entity, "just as a corporation or an association," and that life insurance purchased with its funds is community

property whose character the husband cannot defeat through change of beneficiary.

Accepting as correct, for present purposes, this construction of the local law, also treating the facts disclosed by the certificate as the essential ones, we come to consider the questions submitted for instructions which are restated in order more definitely to indicate our understanding of their significance.

The construction of the local law approved below is certainly a tenable one and finds support in *Graham* v. *Commissioner,* 95 F. 2d 174; *Occidental Life Co.* v. *Powers,* 192 Wash. 475; *Poe* v. *Seaborn,* 282 U. S. 101, 113.

Occasion for the certificate did not arise from doubts relating to the meaning of the community property laws of Washington, but from uncertainty concerning the application of the 1926 Revenue Act to an estate under administration in that State. The court was perplexed by *Bank of America* v. *Commissioner of Internal Revenue,* 90 F. 2d 981, 983, which affirmed that the operation of that Act is not dependent upon local law and "therefore whatever the local law may be we believe it to be immaterial." This statement is not accurate and conflicts with what we have said. *Poe* v. *Seaborn,* 282 U. S. 101, 111, 112; *Blair* v. *Commissioner,* 300 U. S. 5, 9, 10.

1. Must the total or only one-half of the proceeds collected under the insurance policies issued after marriage on the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary and all premiums having been paid from community funds? To this we answer, only one-half.

2. Must the total proceeds of the policy upon a decedent's life, taken out after marriage, children being the sole beneficiaries, and all premiums having been paid from community funds, be reckoned as part of his gross estate; or, in the circumstances, is only one-half to be included? To this we reply, only one-half should be included.

3. Must all proceeds of the policies issued before marriage upon the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary, the first premium having been paid from his separate funds, and all subsequent ones from community funds; or, in the circumstances, is the total received under the policy reduced by one-half of that proportion of such total which premiums satisfied with community funds bear to all premiums paid, the amount to be regarded as belonging to the gross estate? To this we reply, only the total proceeds less one-half of the indicated proportion becomes part of the gross estate.

Section 301 Revenue Act 1926, *supra,* imposes a tax upon the transfer of the net estate of every decedent, etc. And § 302 provides—

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

. . . . . .

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Revenue Acts of 1918, 1921 and 1924 contain similar provisions relative to "policies taken out by the decedent upon his own life."

Treasury Regulations 37 promulgated under the Revenue Act of 1918 provide—

"ART. 32. . . . The term 'insurance' refers to life insurance of every description . . . Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insur-

ance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by, the decedent. . . ."

And there are similar provisions in Treasury Regulations 63, Art. 27, promulgated under 1921 Revenue Act.

Treasury Regulations 68 promulgated under the Revenue Act 1924—

"Art. 25. . . .

"The term 'insurance' refers to life insurance of every description . . . Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not be makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

"Art. 28. The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bears to the total premiums paid. . . ."

Arts. 25 and 28, Treasury Regulations 70, promulgated under Revenue Act 1926, contain provisions identical with those just quoted.

Treasury Regulations 70 were in force when Lang died and are applicable to his estate. It is unnecessary for us to consider the meaning, validity or effect of the changes introduced by Regulations 80.

Articles 25 and 28 of Regulations 70 define the words "policies taken out by the decedent upon his own life." Earlier regulations gave the same definition. Nothing else appearing, it must be treated as approved by Congress. *Helvering* v. *Bliss,* 293 U. S. 144, 151. Counsel for the Commissioner suggest that it is at variance with the statute, unreasonable and without effect; but we think this objection is clearly untenable.

Under the community property statutes of Washington, as interpreted below, one-half of the amounts of community funds applied to payment of premiums was property of the wife. To that extent she paid these premiums. Where she is the beneficiary, under the words of the Regulations she became entitled to the proceeds of the policy in proportion to the amount so paid.

Where children were named beneficiaries and premiums were paid from community funds the situation is not within the precise words of the Regulations; but the rather obvious reason underlying the definition of what constitutes a policy "taken out by the assured" should be respected. In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation. See *Iglehart* v. *Commissioner,* 77 F. 2d 704, 711.

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

HEINER, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* MELLON ET AL., EXECUTORS.

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

Nos. 144 and 145. Argued March 8, 1938.—Decided May 16, 1938.

The stock and business of two corporations were taken over by two partnerships, formed by the three stockholders, for the purpose of liquidation. One of the partners died in 1919, but the liquidation was carried on by the survivors as theretofore. *Held:*

1. That net profits made in 1920 in disposing of partnership assets were taxable, under Revenue Act, 1918, § 218 (a), to the surviving partners to the extent of their distributive shares. P. 274.

The income tax system is based on annual accounting. The fact that it could not be known until a later year, when the liquidation was complete, whether the enterprise had been profitable, is of no legal significance.

2. The fact that the partnership had been dissolved by the death did not affect this tax liability of the surviving partners. P. 277.

Under the Pennsylvania Uniform Partnership Act, which was applicable, on dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs is completed.

3. Art. 1570, T. R. 45, does not provide that dissolution capitalizes all interest of the partner in future partnership profits; it deals only with the determination of a partner's gain or loss on his investment when he completely severs his connection with the partnership and its assets. P. 277.

4. The dissolution did not make the surviving partners trustees taxable only as fiduciaries under Revenue Act, 1918, § 219. P. 278.

The fact that they may be so denominated by the law of Pennsylvania is not conclusive. In the interpretation of the words used in a federal revenue act, local law is not controlling.

5. In § 218 (a) of the Revenue Act of 1918 the term "distributive share" does not mean the share currently distributable under

the state law, but means the proportionate share of the partner in the net income of the partnership. P. 280.

89 F. 2d 141, reversed.

CERTIORARI, 302 U. S. 672, to review the affirmance of recoveries in two actions against a former Collector of Internal Revenue by taxpayers who had paid deficiency income tax assessments under protest.

Assistant Solicitor General Bell, with whom *Solicitor General Reed, Assistant Attorney General Morris, Mr. J. Louis Monarch, Helen R. Carloss,* and *Mr. George H. Zeutzius* were on the brief, for petitioner.

Mr. John G. Frazer, with whom *Messrs. William Wallace Booth* and *Donald D. Shepard* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, tried below in the federal court for western Pennsylvania and argued together here, arise from the same facts and present the same questions of law. Each action was brought against D. B. Heiner, as former Collector of Internal Revenue and individually, to recover an amount paid under protest by the taxpayer in 1927 upon a deficiency assessment of his 1920 income tax. The amounts taxed as additional income were the distributive shares of certain profits alleged to have been earned by each in 1920 as a partner in two firms. Due demand for a refund was made. In No. 144 the taxpayer was A. W. Mellon; in No. 145, R. B. Mellon. Both having died, the suits are by their executors. In No. 144, the District Court entered judgment for $202,502.22 with interest (14 F. Supp. 424); in No. 145 for $187,787.17 with interest. These judgments were affirmed by the Court of Appeals. 89 F. 2d 141. Certiorari was granted because

of alleged conflict as to applicable rules of law important in the administration of the revenue laws.

There is no dispute as to the relevant facts. Prior to December 12, 1918, A. W. Mellon, R. B. Mellon and H. C. Frick each owned one-third of the entire capital stock of two distilling corporations—A. Overholt & Company and West Overton Distilling Company. On that date those three individuals formed two partnerships in which each partner was to have a one-third interest. In January 1919 they caused to be transferred to the partnership called A. Overholt & Company all the assets of the corporation of that name; and to the partnership called West Overton Distilling Company, all the assets of that corporation. These assets included large whiskey inventories in bonded warehouses. Neither corporation had distilled any whiskey after 1916. Liquidation of the businesses of each had been started by the two corporations in 1918; and the partnerships had been organized for the purpose of liquidating them. The business of each partnership in 1920, had, like its business in 1919, consisted in the sale of whiskey certificates and the storage, bottling, casing and sale of the stock of whiskey. It was not until 1925 that the assets of the partnerships then remaining were sold in bulk, and the proceeds distributed among those entitled thereto.

Frick died December 2, 1919; but throughout 1920 the businesses of A. Overholt & Company and of West Overton Distilling Company were conducted, and their books were kept, in the same manner as the businesses had been conducted and books had been kept by the partnerships in 1919, and by the corporations in 1918. For 1920 the partnership returns of the two concerns disclosed facts from which it appeared that substantial gains had been made from the sale of whiskey. But the amounts were not reported as income of the partnerships; and neither A. W. Mellon nor R. B. Mellon included in their income

tax returns for 1920 any amount on account of them. The Commissioner of Internal Revenue determined that these sums were distributive profits; that the returns of taxable income of A. W. Mellon and of R. B. Mellon for the year 1920 should have included one-third of the profits in that year of each firm from the sale of whiskey; and made a deficiency assessment on A. W. Mellon of $190,419.70 and on R. B. Mellon of $175,259.70.

The Revenue Act of 1918[1] governs taxation of 1920 income. Section 218 (a) of the Act provides that individuals carrying on business in partnership shall be liable in their individual capacities for the income tax on profits earned therein, and that in computing the net income of each partner there shall be included his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. Section 224 provides that the partnership shall file an informational return setting forth the items of its gross income, the deductions allowed and the distributive share of net income to which each partner is entitled.

The two Mellons filed their individual returns for 1920, and also the informational partnership returns for that year. While the Mellons claimed that they were not taxable on their shares of the profits from whiskey sold in 1920, they recognized that they were taxable for their shares of these other profits of the concerns earned in 1920. The partnership returns in the case of each concern showed a gain arising from storage, bottling and casing operations, sales of barrels, interest and rentals. One-third of each of these profits was entered by each of the Mellons in his individual return as his distributive share of the profits of the two partnerships.

First. The primary question for decision is whether the net profits made by the two partnerships in 1920 from the

[1] Act of February 24, 1919, c. 18, 40 Stat. 1057.

sales of whiskey were in their nature taxable income. Throughout 1920, A. Overholt & Company and the West Overton Distilling Company were engaged in business. The mere fact that the purpose of the partnerships was to liquidate the assets taken over from the corporations is not of legal significance. Profits made in the business of liquidation are taxable in the same way and to the same extent as if made in an expanding business. Nor is it of legal significance that the liquidation was not completed until 1925 and that until completion of the liquidation it could not be known whether the business venture, taken as a whole, had been profitable. The federal income tax system is based on an annual accounting.[2] Under that law the question whether taxable profits have been made is determined annually by the result of the operations of the year.

Purchasing real estate, subdividing and selling it in parcels is, in essence, a liquidating business. The claim has been repeatedly made that no income was realized until the investment was recouped; but the Board of Tax Appeals has uniformly held in accord with Article 43 of Regulations 45 (and later regulations) that the cost of the real estate must be apportioned among all the lots, and income returned upon the sales in each year, regardless of the number of lots remaining undisposed of at the close of the tax year.[3] A like rule has been applied where the

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[2] *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 365; *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 306; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326; *Brown* v. *Helvering*, 291 U. S. 193, 198–99; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126–127; *Guaranty Trust Co.* v. *Commissioner*, 303 U. S. 493, 497–498.

[3] J. S. Cullinan, 5 B. T. A. 996, 19 B. T. A. 930; Thomas J. Avery, 11 B. T. A. 958; Brodie C. Nalle, 19 B. T. A. 427; Frederika Skinner, 20 B. T. A. 491. See also B. S. Roberts, 7 B. T. A. 1162; Hannibal Missouri Land Co., 9 B. T. A. 1072; D. C. Clarke, 22 B. T. A. 314, 325; Biscayne Bay Islands Co., 23 B. T. A. 731; Searles Real Estate

taxpayer had purchased personal property in a block and was engaged in selling it in parcels. The claim that there was no taxable income until the capital had been returned was rejected.[4]

The fact that it might prove that when the business was fully liquidated the profits of 1920 were offset by heavy loss of later years is immaterial. Losses suffered by a taxpayer in a later year may be deducted from profits, if any, earned by him in that later year; but the tax on a year's income may not be withheld because losses may thereafter occur. If A. Overholt & Company and West Overton Distilling Company had remained corporations they would have been obliged to make each year return of the profits made therein and pay taxes annually throughout the period of liquidation although it might ultimately prove that the losses of the later years exceeded the profits of the earlier ones.[5] Likewise, if the concerns had each been owned by a single individual, the fact that his sole business was liquidating the concern would not have relieved him from paying annually taxes on the

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Trust, 25 B. T. A. 1115. Compare *Perkins* v. *Thomas,* 86 F. 2d 954, 956 (C. C. A. 5), affirmed on other grounds, 301 U. S. 655; see also *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37.

[4] Santa Maria Gas Co., 10 B. T. A. 1412; American Industrial Corp., 20 B. T. A. 188; Bancitaly Corp., 34 B. T. A. 494. Compare Weser Bros., Inc., 12 B. T. A. 1394; C. H. Swift & Sons, Inc., 13 B. T. A. 138; Deer Island Logging Co., 14 B. T. A. 1027; O. H. Himelick, 32 B. T. A. 792.

[5] See Regulations 45, Art. 547; *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327 (C. C. A. 4); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C. C. A. 8); *First Nat. Bank of Greeley* v. *United States,* 86 F. 2d 938 (C. C. A. 10). Compare *Burnet* v. *Lexington Ice & Cold Storage Co.,* 62 F. 2d 906 (C. C. A. 4); *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. 2d 108 (C. C. A. 5); *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. C. A. 6); *Whitney Realty Co.* v. *Commissioner,* 80 F. 2d 429 (C. C. A. 6).

net profits. No good reason is suggested why a different rule should apply to partnerships.

We conclude that gains from the sale of whiskey in 1920 were income of that year. The amount of the income was determinable from the partnership books. Section 212 (b) of the Revenue Act of 1918 provides that the net income shall be computed "in accordance with the method of accounting regularly employed in keeping the books of" the taxpayer, and it is not shown that the method employed clearly failed to reflect net income.

Second. The fact that the partnerships had been dissolved by Frick's death before 1920 does not affect the liability of the Mellons as surviving partners for income taxes on their distributive shares of the net profits made in that year. Compare *Rossmoore* v. *Anderson,* 1 F. Supp. 35 (S. D. N. Y.), affirmed, 67 F. 2d 1009 (C. C. A. 2); *Rossmoore* v. *Commissioner,* 76 F. 2d 520 (C. C. A. 2). The business of A. Overholt & Company did not terminate on Frick's death. Although dissolved, the partnerships and the business continued, since, as stated in the Pennsylvania Uniform Partnership Act: "On dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs is completed." [6] Throughout the year 1920, the business of selling stock on hand and deriving income therefrom was carried on precisely as it had been theretofore, and for the same purpose. Article 424 of Regulations 45 recognizes that even in the hands of a receiver a partnership must file a return.

Third. The Mellons contend, and the court below held, that the partners' interests in the partnerships were capitalized upon dissolution, so that until the liquidation returned to them the cost of their interests, no taxable income was received; that Article 1570 of Regulations 45

[6] Pa. Laws 1915, No. 15, § 30, Pa. Stat. Ann. (Purdon, 1930) Tit. 59, § 92.

so provides; and that this did not take place before 1925. But, as already pointed out, technical dissolution does not affect the liability of a partner under § 218 for taxes on his distributive share of the partnership's income; and Article 1570 does not establish any rule that dissolution capitalizes the interest of a partner in future partnership profits. The article provides:

"When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which income tax has been paid. . . ."

This article is in no way inconsistent with the taxation of a partner on his share of the income of the partnership earned in a single year after dissolution but before completion of liquidation and distribution. It deals only with the determination of a partner's gain or loss on his investment when he completely severs his connection with the partnership and its assets. The gain or loss is determined substantially like that on any other business venture of the individual, treated as a whole. On the other hand, the profits from the sale of whiskey in 1920 were current income of the partnership for that year, not different in their nature from the profits from storage, bottling, casing, and similar operations which the Mellons returned as income. Article 1570 does not deal with this situation.

Fourth. The Mellons contend that because the partnerships were dissolved by the death of Frick in 1919, A. W. Mellon and R. B. Mellon, being surviving partners, became by operation of law liquidating trustees; that any income earned in 1920 from operations of the dissolved partnerships was income to the Mellons only in their

fiduciary capacity as such trustees; that under § 219 of the Revenue Act of 1918 the trust estate was a separate taxable entity; that if any income tax was due, it was therefore due from the trust, and that its assessment is now barred by the statute of limitations.

We do not find it necessary to determine whether assessment of the tax on this theory is now outlawed, or whether, as the Collector urges, recovery is precluded in any event under the doctrine of *Stone* v. *White,* 301 U. S. 532; for we are of the opinion that the Mellons are not trustees within the meaning of § 219. The fact that they may be so denominated by the law of Pennsylvania is not conclusive. It is well settled that in the interpretation of the words used in a federal revenue act, local law is not controlling unless the federal statute "by express language or necessary implication, makes its own operation dependent upon state law." "The state law creates legal interests, but the federal statute determines when and how they shall be taxed." *Burnet* v. *Harmel,* 287 U. S. 103, 110.[7] We think it is clear that under the circumstances set forth, the income earned in 1920 was income of a partnership "carrying on business" within the meaning of § 218 rather than of a trust under § 219.

The obligation of the Mellons to pay, under the federal law, taxes on the profits made in 1920 from sales of

[7] See also *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110, 113, 114; *Palmer* v. *Bender,* 287 U. S. 551, 555–56; *Thomas* v. *Perkins,* 301 U. S. 655, 659; *Biddle* v. *Commissioner,* 302 U. S. 573, 582. Compare *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1, 8–11; *United States* v. *Robbins,* 269 U. S. 315, 327–28; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Tyler* v. *United States,* 281 U. S. 497, 503. See also *Hart* v. *Commissioner,* 54 F. 2d 848, 851 (C. C. A. 1); *Fidelity-Philadelphia Trust Co.* v. *Commissioner,* 47 F. 2d 36, 38 (C. C. A. 3); *Rosenberger* v. *McCaughn,* 25 F. 2d 699 (C. C. A. 3); *Eagan* v. *Commissioner,* 43 F. 2d 881, 883 (C. C. A. 5); *Fritz* v. *Commissioner,* 76 F. 2d 460, 461–62 (C. C. A. 5).

whiskey is in no way affected by their fiduciary obligation under the law of the State to account to the Frick estate for its interest in the two partnerships being liquidated. The surviving partners continued during 1920 to conduct the business from which they earned profits. On such income the federal law required that taxes be paid. It did not require that the payments be made from the partnership assets. How the assets shall be disposed of, and what shall be done with the proceeds when realized, are matters which may be determined by the law of the State or by agreement of the partners. But however the assets are required by the law of the State to be disposed of, or the proceeds applied, the federal law requires that taxes be paid if, in disposing of them within the year the business is conducted and profits are made.

Fifth. The Mellons contend that under the law of Pennsylvania no distribution of profits could lawfully have been made by the surviving partners as liquidating trustees until all debts and liabilities, contingent or otherwise, had been paid or satisfied, and the partners' capital returned; and that although the business of the partnerships had been carried on after dissolution precisely as before, and the partnership accounts for the year 1920 showed large profits earned, their respective shares of them were not distributable and could not be deemed taxable income of the partners.

Section 218 (a) of the Revenue Act of 1918 provides that "There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. . . ." If "distributive" meant "currently distributable under state law," the contentions made by the Mellons might have some force. But it does not. Article 322 of Regulations 45 (and corresponding articles of subsequent Regulations) defines "distributive" as meaning "proportionate." Compare *Earle* v. *Commis-*

sioner, 38 F. 2d 965, 967–68 (C. C. A. 1). And § 220 of the Revenue Act of 1918, taxing to the shareholders the income of a corporation improperly accumulating its gains and profits for the purpose of avoiding surtax, assumes that the two words are synonymous. The tax is thus imposed upon the partner's proportionate share of the net income of the partnership, and the fact that it may not be currently distributable, whether by agreement of the parties or by operation of law, is not material.[8] No claim is made that the proportionate interests of the surviving partners was improperly determined by the Commissioner.

Sixth. Finally, the Mellons contend that in 1928 and 1929 the Commissioner determined that no profit was realized until final liquidation of the partnerships in 1925, and that income taxes for that year have been collected on this theory and not yet refunded. The Commissioner's alleged change of position is not here important. It is not shown that refund of these taxes is now barred. Nor is it necessary for us to consider the cost to the Mellons of their interest in these partnerships, or whether the Mellons' 1925 income taxes were erroneously assessed and collected, or whether the Commissioner correctly settled the tax liability of the Frick estate. None of these questions has any bearing upon the determination of the case before us.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

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[8] Compare *Earle* v. *Commissioner,* 38 F. 2d 965 (C. C. A. 1); *Hill* v. *Commissioner,* 38 F. 2d 165, 168 (C. C. A. 1); *Pope* v. *Commissioner,* 39 F. 2d 420 (C. C. A. 1); *Ruprecht* v. *Commissioner,* 39 F. 2d 458 (C. C. A. 5); *Benedict* v. *Price,* 38 F. 2d 309 (E. D. N. Y.); W. Frank Carter, 36 B. T. A. 60. See also O. D. 187, 1 C. B. 174.

Syllabus.

HELVERING *v.* NATIONAL GROCERY CO.

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

No. 723. Argued April 8, 11, 1938.—Decided May 16, 1938.

Section 104 of the Revenue Act of 1928 provides that if any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected and paid for each taxable year upon the net income of such corporation an additional tax equal to 50 per centum of the amount of such income, and that the fact that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax. From the evidence before it, the Board of Tax Appeals found that the respondent's accumulations in a taxable year were beyond such needs; that the evidence did not overcome the presumption, and that the corporation was availed of for the interdicted purpose. The corporation had but one stockholder, so that rights of minority stockholders were not involved. *Held:*

(1) The Act does not violate the Tenth Amendment by interfering with the right of the corporation to declare or withhold dividends. It merely lays the tax upon corporations that use their powers to prevent imposition upon their stockholders of the federal surtaxes. P. 286.

(2) The Act is not unconstitutional as imposing, not a tax upon income, but a penalty to force distribution of corporate earnings in order to create a basis for taxation against stockholders. P. 288.

Congress may impose penalties in protection of the revenue. *Helvering* v. *Mitchell,* 303 U. S. 391.

(3) The tax is not objectionable as a direct tax on a mere purpose—a state of mind. P. 289.

It is a tax on the income of the corporation. The existence of the defined purpose merely determines the incidence of the tax.

(4) The standard prescribed to guide the Commissioner in assessing, or the corporate directors in avoiding, the additional tax, is not too vague. P. 289.

(5) The retroactive assessment is not constitutionally objectionable. P. 290.

(6) The statute does not delegate legislative power to the Commissioner. P. 290.

(7) Depreciation in any of the assets is evidence to be considered by the Commissioner and the Board of Tax Appeals in determining the issue of fact whether the accumulation of profits was in excess of the reasonable needs of the business. But depreciation in the market value of securities which the corporation continues to hold does not, as matter of law, preclude a finding that the accumulation of the year's profits was in excess of the reasonable needs of the business. P. 291.

(8) The evidence in this case supports the findings of the Board of Tax Appeals that the accumulation of a huge surplus by the taxpayer—a chain grocery company—was not with a purpose of providing for the expansion of the business, but to enable the sole stockholder to escape surtaxes. P. 291.

(9) To weigh the evidence, draw inferences from it and declare the result is a function of the Board of Tax Appeals not subject to review by the Circuit Court of Appeals. P. 294.

92 F. 2d 931, reversed.

CERTIORARI, 303 U. S. 630, to review a judgment of the Circuit Court of Appeals which overruled a decision of the Board of Tax Appeals, 35 B. T. A. 163, sustaining a deficiency income tax assessment.

Assistant Attorney General Morris, with whom *Solicitor General Jackson,* and *Messrs. Sewall Key* and *Carlton Fox* were on the brief, for petitioner.

Mr. James D. Carpenter, Jr., with whom *Mr. Edwin F. Smith* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

National Grocery Company is a New Jersey corporation, which operates chain stores. Since 1911 it has had $200,000 capital stock, all owned beneficially by Henry Kohl. In the year ending January 31, 1931, the corporation's books showed a net profit of $682,850.38, after paying $104,000 to Kohl as salary and the regular federal

corporation income tax of 12 per cent. Its surplus, as shown by its books, increased during the year from $7,245,824.26 to $7,938,965.54; that is $693,141.28. It paid no dividend.

Section 104 of the Revenue Act of 1928, c. 852, 45 Stat. 814, provides:

"(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13. . . .

"(b) The fact . . . that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax."

The Commissioner of Internal Revenue, having found that the corporation had been availed of for the purpose of preventing the imposition of the surtax upon Kohl by permitting the gains and profits to accumulate, assessed upon it, under § 104, a deficiency tax of $477,322.81 for the tax year, in addition to the regular corporation income tax, which had been paid. This amount, together with $37.87 admittedly due, constitutes the total deficiency assessment of $477,360.68.

The corporation petitioned for a redetermination by the Board of Tax Appeals. Before the Board a large volume of evidence was introduced which had not been submitted to the Commissioner. It detailed, among other things, the financial history of the business from its inception. There were 35 elaborate exhibits, many of them prepared from the books with the co-operation of the counsel for the corporation and for the Commissioner.

Twenty-four of the exhibits were introduced by the taxpayer; eleven by the Commissioner. The taxpayer also presented as witnesses Kohl and the treasurer of the corporation, who testified orally to the history of the business, its practices and aims; local bank officials who testified as experts to the wisdom of accumulating the profits; and other experts who testified to the depreciation in 1930 of the market value of the securities held by the corporation and of its real estate. The Board, by a bare majority,[1] sustained the Commissioner's determination. In stating its conclusions, it found as follows:

"We find as a fact that the petitioner's accumulation of earnings was far in excess of the 'reasonable needs' of the corporate business.

"We are also of opinion that the evidence of record does not rebut the prima facie presumption created by the statute that the accumulation of earnings beyond the 'reasonable needs of the business' was for the purpose of preventing the imposition of the surtax upon its sole stockholder. . . .

"Upon the evidence before us we have made the finding that the petitioner was 'availed of' during the fiscal year ended January 31, 1931, for the purpose of preventing the imposition of the surtax upon its sole stockholder 'through the medium of permitting its gains and profits to accumulate instead of being divided or distributed.' "

The corporation then petitioned for a review by the Circuit Court of Appeals. It reversed the order of the Board; and did so on the ground that there was before the Board "no proof, substantial or otherwise, to support its imposition of" the tax. Certiorari was sought by the

[1] Mr. Mellott, who stated the views of the minority, said: "This being a 'fact case', it is with some reluctance that I reach a conclusion at variance with that of the Member who heard the testimony of the witnesses and had the advantage of observing their manner and demeanor while testifying. . . ."

Commissioner, who urged that in so deciding the court had departed from the accepted and usual course of judicial proceedings. We granted certiorari because of the importance in the administration of the revenue laws of the matter presented.

The corporation makes here two contentions in support of the judgment which were not discussed by the Court of Appeals. It challenges the constitutionality of the statute and also urges that in holding that there were "gains and profits" the Commissioner and the Board of Tax Appeals misconstrued the statute. These contentions will be considered before examining the alleged lack of evidence to support the findings of the Board.

First. The National Grocery Company concedes that § 104 is constitutional as applied to a corporation organized for the purpose of preventing the imposition of surtaxes upon its shareholders;[2] but urges five reasons why it should be held void as applied to a legitimate business corporation which is "availed of" for the forbidden purpose. None of these reasons is sound.

1. It is said that the statute violates the Tenth Amendment because it interferes with the power to declare or to withhold dividends—a power which the State conferred upon the corporation. The statute in no way limits the powers of the corporation. It merely lays the tax upon corporations which use their powers to prevent imposition upon their stockholders of the federal surtaxes. "Congress in raising revenue has incidental power to de-

[2] Citing *United Business Corp.* v. *Commissioner,* 62 F. 2d 754 (C. C. A. 2); *A. D. Saenger, Inc.* v. *Commissioner,* 84 F. 2d 23 (C. C. A. 5); *Almours Securities, Inc.* v. *Commissioner,* 91 F. 2d 427 (C. C. A. 5); *Williams Inv. Co.* v. *United States,* 3 F. Supp. 225 (Ct. Cl.). See also *United States* v. *R. C. Tway Coal Co.,* 75 F. 2d 336 (C. C. A. 6); *Keck Inv. Co.* v. *Commissioner,* 77 F. 2d 244 (C. C. A. 9).

feat obstructions to that incidence of taxes which it chooses to impose." *United Business Corp.* v. *Commissioner,* 62 F. 2d 754, 756.

Kohl's personal income tax for the calendar year 1931 was $32,034.74. If he had included in his personal return of taxable income the corporation's entire net income for the fiscal year 1930–1931, an additional tax upon him of over $115,000 would have been due;[3] and no tax would have been assessable against the corporation under § 104. For the statute expressly provides, in paragraph (d), that the corporation shall not be so taxed, if the stockholders make the return required to ensure the surtax:

"(d) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included."

[3] It is not possible to calculate what Kohl's exact additional surtax liability would have been had he included the corporation's income for 1930–1931 in his personal return for 1931, since that return is not in evidence. A minimum figure, however, may be obtained. The corporation's "net income," as defined in § 104, was $954,645.62. There must be deducted from this $103,654.47 for corporation income tax; and $100,000 was distributed as a dividend in 1931 and included in computing the tax paid by Kohl in that year. Even assuming that the remaining $750,991.15 would have constituted his entire net income for 1931, and that the maximum deduction of 15% of this amount for charitable contributions could have been taken, a surtax of $119,328.50 would have been due.

2. It is said that the statute is unconstitutional because the liability imposed is not a tax upon income, but a penalty designed to force corporations to distribute earnings in order to create a basis for taxation against the stockholders. If the business had been carried on by Kohl individually all the year's profits would have been taxable to him. If, having a partner, the business had been carried on as a partnership, all the year's profits would have been taxable to the partners individually, although these had been retained by the partnership undistributed. See *Heiner* v. *Mellon, ante,* p. 271. Kohl, the sole owner of the business, could not by conducting it as a corporation, prevent Congress, if it chose to do so, from laying on him individually the tax on the year's profits.[4] If it preferred, Congress could lay the tax upon the corporation, as was done by § 104. The penal nature of the imposition does

[4] The first statute which provided for taxation where corporate profits are accumulated for the purpose of preventing the imposition of surtaxes upon stockholders was the Tariff Act of 1913, § 2A, subdiv. 1, 38 Stat. 166. In that Act, in the Revenue Act of 1916, § 3, 39 Stat. 758, and in the Revenue Act of 1918, § 220, 40 Stat. 1072, the tax was laid upon the shareholder. In all later Revenue Acts, the tax is laid upon the corporation. 1921 Act, § 220, 42 Stat. 247; 1924 Act, § 220, 43 Stat. 277; 1926 Act, § 220, 44 Stat. 34; 1928 Act, § 104, 45 Stat. 814; 1932 Act, § 104, 47 Stat. 195; 1934 Act, § 102, 48 Stat. 702; 1936 Act, § 102, 49 Stat. 1676.

The Revenue Acts of 1918 and 1921, §§ 218 (e) and 218 (d), respectively, also taxed the shareholders of "personal service corporations" like partners. Section 112 (k) of the Revenue Act of 1932 and § 112 (i) of the Acts of 1934 and 1936 provide for the disregard of the corporate entity in certain cases where foreign corporations are used for the purpose of avoiding federal taxes. And § 201 of the Revenue Act of 1937, 50 Stat. 818, provides that the adjusted undistributed net income of foreign personal holding companies must be included in the gross income of their United States shareholders. Compare also *Southern Pac. Co.* v. *Lowe,* 247 U. S. 330, 336; *Gulf Oil Corp.* v. *Lewellyn,* 248 U. S. 71; *Gregory* v. *Helvering,* 293 U. S. 465.

not prevent its being valid, as the tax was otherwise permissible under the Constitution. Compare *Helvering* v. *Mitchell,* 303 U. S. 391.

3. It is said that § 104 is unconstitutional because the liability is laid upon the mere purpose to prevent imposition of the surtaxes, not upon the accomplishment of that purpose; and that, thus, it is a direct tax on the state of mind. But this is not so. The tax is laid "upon the net income of such corporation." The existence of the defined purpose is a condition precedent to the imposition of the tax liability, but this does not prevent it from being a true income tax within the meaning of the Sixteenth Amendment. The instances are many in which purpose or state of mind determines the incidence of an income tax.[5]

4. It is said that § 104 as applied deprived the corporation of its property without due process of law; that it is unreasonable, arbitrary and capricious in that no stand-

[5] For example, § 293 (b) of the Revenue Act of 1928 provides that if any part of a deficiency is due to "fraud with intent to evade tax," there shall be an "addition to the tax" of 50% of the deficiency. *Helvering* v. *Mitchell,* 303 U. S. 391. Whether a payment received is compensation within § 22 (a) or is a gift within § 22 (b) (3) is largely a matter of intention. Compare *Bogardus* v. *Commissioner,* 302 U. S. 34, 45. Similarly, the deductibility of losses under § 23 (e) may depend upon whether the taxpayer's motive in entering into the transaction was primarily profit. Compare *Heiner* v. *Tindle,* 276 U. S. 582; *Stuart* v. *Commissioner,* 84 F. 2d 368 (C. C. A. 1); *Goldsborough* v. *Burnet,* 46 F. 2d 432 (C. C. A. 4); *Beaumont* v. *Helvering,* 63 App. D. C. 387; 73 F. 2d 110, 113; *Dresser* v. *United States,* 55 F. 2d 499 (Ct. Cl.). And § 112 (k) of the Revenue Act of 1932 (and § 112 (i) of the Acts of 1934 and 1936) provides that a foreign corporation shall not be considered as a corporation for purposes of certain of the non-recognition provisions of that section unless "it has been established to the satisfaction of the Commissioner that such exchange or distribution is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes."

ard or formula is specified to guide the Commissioner in assessing, or the corporate directors in avoiding, the additional tax; that it is assessed retroactively; and that it is unfair to non-assenting minority stockholders. The prescribed standard is not too vague. As Judge Learned Hand said in *United Business Corp.* v. *Commissioner,* 62 F. 2d 754, 756:

"Standards of conduct, fixed no more definitely, are common in the law; the whole law of torts is pervaded by them; much of its commands are that a man must act as the occasion demands, the standard being available to all. The vice of fixing maximum prices is that it requires recourse to standards beyond ascertainment by sellers, by which therefore they cannot in practice regulate their dealings. That is not true of the reasonable needs of a business, which is immediately within the ken of the managers, the supposititious standard, though indeed objective, being as accessible as those for example of the prudent driving of a motor car, or of the diligence required in making a ship seaworthy, or of the extent of proper inquiry into the solvency of a debtor."

Clearly, retroactive assessment is no more objectionable here than in the case of penalties for fraud or negligence. *Helvering* v. *Mitchell, supra.* And since no minority stockholders are here involved, the last objection need not be considered. *Castillo* v. *McConnico,* 168 U. S. 674, 680; *Atlantic Refining Co.* v. *Virginia,* 302 U. S. 22, 27.

5. It is said that § 104 is void because it delegates to the Commissioner legislative power. The statute provides that if the corporation is availed of for the forbidden purpose, the tax "shall be levied, collected, and paid"; and certain facts are made prima facie evidence of the existence of this purpose. No power is delegated to the Commissioner save that of finding facts upon evidence.

Second. The corporation contends, as a matter of statutory construction, that § 104 was not applicable

because there were no "gains and profits" within the tax year. Conceding that net income of $863,787.22 was earned,[6] it asserts that there were "no gains and profits" because the depreciation in the securities owned, none of which were sold, exceeded $2,000,000. The argument is that the word "gains" was not used as synonymous with "profits," but to express contemplated unrealized increases or accession in net worth of the assets; and that assessability under § 104 depends not upon gains or profits—but upon the aggregate of gains (or losses) and profits, since prudent directors would take these into consideration in determining whether a dividend should be declared. Depreciation in any of the assets is evidence to be considered by the Commissioner and the Board in determining the issue of fact whether the accumulation of profits was in excess of the reasonable needs of the business. But obviously depreciation in the market value of securities which the corporation continues to hold does not, as matter of law, preclude a finding that the accumulation of the year's profits was in excess of the reasonable needs of the business.

Third. There was ample evidence to support the findings of the Board of Tax Appeals. The corporation held on January 31, 1930, bonds and stocks valued at $2,779,718.07; on January 31, 1931 it held $2,989,452.74—an increase of $209,734.67. The list of these bonds and stocks showed that they were in no way related to a grocery business.[7] That there was no need of accumu-

[6] The corporation reported in its return an income of $863,471.67. This was increased by the Commissioner to $863,787.22, and is not now disputed.

[7] The stock held January 31, 1931, of the aggregate cost of $2,676,061.47, consisted of issues of 147 different corporations. Of industrials there were 61. Of public utilities, 27. Of insurance com-

lating any part of the year's earnings for the purpose of financing the business was shown by the balance sheet. Comparing the cash on hand with the outstanding indebtedness, it appears that the $1,332,332.28 cash on hand January 31, 1930 exceeded the $1,161,121.96 accounts payable, notes and mortgage, by $171,210.32. On January 31, 1931, the excess of cash over accounts payable was $1,136,820.55. These were then only $269,140.49; and the cash on hand was $1,405,961.04. The notes payable and the mortgage had been discharged.

That the purpose of accumulating this huge surplus was to escape the imposition upon Kohl of surtaxes, was indicated by the following facts. The $4,395,413.78 aggregate of bonds, stocks, and excess cash January 31, 1931, represents about four-fifths of the total accumulation of the surplus profits during the last ten years, which amounted to $5,742,455.35.[8] If the surplus profits of the fiscal year 1930–1931 had been distributed as dividends, the additional surtaxes payable thereon by Kohl in the year 1931 would have been at least $90,744.56, and for the preceding nine years would have aggregated $1,240,852.30.[9]

panies, 18. Of investment trusts, 13. Of banks and trust companies, 28. There were, besides, government, municipal, railroad, public utility, industrial and miscellaneous bonds which cost $313,391.27.

[8] The profits for these years (after deducting federal corporation income taxes paid) are listed in note 9, *infra*.

[9] Kohl's individual returns were made on a calendar year cash basis. For the fiscal year here in question, January 31, 1930 to January 31, 1931, the corporation's books showed a profit of $682,850.38 after deducting Kohl's salary and the 12% corporation income tax paid. A dividend of $100,000 was paid in 1931. Had the remaining $582,850.38 been entirely distributed in that year, Kohl would have incurred an additional surtax liability of $90,744.56, even if it be assumed that the additional distribution would have constituted his entire net income for that year and that the 15% maximum charitable contributions deduction could have been taken. (It is impossible to calculate what his exact surtax liability for 1931 would have been,

Further evidence to support the Board's findings that in the tax year dividends were omitted and the surplus accumulated in order to enable Kohl to escape these surtaxes is furnished by the following facts: Kohl drew his salary of $104,000 a year; and that sum, as an expense of the business, was deducted before calculating the corporation's profit on which it paid taxes under § 13. He needed personally further sums and took these in the form of loans. In the tax year Kohl borrowed from the corporation $140,000. His aggregate indebtedness on January 31, 1931 for borrowings during seven years, was $610,000. As was stated in *United Business Corp.* v. *Commissioner, supra,* p. 755: "These loans are incompatible with a purpose to strengthen the financial position of the

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inasmuch as his personal return for that year is not in evidence.) Compare note 3, *supra.*

If the corporation had distributed its profits for each fiscal year immediately after its close on January 31, Kohl's additional surtax liability for the nine preceding years would have been as follows:

Year	Fiscal year in which distribution was earned by corporation	Book profits of corporation less Federal corporation income tax paid	Kohl's computed net income including distribution	Kohl's computed surtax	Surtax actually paid	Difference
1930	Jan. 31, 1929–Jan. 31, 1930.	$713,181.62	$703,972.52	$132,454.50	$8,022.37	$124,432.13
1929	Jan. 31, 1928–Jan. 31, 1929.	769,945.96	839,766.18	159,613.24	8,441.14	151,172.10
1928	Jan. 31, 1927–Jan. 31, 1928.	707,239.60	775,363.34	146,732.67	8,411.75	138,320.92
1927	Jan. 31, 1926–Jan. 31, 1927.	498,879.08	569,440.88	105,548.18	8,481.21	97,066.97
1926	Jan. 31, 1925–Jan. 31, 1926.	508,837.06	584,937.44	108,647.49	9,113.16	99,534.33
1925	Jan. 31, 1924–Jan. 31, 1925.	528,022.34	614,044.69	114,468.94	9,004.24	105,464.70
1924	Jan. 31, 1923–Jan. 31, 1924.	547,483.80	546,921.87	188,788.75	2,820.60	185,968.15
1923	Jan. 31, 1922–Jan. 31, 1923.	461,106.88	441,832.17	191,876.09	2,069.50	189,806.59
1922	Jan. 31, 1921–Jan. 31, 1922.	324,908.63	362,986.22	152,453.11	3,366.70	149,086.41
						$1,240,852.30

petitioner, but entirely accord with a desire to get the equivalent of his dividends under another guise." [10]

Since Kohl was the sole owner of the corporation, the business would have been as well protected against unexpected demands for capital, and assured of capital for the purpose of any possible expansion, by his personal ownership of the securities as by the corporation's owning them. Moreover, no conceivable expansion could have utilized so large a surplus.[11] The high taxes were first imposed in 1919.[12] After that time no dividend was paid until after the close of the taxable year here involved.

Thus, independently of the presumption prescribed in § 104 (b) there was ample evidence to support the Board's findings.

Fourth. The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial *de novo,* in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so. *Helvering* v. *Rankin,* 295 U. S. 123, 131–32. To draw inferences, to weigh the evidence and to declare the result was the function of the Board. *Hulburd* v. *Commissioner,*

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[10] Compare *A. D. Saenger, Inc.* v. *Commissioner,* 84 F. 2d 23 (C. C. A. 5); *United States* v. *R. C. Tway Coal Co.,* 75 F. 2d 336, 340 (C. C. A. 6).

[11] In the ten years the number of stores in the chain had been increased from 358 to 815. Even on Kohl's own estimate that "including everything you have to have about $5000 per store," this expansion could account for only $2,285,000 of the $5,742,455.35 of profits accumulated over that period.

[12] The Revenue Act of 1918, 40 Stat. 1057, which was not enacted until February 24, 1919, imposed a surtax of as much as 65% on income in excess of $1,000,000. The maximum rate under the Revenue Act of 1916, 39 Stat. 756, was only 13% on income in excess of $2,000,000.

296 U. S. 300, 306; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40.

Fifth. The court expressed the opinion that the Board failed to consider relevant and controlling facts, that it relied upon improper evidence in reaching its conclusion, and that it failed to make the findings required by the statute. There is nothing in the record to justify that view. The findings quoted above are specific. The Board was not obliged to accept as true Kohl's statement of his intention and purposes; or to accept as sound the opinion of his experts. It was error to reverse the decision of the Board. There is no occasion to remand the case to it for further consideration.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment below should be affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

ST. LOUIS, BROWNSVILLE & MEXICO RY. CO. ET AL. *v.* BROWNSVILLE NAVIGATION DISTRICT ET AL.

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

No. 300. Argued March 2, 1938.—Decided May 16, 1938.

1. Though not bound to furnish cars for transportation in Mexico, carriers may not discriminate unreasonably between shippers, places, or classes of traffic within the United States in the furnishing of equipment for transportation beyond the boundary. P. 300.
2. The rail connection of the Port of Brownsville, Texas, with Matamoros, Mexico, was over line of carrier A to line of con-

necting carrier B; over B to a bridge, and across the Rio Grande to lines in Mexico. A owned no cars but confined itself to switching service; B was engaged in traffic between other Texas ports and Mexico, but participation in traffic between Port of Brownsville and Mexico was confined to intermediate switching service, the charge for which was specified in its tariff. There was no joint rate applicable over the tracks of A and B, the bridge and any railway in Mexico, nor did the tariffs of A and B contain any provision relating to the furnishing of cars for such transportation. B furnished cars for line hauls from the other ports but refused to permit cars delivered by it to A to be reloaded for shipment into Mexico, or to deliver cars to A for loading at the Port of Brownsville, or, if loaded there, to switch them en route to Mexico. In an action of mandamus by the Port of Brownsville, and shippers, *held:*

(1) That the District Court was without jurisdiction to require either A or B to furnish cars for transportation between that Port and Mexico. Pp. 299–300.

(2) The question of discrimination by B between that and other ports, was an administrative question for the Interstate Commerce Commission. *Id.*

91 F. 2d 502, reversed.

CERTIORARI, 302 U. S. 669, to review a judgment which reversed a judgment of the District Court dismissing a petition for mandamus, for want of jurisdiction.

Mr. Robert H. Kelley, with whom *Mr. John P. Bullington* was on the brief, for petitioners.

Mr. Carl B. Callaway, with whom *Messrs. A. B. Cole* and *A. L. Reed* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondents applied to the United States court for the southern district of Texas to obtain a writ of mandamus [1]

[1] As defining jurisdiction, respondents rely on Judicial Code, § 24(8), 28 U. S. C. § 41: "The district courts shall have original jurisdiction . . . (8) Of all suits and proceedings arising under any law regulating commerce"; and on 49 U. S. C. § 49: "The district

commanding petitioners to transport certain traffic and to furnish and continue for all time to furnish cars for transportation of freight between the Port of Brownsville, Texas, and Matamoros, Mexico. Petitioners by pleas to

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courts . . . shall have jurisdiction upon the relation of any person or . . . corporation, alleging such violation by a common carrier, of any of the provisions of chapter 1 of this title [Interstate Commerce Act], as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ . . . of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ . . ."

As imposing duties for the enforcement of which the proceedings were instituted, respondents rely on the Interstate Commerce Act, 49 U. S. C. § 1 (3):

". . . The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles . . . irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the . . . handling of property transported."

§ 1 (4) "It shall be the duty of every common carrier . . . engaged in the transportation of . . . property to provide and furnish such transportation upon reasonable request therefor, . . . and to provide reasonable facilities for operating through routes . . ."

§ 1 (11) "It shall be the duty of every carrier . . . to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

§ 6 (1) "Every common carrier . . . shall file with the Commission . . . schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier. . . . If no joint rate over the through route has been established, the several carriers in such through route shall file . . . the separately established rates, fares, and charges applied to the through transportation . . ."

the jurisdiction asserted that the questions raised were essentially administrative and that therefore resort must first be had to the Interstate Commerce Commission. The district court heard evidence on the issues tendered by the pleas, sustained the petitioners' contention and dismissed the case. The circuit court of appeals reversed. 91 F. 2d 502. This Court granted a writ of certiorari.

The city of Brownsville is on the north side of the Rio Grande opposite Matamoros. The respondent Navigation District, called the "Port of Brownsville," was incorporated under Texas law;[2] it includes a channel extending from the Gulf of Mexico about 17 miles to a turning basin which is located outside, and about five miles from the center of, Brownsville. The Port has no locomotive or cars; it has facilities at the basin to load and unload vessels, and a railroad track extending from the basin about a mile, to junction, at the boundary of the district, with a short branch or spur of petitioner, the Port Isabel & Rio Grande Valley Railway Company. Each of the other two respondents is engaged in business at the port as stevedore, freight broker, and forwarding agent. All the respondents are directly interested in the transportation of freight between the Port of Brownsville and points in Mexico via Matamoros.

Petitioner Thompson, as trustee in proceedings under § 77 of the Bankruptcy Act, operates the St. Louis, Brownsville & Mexico Railway and other lines of the Missouri Pacific System for transportation between gulf ports in Texas and Rio Grande crossings into Mexico. The Port Isabel, in all about 26 miles long, extends from the gulf to tracks operated by the trustee in the city of Brownsville. The Brownsville & Matamoros Bridge Company has a bridge and railroad tracks connecting the trustee's tracks in Brownsville with the National Rail-

[2] Ch. 192, House Bill 724, 41st Legislature, Regular Session.

ways of Mexico in Matamoros. Shipments between the Port of Brownsville and Matamoros must move about a mile over the tracks of the Navigation District, 7.4 miles over the Port Isabel, 2.49 miles over the trustee's tracks and 1.24 miles over the Bridge Company's rails.

There is no joint rate applicable to transportation between the Port and Matamoros or any other point in Mexico over the tracks of petitioners, the Bridge Company and any railway in Mexico. The service performed by each petitioner is covered by a switching charge specified in its tariff filed with the Interstate Commerce Commission. Neither the tariff of the Port Isabel nor that of the trustee contains any rule, regulation or provision relating to the furnishing of cars for the transportation in question. The Port Isabel performs the initial movement of traffic from the Port; it has no cars or means to acquire any. The Mexican National Railways are the initial carriers of traffic in the other direction; they refuse to permit their cars to leave Mexico.

The trustee furnishes cars for transportation from the ports of Corpus Christi and Houston to gateways at Rio Grande crossings, including Laredo and Brownsville; in all that transportation he has substantial line hauls. But he refuses to permit cars delivered by him to the Port Isabel and taken by the latter to the basin for unloading to be reloaded for shipment into Mexico, and refuses to deliver to the Port Isabel cars under his control to be loaded at the Port; and if loaded there for transportation into Mexico he refuses to switch them en route. Without regard to ownership, control or distribution, the Port Isabel is willing to switch cars between the Port and its junction with the trustee's tracks.

After the district court dismissed this case, respondents filed with the Commission a complaint alleging that petitioners, principally by their failure to furnish equipment, refused to permit traffic to move between the Port and Matamoros, in violation of §§ 1 and 6 of the Interstate

Commerce Act, and that the trustee's refusal to permit such use of his equipment, while permitting it between other ports and Mexico, violates § 3 of the Act. They prayed an order requiring petitioners to furnish equipment and to remove the prejudice and preference alleged. After hearing by the Commission but before its report, the circuit court of appeals announced its decision, in which it held that the district court has jurisdiction to grant mandamus, notwithstanding the petition for the writ alleged unreasonable and prejudicial discrimination against the Port of Brownsville. After this Court granted the writ of certiorari, respondents filed a petition with the Commission asking it to defer acting upon their allegations of violation of §§ 1 and 6. And the Commission did limit its decision to alleged violations of § 3. It held that the refusal of the trustee to furnish cars was not unduly prejudicial or preferential.

The respondents do not complain that petitioners refuse to switch cars furnished by other carriers or by the Port itself. Their grievance is not that petitioners refuse to do the switching covered by their tariffs at the specified rates; it is that in applying their tariffs, they discriminate against the Port of Brownsville in order to divert traffic to other ports and gateways so that the trustee may obtain substantial line hauls. The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654.

As the Port Isabel does not own or control any freight cars, respondents may not have relief on the ground that the failure of that carrier to furnish them is unreasonable

discrimination. As the trustee participates in traffic between the basin and points in Mexico only to the extent of an intermediate switching movement, he is not, as a matter of law, bound to furnish cars even for the part of the transportation that is performed within the United States. The question, whether the discrimination in the application of his tariff covering the switching movement is unreasonable, is an administrative one. Appropriate consideration of it may extend to many facts and circumstances, including the influence, if any, of the discrimination upon the trustee's line hauls between other Texas ports and points in Mexico, and to the broad field of competition legitimately available to carriers, shippers and commodities seeking transportation between the United States and Mexico. And the ascertainment of appropriate remedy for discrimination condemned calls for another administrative determination involving, it may be, investigation of numerous conditions affecting transportation between the two countries. And as determination of reasonableness of petitioners' refusal to furnish cars for the transportation in question and the prescribing of change in the service, if any is to be ordered, are primarily within the regulatory powers of the Commission, the district court rightly held that it was without jurisdiction and dismissed the cause. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. *Baltimore & Ohio R. Co.* v. *U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 493. *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 313. *Texas & Pac. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, 146. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. Cf. *Pennsylvania R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 468. The decree of the circuit court of appeals must be

Reversed.

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

Counsel for Parties.

LOWE BROTHERS CO. *v.* UNITED STATES.

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

No. 864. Argued April 29, 1938.—Decided May 16, 1938.

1. Under Jud. Code § 24 (20), as amended, a suit against the United States to recover internal revenue taxes wrongfully collected, in excess of $10,000, will not lie in the District Court unless the overpayment was collected by a collector who could have been sued personally but who, when the proceeding began, was dead or out of office. P. 304.
2. Where the claim against the United States was for an overpayment for 1917, more than $10,000, alleged to have resulted from the action of the Commissioner in crediting against a barred deficiency of that year an overpayment for 1918—*held* that the suit would not lie in the District Court under Jud. Code § 24 (20) as amended, since the action of the Commissioner, if a collection, was not the action of the collector and occurred in a later year in which no overpayment was made. P. 306.
3. Application of an overpayment to an earlier deficiency is effected through the Commissioner's approval of the schedule of overpayments. The certification of the overpayment by the collector to the Commissioner, a mere ministerial act, could subject the collector to no personal liability. *Id.*

92 F. 2d 905, affirmed.

CERTIORARI, 303 U. S. 633, to review the affirmance of a judgment dismissing a suit to recover an alleged overpayment of taxes from the United States.

Mr. John E. Hughes, with whom *Mr. William Cogger* was on the brief, for petitioner.

Mr. A. F. Prescott, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the district courts of the United States have jurisdiction, under § 24 (20) of the Judicial Code, of a suit brought against the United States to recover income and excess profits taxes in an amount in excess of $10,000 when the recovery sought is of an overpayment of taxes for one year, effected by crediting against a barred deficiency for that year an overpayment for another year.

Petitioner [1] overpaid income and excess profits taxes for 1918. The commissioner, on May 15, 1924, signed a schedule of overpayments by which he approved a credit as of April 24, 1924 of a part of the 1918 overpayment, in an amount exceeding $10,000, against a tax deficiency of petitioner for 1917, the collection of which was then barred by the statute of limitations. The collector in office in 1924, when the credit was allowed, having retired, petitioner brought the present suit against the United States, in the district court of southern Ohio, to recover the amount of the credit. The petition alleges overpayment of the 1917 tax by reason of the credit, and demands its recovery. Petitioner has neither alleged nor proved any claim for refund of the 1918 overpayment, recovery of which, without such claim, was barred by limitation.

The trial court, construing the suit as one to recover an overpayment of 1917 taxes, as petitioner conceded in open court, gave judgment dismissing the petition on the ground that the credit of the 1918 overpayment upon the barred deficiency for 1917 was not a payment of the

[1] As petitioner stands in the place of its corporate predecessor by virtue of a merger, and as their rights and interests in the present suit may be treated as identical, both will be referred to as "petitioner."

1917 tax since the credit is "void" under the applicable sections, 607 and 609, of the Revenue Act of 1928. The Court of Appeals for the Sixth Circuit affirmed on a different ground, holding that the district court was without jurisdiction, under the provisions of § 24 (20) of the Judicial Code, 28 U. S. C. § 41 (20), which confers jurisdiction on the district court of suits against the United States to recover taxes erroneously assessed or collected in excess of $10,000, only if the collector by whom the tax was collected is dead or is not in office when the suit is brought. 92 F. 2d 905. We granted certiorari, upon a petition presenting the single question of the jurisdiction of the district court, in order to resolve an asserted conflict between the decision below and that of the Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. 2d 296.

The Court of Appeals, following *United States* v. *Piedmont Mfg. Co., supra,* and its own decision in *United States* v. *John Gallagher Co.*, 83 F. 2d 368, thought that the credit of the 1918 overpayment of the 1917 tax was not void, but voidable only at the election of the taxpayer and was consequently an overpayment of 1917 taxes for which recovery might be had in a court having jurisdiction. But following its own decision in *United States* v. *Reeves Bros. Co.*, 83 F. 2d 121, and that of the Court of Appeals for the Second Circuit in *Moses* v. *United States,* 61 F. 2d 791, it held that the district court was without jurisdiction because the collection of the 1917 tax, effected by the allowance of the credit, was not made by a collector and thus did not satisfy the jurisdictional requirement.

The Court of Claims has jurisdiction of suits against the United States brought to recover internal revenue taxes erroneously collected without regard to the amount involved. § 145 J. C., 28 U. S. C., § 250. Before the

amendment of 1921, c. 136, 42 Stat. 311 (continued by Revenue Act of 1924, 43 Stat. 348, and, so far as now material, in the Revenue Act of 1926, 44 Stat. 121), § 24 (20) of the Judicial Code gave jurisdiction to the district courts, concurrent with the Court of Claims, of suits against the United States to recover "claims not exceeding ten thousand dollars founded upon . . . any law of Congress . . . or upon any contract, express or implied, with the Government of the United States . . ." C. 231, 36 Stat. 1093. Both before and after the amendment, district courts also had jurisdiction of suits against a collector of internal revenue brought to recover, in any amount, internal revenue taxes which he had erroneously collected. § 24 (5) J. C., 28 U. S. C. § 41 (5). Such suits brought against the collector survive his retirement from office and do not abate upon his death. *Patton* v. *Brady,* 184 U. S. 608; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; *Union Trust Co.* v. *Wardell,* 258 U. S. 537.

By the amendment of § 24 (20) the jurisdiction of district courts was extended so as to embrace suits against the United States to recover taxes "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax . . . was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." Since the suit allowed against the collector before the amendment was based on his personal liability, *Sage* v. *United States,* 250 U. S. 33; *Smietanka* v. *Indiana Steel Co., supra,* no such suit will lie unless he has collected the tax. The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the collector whenever the amount claimed exceeds $10,000 and the collector is out of office. This is made evident by the words of the amendment which authorize the substitution only when the collection is made by the collector when in office.

As we think it plain that no suit could have been maintained against the collector to recover the alleged overpayment, it follows that the district court was without jurisdiction to entertain the present suit. If the 1917 tax can be said to have been collected at all, as to which we express no opinion, it was collected by the action of the commissioner in crediting against the 1917 deficiency the 1918 overpayment. In 1924, the year of the claimed overpayment, the collector received no overpayment of petitioner's tax for any year. If the 1917 taxes were then collected it was by virtue of the application to the 1917 deficiency of moneys already in the treasury. The collector was without authority to make such application. It was the commissioner's approval of the schedule of overpayments which was effective for that purpose. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 170, 171; *United States* v. *Swift & Co.,* 282 U. S. 468. The certification of the overpayment by the collector to the commissioner, a mere ministerial act, could subject the collector to no personal liability.

It is true that under the statutes of the United States the collector is relieved from personal liability except in the case where the district court is of opinion that he acted without probable cause, *Sage* v. *United States, supra,* 37, and that such suits against the collector are commonly but a means of collecting the overpayment from the United States. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382. But no statute has enlarged the collector's common law liability to suit, and we cannot ignore the words of the amendment of § 24 (20) which, in providing for a suit against the United States in lieu of one against the collector, make collection by him the *sine qua non* of jurisdiction.

Graham & Foster v. *Goodcell,* 282 U. S. 409, did not deal with the point here considered. The only one of the several cases decided there involving a credit of an over-

payment for one year against a deficiency for another, *Boston Pressed Metal Co.* v. *United States,* was a suit brought in the Court of Claims for less than $10,000.

Affirmed.

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

J. D. ADAMS MANUFACTURING CO. *v.* STOREN, CHIEF ADMINISTRATIVE OFFICER, ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 641. Argued March 30, 31, 1938.—Decided May 16, 1938.

1. Indiana Gross Income Tax Act of 1933 imposes a tax upon gross receipts from commerce. P. 309.
2. It can not constitutionally be applied to the gross receipts derived by an Indiana corporation from sales in other States of goods manufactured by it in Indiana. P. 311.
3. The Indiana Act of Mar. 9, 1903, which declared "that all bonds, notes and other evidences of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the State upon which the said State or the said municipal corporations pay interest shall be exempt from taxation," is considered in connection with other provisions with which it is associated in the codification of March 11, 1919, and with regard to the fact that the State had no income tax law. So considering it, the construction adopted by the Supreme Court of Indiana confining the exemption to taxation *ad valorem* is not plainly wrong; consequently, the claim that to include the interest from such obligations in a tax on gross receipts would impair the contract rights of those who bought in reliance on the exemption, must fail. P. 314.

212 Ind. 343; 7 N. E. 2d 941, affirmed in part; reversed in part.

APPEAL from the reversal of a declaratory judgment declaring a taxing Act unconstitutional in certain parts, as applied to the appellant.

Messrs. Frederick E. Matson and *Harry T. Ice* for appellant.

Messrs. A. J. Stevenson, First Assistant Attorney General, and *Joseph P. McNamara,* Deputy Attorney General, with whom *Messrs. Omer Stokes Jackson,* Attorney General, and *Joseph W. Hutchinson,* Deputy Attorney General, of Indiana, were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we are called upon to determine whether the Indiana Gross Income Tax Act of 1933 [1] as construed and applied burdens interstate commerce and impairs the obligation of contract in contravention of Article I, §§ 8 and 10 of the Constitution of the United States.

Section 1 declares that the phrase "gross income" as used in the Act means, *inter alia,* gross receipts derived from trades, businesses, or commerce, and receipts from investment of capital, including interest. Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the State and the gross income of every non-resident derived from sources within the State. Section 6 exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America."

The appellant, an Indiana corporation, manufactures road machinery and equipment and maintains its home office, principal place of business, and factory in the State. It sells eighty per cent. of its products to customers

[1] Indiana Acts 1933, c. 50; Ind. Stat. Ann. (Burns) § 64–2601 ff.

in other States and foreign countries upon orders taken subject to approval at the home office. Shipments are made from the factory and payments are remitted to the home office. Pursuant to a practice of investing surplus funds not immediately required in its business, the appellant owns and receives interest upon bonds and notes of Indiana municipal corporations which, at the time they were issued, were declared by statute to be exempt from taxation.

Upon the adoption of the Act, the appellant filed a petition in a state circuit court in which, after reciting these facts, it alleged that the appellees were demanding that it report and pay taxes upon income received in interstate and foreign commerce and income received as interest upon securities exempted from taxation by the state law and that these demands, together with penalties specified in the statute for failure to make return and pay the tax, would be enforced unless prevented by the judgment of the court. The prayer was for a declaratory judgment that the Act, as construed and applied by the appellees, is unconstitutional. After issue joined the facts were stipulated and the court made findings and entered a judgment in favor of the appellant. The Supreme Court of Indiana reversed the judgment, holding that the tax demanded does not unconstitutionally burden the interstate commerce in which appellant is engaged and does not impair the obligation of any contract of the State exempting municipal securities from taxation.[2]

1. Will the threatened imposition of the tax on the gross income from the appellant's sales in interstate commerce contravene Article I, § 8 of the Constitution, which reposes in Congress power to regulate interstate and foreign commerce?

The title of the Act declares that it is a revenue measure imposing a tax upon "the receipt of gross income."

[2] 212 Ind. 343; 7 N. E. (2d) 941.

The statute defines gross income as meaning the gross receipts derived from trades, businesses, or commerce. The Supreme Court of Indiana in its opinion states: "The statute here under consideration levies a tax upon all who are domiciled within the state, based upon the privilege of domicile, and transacting business, and receiving gross income, within the state, and measured by the amount of gross income." [3]

The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources within the State. Nor is it for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales, such as the State would be competent to demand from domestic or foreign corporations for the privilege conferred.[4] It is not an excise upon the privilege of producing or manufacturing within the State, measured by volume of production or the amount of sales.[5] It is not a tax in lieu of ad valorem taxes upon property, which would be inoffensive to the commerce clause,[6] since the appellant pays local and state taxes upon its property within the State and it appears that these, as respects appellant and others similarly situated, have not been reduced. The Act, moreover, is silent as to the tax being in lieu of property taxes. The opinion of the Supreme Court suggests that the

[3] Compare *Miles* v. *Department of Treasury*, 209 Ind. 172, 188; 199 N. E. 372, 379.

[4] Compare *Matson Navigation Co.* v. *State Board*, 297 U. S. 441, 444.

[5] Compare *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165.

[6] Compare *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Co.* v. *Richardson*, 261 U. S. 330.

statute was adopted as part of a scheme for the reduction of local property taxes and the substitution of a gross income tax, but, as appellant points out, provision for reduction of property taxes was made by legislation passed in 1932.[7]

The regulations issued by the Department of the Treasury, pursuant to authority granted by the Act, treat the exaction as a gross receipts tax;[8] and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this a correct description.

We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.[9] We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the

[7] Indiana Acts of 1932, c. 10, p. 17.

[8] Article 2 of the Regulations states "The gross income tax of 1933 is primarily and in effect a gross receipts tax . . ." Article 16 states that the "tax shall apply to and be levied and collected upon all gross income received . . ."

[9] See *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250.

Constitution.[10] The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce.[11]

The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, as supporting the tax on appellant's total gross receipts derived from commerce with citizens of the State and those of other States or foreign countries. But that case dealt with a municipal license fee for pursuing the occupation of a manufacturer in St. Louis. The exaction was not an excise laid upon the taxpayer's sales or upon the income derived from sales. The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales.[12] The taxpayer had during the preceding year removed some of the goods manufactured to a warehouse in another State and, upon sale, delivered them from the warehouse. It contended that the city was without power to include these sales in the measure of the tax for the coming year. The court held, however, that the tax was upon the privilege of manufacturing

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[10] *Cook* v. *Pennsylvania,* 97 U. S. 566; *Fargo* v. *Michigan,* 121 U. S. 230; *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; *Minnesota Rate Cases,* 230 U. S. 352, 400; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328; *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 349; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650, 655; *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U. S. 90; *Western Livestock* v. *Bureau of Revenue,* 303 U. S. 250.

[11] *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 69; *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384, 393.

[12] Compare *Bass, Ratcliff & Gretton* v. *State Tax Comm'n,* 266 U. S. 271, 280; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387–8.

within the State and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another State. That the tax in the present case is not a tax on the manufacture but a tax on gross sales, is evident from the regulations promulgated pursuant to the Act and confirmed by an amendment of the statute adopted in 1937 under which, if the appellant had shipped its products to another State and thence sold them (as did the American Manufacturing Company), the receipts from the sales would be exempt from the gross income reached by the Act.[13]

So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured,[14] or by other permissible forms of levy upon

[13] Regulations 193 (4) "Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in states other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom."

Acts of Indiana, 1937, c. 117, p. 609: "That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto . . ."

[14] *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284; *American Mfg. Co.* v. *St. Louis, supra.*

the intrastate transaction.[15] It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate.

We hold that, as respects the appellant's sales of its manufactured product in interstate and foreign commerce, the statute cannot constitutionally be enforced.

2. Will the imposition of the tax in respect of interest on the bonds of Indiana municipalities violate Article I, § 10 of the Constitution of the United States?

By an Act of March 9, 1903, entitled "An Act to exempt from taxation all bonds, notes and other evidences of interest-bearing debt issued by the State or by municipal corporations," it was provided "That all bonds, notes and other evidences of indebtedness hereafter issued by the State of Indiana or by municipal corporations within the State upon which the said State or the said municipal corporations pay interest shall be exempt from taxation." [16] By an Act of March 11, 1919, tax laws of the State were codified and the Act of 1903 was incorporated without change as clause twentieth of § 5 of the codification.[17] The section has since been amended but the twentieth clause remained unchanged at the date of the passage of the Gross Income Tax Act of 1933.

The appellant insists that the exemption granted in the Acts of 1903 and 1919, constitutes a contract with purchasers of municipal securities the obligation of which is unconstitutionally impaired by the attempt to tax the interest they yield. The State replies that the Acts were

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[15] *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Federal Compress Co.* v. *McLean*, 291 U. S. 17; *Chassaniol* v. *Greenwood*, 291 U. S. 584.

[16] Acts of Indiana, 1903, c. CLXXIX, p. 322.

[17] Acts of Indiana, 1919, c. 59, § 5 (twentieth) p. 203.

not intended to create a contract and did not in fact do so, but that if they did, the covenant did not embrace interest payable on municipal obligations but only ad valorem taxation upon them.

When the exemption laws were adopted the State had no income tax law. Whatever may have been the background against which the Act of 1903 is to be construed, its setting, as a portion of the tax codification of 1919, is significant. The latter deals with two forms of taxation,—poll taxes and property taxes. It embodies a comprehensive scheme of annual assessment of real and personal property of individuals, partnerships, and corporations, including public utilities; makes provision for a return by taxpayers of complete inventories of property and, in the case of corporations, of the excess value of capital stock and surplus and of the value of franchises or privileges enjoyed; and provides for assessment by public officials for the purpose of the application of a rate ad valorem by various public bodies. The statute has nothing to say with respect to license, occupation, privilege or other excise taxes. In § 25 it provides that "Where bonds or stocks are now or may hereafter be exempted from taxation, the accrued interest on such bonds or dividends on such stock shall be listed and assessed, unless otherwise exempted, without regard to the time when the same is to be paid." Thus the legislature distinguished between the bonds themselves and the interest accrued upon them as separate subjects of assessment and ad valorem taxation. The Supreme Court of Indiana has consistently held that exemptions from taxation are not favored but are to be strictly construed.[18]

In the light of the foregoing facts we are of opinion that the case is controlled by *Hale* v. *Iowa State Board*,

[18] *South Bend* v. *University*, 69 Ind. 344, 348; *Read* v. *Yeager*, 104 Ind. 195, 199; 3 N. E. 856.

302 U. S. 95. We are unable, therefore, to hold that the decision of the Supreme Court is plainly wrong, even upon the assumption that in adopting the statutory exemption the legislature intended to, and in fact did, contract with purchasers of municipal bonds.

As respects the tax demanded on appellant's gross income from its business in interstate commerce, the judgment is reversed and, as respects the tax on interest received from obligations issued by municipalities of the State, the judgment is affirmed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed in part; affirmed in part.

MR. JUSTICE MCREYNOLDS is of opinion that the challenged judgment should be reversed *in toto*.

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

MR. JUSTICE BLACK, dissenting in part.

The Indiana statute of 1933 here invalidated imposes "a tax, measured by the amount or volume of gross income, . . . upon all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and . . . companies, . . . who are not residents of . . . Indiana, but are engaged in business in Indiana." The tax is general in effect throughout the entire State, applying to all who do business and who receive annual incomes in the State above $1,000.00 (with minor exceptions). It falls uniformly upon all such gross incomes whether derived from interstate or intrastate business or from investments, interest or services.[1]

[1] The generality of this tax is made clear in its definition of gross income as including, with minor exceptions, "the gross receipts of the taxpayer received as compensation for personal services, and the

There is no contention that the statute was inspired by any spirit of antagonism or hostility to interstate commerce or that it discriminates against interstate commerce in amount or method of application.

Concurrently with the passage of this Revenue Act, the Indiana legislature limited the tax that could be imposed upon other forms of property by the State or any "taxing units within the state."[2] The Supreme Court of Indiana in the opinion below [3] said:

"Legislative history indicates that one of the purposes of the Gross Income Tax Law was to redistribute governmental burdens and relieve property of a tax burden which was thought to be too great."

Indiana passed this gross income tax law at a time when depressed economic conditions were causing the fiscal policies of many States to turn toward similar legislation.[4]

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gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, . . ." Section (f), c. 50, Indiana Acts 1933.

[2] Acts of Indiana, 1933, p. 1085 (Act approved March 9, 1933). The Gross Income Tax Law was approved February 27, 1933, Acts 1933, Indiana, c. 50, 78th Session, p. 388.

[3] 7 N. E. (2d) 941, 945.

[4] "The obtaining of funds to replenish impoverished treasuries was the principal goal of the state legislatures in 1933. Relief to property also was a much sought after end. Property relief was accorded through reduced appropriations, lowered tax limits, and collection leniency. The drive for new revenue resulted in the adoption of gross income or gross sales taxes in fifteen states. . . .

"The development of the gross income or gross sales taxes is probably the outstanding tax news of the year." The Tax Magazine, Vol. 12, February, 1934, p. 63, "State Tax Legislation, 1933," Raymond E. Manning. *Id.*, see p. 365, "Chart of State Sales, Gross Income, and License Taxes."

Serious financial difficulties of the States stimulated efforts to find new sources of taxation, and the widespread belief that property was bearing an unfair burden of taxes also substantially contributed to the levying of these new taxes.[5]

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[5] "Indiana's fiscal strain was not to be found in the state government until the $1.50 property tax limitation adopted by the legislature in 1932 cut almost in half the state rate on property, which had been furnishing not far from one-fourth of total state revenues (including motor vehicle taxes). Coupled with a drastic shrinkage in assessed valuations and a demand for increased state aid to localities, this made it imperative for the state government to seek new revenue sources even though the other tax yields had been holding up fairly well through 1931–32. . . .

"It is evident that the local tax situation was the chief factor bringing about the sweeping change in the state's own system. For one not intimately acquainted with conditions in Indiana it is not easy to locate from the available data the precise sources of trouble, but whatever they may have been, the tax limitation law crystallized them, and the result is a threatened breakdown of governmental finance in many localities, unless the state succeeds in carrying out its greatly increased program of aid to localities through highway and school moneys. . . .

"The campaign in support of the [gross receipts] tax . . . was led by the Indiana Farm Bureau, which secured the signatures of a large number of farmers on a petition urging the passage of a sales tax. On February 12 a meeting of farmers and other property owners was held, and several thousand marched to the capitol. For several years the bureau had been urging the reduction of property taxes, and partly as a result of its efforts the $1.50 law was passed in the special session of 1932, limiting the state levy to 15 cents and all local levies to $1.35 per $100 of assessed value. . . .

"The Indianapolis Real Estate Board, in addition to cooperating with the Indiana Farm Bureau, worked with the Indiana Real Estate Association and the Federation of Community Civic Clubs. A meeting of all these organizations, held on February 10, 1933, passed resolutions favoring the sales tax."

"The Sales Tax in the American States," Haig and Shoup, (1934, Columbia University Press), 238, 241, 242.

Appellant is an Indiana corporation engaged in the business of manufacturing and selling road machinery. All of the machinery is manufactured in Indiana. Its office, only plant and all its properties are located in Indiana. Its products are sold to ultimate purchasers in Indiana and other States by independent distributors or through sales agents of appellant. All sales must be approved by, and all payments made to appellant's office in Indiana. While appellant is thus engaged in interstate commerce, obviously, a major portion of its activities takes place in Indiana.

The prevailing judgment here is that Indiana cannot constitutionally impose this tax measured by the gross income received by appellant in Indiana from that substantial part of its products (manufactured in Indiana) sold to purchasers in other States. It is held that the tax, thus applied, is prohibited by § 8, Article 1 of the Federal Constitution which provides that

"The Congress shall have power . . . to regulate commerce among the several states, ..."

The Indiana tax is not invalidated on the ground that it violates any law passed by Congress under this constitutional power to regulate interstate commerce.

This power to regulate commerce among the States "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." [6]

[6] Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197. Since Congress has not acted upon this subject, the present case does not involve a manifestation by Congress of its paramount and exclusive authority to regulate an aspect of interstate commerce with which the states may deal (because of its local nature) until Congress acts. Cf. *New York Central & H. R. R. Co.* v. *County of Hudson*, 227 U. S. 248.

The question, therefore, is whether—in the absence of regulatory legislation by Congress condemning state taxes on gross receipts from interstate commerce—the Commerce Clause, of itself, prohibits *all* such state taxes, as "regulations" of interstate commerce, even though general, uniform and non-discriminatory.

All state taxes on gross receipts from interstate commerce do not discriminate against, or impose extraordinary burdens upon, that commerce. Those that do not, do no more than impose a normal burden of government upon that commerce. On the other hand, some state gross income taxes may be designed or applied so as seriously to impede the freedom of interstate commerce. If interstate commerce should be so impeded, Congress might—under its commerce power—find it "necessary and proper" to condemn *all* state taxes on gross receipts, in order to "carry into execution" its granted power to regulate and protect interstate commerce.[7] We are not here confronted with such a congressional enactment. Should the Indiana law, and *all* state taxes on gross receipts from interstate commerce, as such—in the absence of such enactment—be condemned as a regulation of interstate commerce in the constitutional sense?

"Taxation" and "regulation" are not synonymous; all state, county or city taxes that affect interstate commerce do not "regulate" it in the constitutional sense; unquestionably, taxes can be levied for revenue only. As pointed out by Mr. Justice Holmes in *Galveston, H. & S. A. Co.* v. *Texas,* 210 U. S. 217, 225, involving a state tax which was not general but was levied only on gross receipts laid on railroads:

"It being once admitted, as of course it must be, that not every law that affects commerce among the States is a

[7] Cf. *Houston, E. & W. T. Ry. Co.* v. *United States* (The Shreveport Case), 234 U. S. 342, 350 *et seq.*

regulation of it in a constitutional sense, nice distinctions are to be expected."

The majority there found that the tax on interstate transportation violated the Commerce Clause. The dissent, applying the similar principle that every gross receipts tax is not necessarily a regulation, insisted that the particular gross receipts tax involved did not "attempt to regulate commerce among the states" and should not "be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct." Both opinions recognized a distinction between taxes for revenue, which incidentally affect interstate commerce, and other taxes which directly regulate commerce. More recently, this Court has said in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 259:

"Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former." [8]

[8] ". . . the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, . . . and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. . . . Net earnings from interstate commerce are subject to income tax, . . . and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable

Many cases relied on to support the prevailing judgment here hold that state gross receipts taxes imposed on interstate "transportation" violate the Commerce Clause. While this construction of the Commerce Clause had been previously considered, it was fully clarified and delimited in *Philadelphia & Sou. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 341, 342, 344, 345, and that decision has served as the authoritative basis for subsequent decisions:

"The tax in the present case is laid upon the gross receipts for transportation *as such.* Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing,) for which the company is called upon to pay the tax. They are taxed, not only because they are money, or its value, but because they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, *without regard to the source from which it was derived, whether from commerce, or banking, or any other employment.* But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. . . .

"It [the tax under consideration] is not a general tax on the income of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation . . . It is clearly not such, but a tax on transportation only." (Italics supplied.)

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to business done within the state by fair method of apportionment. . . . All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255.

Previous decisions had held that the Commerce Clause did not prohibit state taxes on gross receipts from interstate commerce.[9] The effect of these prior decisions was modified by the *Philadelphia Steamship Co.* case. The latter case decided (contrary to the previous decisions) that a state tax on gross receipts received for actual interstate transportation is prohibited by the Commerce Clause. In that case the tax invalidated was a selective

[9] ". . . it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. . . .

". . . we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree." *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293, 296.

"The tax [15 Wall. 284] on gross receipts was held not to be repugnant to the Constitution, because imposed on the railroad companies in the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one State to another. . . .

". . . It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity.

"In the second of the cases recently decided, the whole court agreed that a tax on business carried on within the State and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected. . . .

"It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the municipal ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate, in the absence of legislation by Congress, upon subjects over which the Constitution has clothed that body with legislative authority." *Osborne* v. *Mobile*, 16 Wall. 479, 481, 482.

tax applied to the particular business of transportation. Consequently, the Court did not decide whether a State could constitutionally impose a general gross income tax (such as Indiana's) to an interstate business (such as appellant's) not involving transportation. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, December, 1917, and *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, June, 1918, marked the all-inclusive condemnation of state taxes on gross receipts from interstate commerce, as a class—without regard to discrimination or generality.

However, as pointed out in the opinion, the "bare question" in the *Crew Levick* case was "whether a state tax imposed upon the business of selling goods in foreign commerce, insofar as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." The tax there involved was not a general income tax bearing uniformly upon all business within the State. When the opinion in the *United States Glue Co.* case—where a gross income tax was not in issue—indicated approval of an extension of the previous constitutional rule so as to condemn—as a class—*all* state taxes on gross receipts from interstate commerce, the Court clearly set out its reasons for the extension. The Court said that the distinction:

" . . . between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit

as to impede or discourage the conduct of the commerce. A tax upon the net profit has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." Pp. 328–329.

A tax upon property used in interstate commerce, even with an augmented value due to such use, is not a regulation of commerce, is valid and is within the powers of the State.[10] Yet, the constitutional validity of a tax on property does not turn upon whether the property is profitable to its owner. Gross receipts from interstate commerce—as from all sources—vary and will probably rise and fall with property values. Therefore, the total amount exacted from interstate commerce under a gross receipts tax can fluctuate just as the total paid under a property tax. Since property and corporate franchises used in interstate commerce can be constitutionally taxed by States, whether profitable or unprofitable, it seems difficult to justify a constitutional test for state income taxes based upon existence or absence of profit.

The application of such a constitutional test will—as a practical matter—inevitably result in exempting *all*

[10] Cf. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 453, 454; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 345, 347.

enterprises engaged in interstate commerce from *all* state gross income taxes on interstate commerce receipts, whether profitable or not. At the same time, local intrastate enterprises, doing business in the same communities, must pay state gross receipts taxes whether profitable or unprofitable. Such a construction of the Commerce Clause—designed to prevent a State from imposing unfair tax burdens upon those engaged in interstate commerce—actually serves to impose an unfair and discriminatory burden upon local intrastate business. Failure of an interstate business to make a profit does not relieve the State of its burden in affording protection for that business. While the federal government is charged with the constitutional duty of protecting and fostering interstate commerce by proper regulation [11] it has not attempted to provide local governmental protection for those engaged in such commerce. However desirable it may be, as a tax policy, to tax in accordance with ability to pay, the failure to make a profit should not of itself create a *constitutional* exemption from a tax which the State might otherwise impose.[12] And, as a practical matter, state taxing authorities may be moved by the consideration that profits are not always capable of ascertainment with complete accuracy and certainty.[13]

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[11] *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478.

[12] *State Railroad Tax Cases,* 92 U. S. 575, 606; cf., *Ohio Tax Cases,* 232 U. S. 576, 590.

[13] Cf., with reference to a state tax law assailed as violative of the Fourteenth Amendment, dissent of Mr. Justice Cardozo: "But profits themselves are not susceptible of ascertainment with certainty and precision except as the result of inquiries too minute to be practicable. The returns of the taxpayer call for an exercise of judgment as well as for a transcript of the figures on his books. They are subject to possible inaccuracies, almost without number. Salaries of superintendence, figuring as expenses, may have been swollen inordinately; appraisals of plant, of merchandise, of patents, of what

It has been suggested, however, that Indiana might by law apportion to itself that part of a tax on gross receipts from interstate commerce to which it is entitled. Such an apportionment by Indiana would, in effect, fix the portion of such a tax for the other forty-seven States which appellant's interstate business might touch. Indiana has no authority to determine what, how, when or to what extent other States may tax within their respective boundaries. If such power of apportionment or allocation exists at all, it must be true that the only repository of a power touching complex and national aspects of interstate commerce is not Indiana, not the Judiciary—but the National Congress.

Interstate commerce constitutes a large part of the business of the nation. Until Congress, in the exercise of its plenary power over interstate commerce, fixes a different policy, it would appear desirable that the States should remain free to adopt tax systems imposing uniform and non-discriminatory taxes upon interstate and intrastate business alike.

It is also urged that a gross receipts tax under the Commerce Clause is invalid because it might result in multiple burdens on interstate commerce.[14] The possibility is suggested that the States may use gross income taxes to

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not, may be erroneous or even fraudulent. In the words of a student of the problem, 'statements of profits are affected both by accounting methods and by the optimistic or pessimistic light in which the future is viewed at the time when the accounts are made up.' . . . These difficulties and dangers bear witness to the misfortune of forcing methods of taxation within a Procrustean formula. If the state discerns in business operations uniformities and averages that seem to point the way to a system easier to administer than one based upon a report of profits, and yet likely in the long run to work out approximate equality, it ought not to be denied the power to frame its laws accordingly." *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 576–577.

[14] See *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250.

create direct, extraordinary, and unjust burdens upon interstate commerce and that this possibility requires that *all* state taxes on gross interstate commerce receipts be condemned as within the prohibition of the Commerce Clause. Congress was undoubtedly given the exclusive power to regulate commerce in order that undue, unjust and unfair burdens might not be imposed upon such commerce.[15] It was not intended, however, that interstate commerce should enjoy a preferred status over intrastate business or to remove those engaged in interstate commerce from the ordinary and usual burdens of the government which affords such commerce protection.[16] A court may act to protect a litigant from unfair and unjust burdens upon the litigant's interstate business. Yet, it would seem that only Congress has the power to formulate rules, regulations and laws to protect interstate commerce from *merely possible future unfair burdens.* Here the record does not indicate any charge or proof of an existing extraordinary, unfair or multiple tax burden on appellant. The tax burden from which appellant is here exempted is one which the local taxpayers of Indiana must bear. As a result, an unjust and unfair burden is actually imposed upon intrastate business, because of an apprehension of a possible future injury to interstate commerce. The control of future conduct, the prevention of future injuries and the formulation of regulatory rules in the fields of commerce and taxation, all present legislative problems.

This Court has sustained, and the majority opinion refers approvingly to a municipal license tax in Missouri, imposed in addition to an ad valorem property tax, in which the amount of the license was measured by the amount received for the interstate sale of goods manu-

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[15] *Philadelphia & Sou. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 346.

[16] See *Woodruff* v. *Parham,* 8 Wall. 123, 137.

factured within the municipality.[17] It is true that the amount of the license for a succeeding year was there measured by a percentage of the amount of sales for the preceding year, while the Indiana tax is paid quarterly during the year of sale. However, if we look to substance and effect, disregard the nominal designation of each tax, and consider the realities of the two taxes, the tax burdens are identical under the approved Missouri tax and the disapproved Indiana tax.[18] Numerous other decisions have recognized the principle of including receipts from interstate commerce in the figure (not wholly derived from such commerce) used in measuring the amount of a state excise tax.[19]

It has been often said that no formula can be devised for determining in all cases whether or not a state tax is prohibited by the Commerce Clause, and that "the question is inherently a practical one, depending for its decision on the special facts of each case, . . ."[20] A formula which arbitrarily stamps *every* state gross receipts tax as a violation of the Commerce Clause, on the ground that it can be used for cumulative tax purposes, leaves unanswered the possibility that other taxes, previously held valid, may be used with like effects on interstate commerce; disregards the fact that in many cases, as here,

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[17] *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459.

[18] Apparently, if the Indiana tax had been "on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods, both intrastate and interstate" instead of designated as "a tax, measured by the amount or volume of gross income" received from manufacturing and sales interstate and intrastate, the tax would be held valid. See, *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250.

[19] *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, 294; *Maine* v. *Grand Trunk Railway Co.,* 142 U. S. 217; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379; *United States Express Co.* v. *Minnesota,* 223 U. S. 335, 343.

[20] *Hump Hairpin Co.* v. *Emmerson, supra,* at 295.

such a tax can be fairly and uniformly applied to both interstate and intrastate commerce; and in effect actually denies a State the privilege of using such a tax unless willing to impose unjust and unequal burdens upon its own citizens engaged in intrastate commerce.

The receipt of income is a taxable event and need not necessarily enjoy the immunity of the income's source.[21] Appellant's receipt of gross income could be taxed in one State only, because appellant received income only in Indiana. A sales tax might possibly be imposed upon independent distributors of appellant's products who do business in other States. Such tax would be constitutional only if it did not discriminate against appellant's products.[22] Distributors in States other than Indiana do

[21] In sustaining an income tax law of the State of New York against a challenge that it violated the Fourteenth Amendment, it was said: "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. 'Taxes are what we pay for civilized society.' . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. . . . It may tax net income from operations in interstate commerce although a tax on the commerce is forbidden, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, . . . [252 U. S. 37, 50]." *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 312, 313. The dissent called attention to the fact that not only was the New York taxpayer subject to an income tax in that State by the decision, but that "New Jersey, in addition to tax on the land measured by its value, may lay a tax upon the income received by the owner for its use." *Id.*, p. 318.

[22] "'A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is *not* discriminating in its incidence against the merchandise because of its origin in another State.' *Sonneborn Bros.* v. *Cureton*,

business under the protection of their respective States. Under these circumstances, non-discriminatory sales taxes in those States upon the distributors create no unfair multiplication of taxes and would not be unconstitutional.[23] The manufacturer who receives protection under the laws of Indiana and the distributors who receive protection under the laws of the States in which products are sold, should be subject to uniform, non-discriminatory taxes imposed by the sovereign power of the States in which both do business under State protection.

Judicial interpretation of the Commerce Clause gradually evolved the principle that non-action by Congress is tantamount to a congressional declaration that the flow of commerce from State to State must be free from unfair and discriminatory burdens.[24] Throughout the decisions upon the question has run recognition of the supreme power of Congress to regulate interstate commerce, and the courts have stricken down state taxes when found to raise barriers impeding the free flow of commerce between the States, but not obstructing commerce between citizens within a single State. Courts—in the absence of congressional regulation of interstate commerce—have acted because there " . . . would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. . . . it is a matter of public history that the object

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[262 U. S. 506] at p. 516. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. . . . They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken." *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 526, 527. (Italics supplied.)

[23] *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506.

[24] See *Philadelphia & Sou. S. S. Co.* v. *Pennsylvania, supra.*

of vesting in Congress the right to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation." [25] With reference to borderline laws, it has been significantly pointed out that there " . . . is also, in addition to the restraint which those provisions [the Commerce Clause] impose by their own force on the States the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another." [26]

If it be true, as urged, that some state gross receipts taxes may possibly in the future be multiplied so as to burden interstate commerce unfairly, it is equally true that other state gross receipts taxes (as the Indiana tax) may not, in the absence of such multiplication, result in such burdens. Since the present litigation has developed that no such unfair burdens have been imposed upon appellant's interstate business, appellant can only be exempted from payment of this tax by application of a regulatory rule or law which condemns *all* such state taxes—whether fair or unfair. If such a general rule or law is to be promulgated it would seem that under our constitutional division of governmental powers such a regulatory policy should be considered and determined by Congress under its exclusive grant. It will be time enough for judicial protection when a litigant actually proves, in a particular case, that state gross receipts taxes levied against the litigant have resulted in unfair and unjust discrimination against the litigant because of engagement

[25] *County of Mobile* v. *Kimball*, 102 U. S. 691, 697.

[26] *Woodruff* v. *Parham*, 8 Wall. 123, 140.

in interstate commerce. Many arguments—which we might believe to be sound—can be advanced against the legislative policy of a gross receipts tax. These objections, however, are not the criterion of its constitutionality. With the wisdom of such fiscal policy of a State we are not concerned.[27] The interests of interstate commerce will best be fostered, preserved and protected—in the absence of direct regulation by the Congress—by leaving those engaged in it in the various States subject to the ordinary and non-discriminatory taxes of the States from which they receive governmental protection. For these reasons I believe that the entire judgment of the court below should be affirmed.

NATIONAL LABOR RELATIONS BOARD *v.* MACKAY RADIO & TELEGRAPH CO.

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

No. 706. Argued April 5, 6, 1938.—Decided May 16, 1938.

1. The Circuit Court of Appeals has jurisdiction to entertain a petition for rehearing, filed at the same term and in time under its rules, of a judgment denying an application of the National Labor Relations Board for enforcement of an order; and the three months within which a petitioner must apply to this Court for certiorari to review the decision in such case runs from the date of the order entered upon the petition for rehearing. P. 343.
2. Following the failure of negotiations looking to an agreement in respect of terms and conditions of employment, employees of a company engaged in the transmission and receipt of radio, telegraph and cable messages, interstate and foreign, went on a strike. The company brought employees from its offices in other cities to take the places of the strikers. Subsequently, all but five of

[27] Cf. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

those who had been on strike were taken back into the employ of the company. A proceeding was had before the National Labor Relations Board upon a complaint against the company charging that its non-employment of the five was a discrimination against them on account of union activities and that it was guilty of unfair labor practices. After a hearing, and upon findings of fact and conclusions of law, the Board ordered the company to cease and desist from discharging or threatening to discharge, any of its employees because of their membership in the union or on account of union activities; to refrain from interfering with, restraining or coercing its employees in respect of self-organization and collective bargaining; and required the company to reinstate to their former positions, with back pay, the five men who had not been reëmployed, and to post notices to the effect that members of the union would not be discriminated against. *Held:*

(1) Under the findings, the strike was a consequence of, or in connection with, a "labor dispute" as defined in § 2 (9) of the National Labor Relations Act. It was not necessary for the Board to find what the state of the negotiations was when the strike was called; nor, in so many words, that a "labor dispute" existed. P. 344.

(2) Their work having ceased as a consequence of, or in connection with, a current labor dispute, § 2 (3), the strikers remained "employees" of the company for the purposes of the Act, and were protected against the unfair labor practices denounced by it. P. 345.

(3) Discrimination in reinstating employees who had been on strike by excluding certain of them for the sole reason that they had been active in the union, was an unfair labor practice, prohibited by § 8 of the Act. P. 346.

However, it was not an unfair labor practice for the company to replace its striking employees with others in an effort to carry on the business; nor was the company bound later to discharge such others in order to reinstate the strikers. P. 345.

(4) The Board's finding that, in reinstating employees who had been on strike, the company discriminated against those who had been most active in the union, was supported by evidence. P. 346.

(5) The provision of the Act continuing the relationship of employer and employee in the case of a strike as a consequence of, or in connection with, a current labor dispute, does not violate the Fifth Amendment. P. 347.

In the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife.

(6) The affirmative relief ordered by the Board was within its powers and its order was not arbitrary or capricious. P. 348.

(a) Complete relief in respect of the five men discriminated against justified their being given their former positions and reimbursement for loss resulting from the discrimination. P. 348.

(b) In respect of back pay for those ordered to be reinstated, deductions are to be allowed for all sums earned to the date of reinstatement. P. 348.

(c) The clause of the order in respect of the posting of notices to be read in connection with other parts forbidding discharge on account of union activity and not as requiring notice that reinstated employees would not be discharged for any reason whatever. P. 348.

(7) A claim that the company was denied a hearing with respect to the offense found by the Board, because of variance between the findings and the charges on which the complaint was based, examined and rejected. P. 349.

3. At the conclusion of the testimony, and prior to oral argument before the trial examiner, the Board brought the proceeding before it, heard oral argument and received briefs, after which it made its findings of fact and conclusions of law. The issues and contentions of the parties were clearly defined. *Held,* the submission of a tentative report by the trial examiner and a hearing on exceptions to that report were not essential. P. 350.

4. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. P. 351.

87 F. 2d 611; 92 *id.* 761, reversed.

CERTIORARI, 303 U. S. 630, to review a judgment denying an application of the National Labor Relations Board for the enforcement of an order.

Mr. Charles Fahy, with whom *Solicitor General Jackson,* and *Messrs. Robert L. Stern, Robert B. Watts,* and *Laurence A. Knapp* were on the brief, for petitioner.

Mr. Louis W. Myers, with whom *Messrs. Howard L. Kern, Homer I. Mitchell, H. W. O'Melveny,* and *Walter K. Tuller* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals refused [1] to decree enforcement of an order of the National Labor Relations Board.[2] We granted certiorari because of an asserted conflict of decision.[3]

The respondent, a California corporation, is engaged in the transmission and receipt of telegraph, radio, cable, and other messages between points in California and points in other States and foreign countries. It maintains an office in San Francisco for the transaction of its business wherein it employs upwards of sixty supervisors, operators and clerks, many of whom are members of Local No. 3 of the American Radio Telegraphists Association, a national labor organization; the membership of the local comprising "point-to-point" or land operators employed by respondent at San Francisco. Affiliated with the national organization also were locals whose members are exclusively marine operators who work upon ocean-going vessels. The respondent, at its San Francisco office, dealt with committees of Local No. 3; and its parent company, whose headquarters were in New York, dealt with representatives of the national organization. Demand was made by the latter for the execution of agreements respecting terms and conditions of employment

[1] 87 F. 2d 611; 92 F. 2d 761.

[2] 1 N. L. R. B. 201.

[3] See *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. 2d 134; *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 91 F. 2d 509; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. 2d 138; *Black Diamond S. S. Corp.* v. *National Labor Relations Board,* 94 F. 2d 875.

of marine and point-to-point operators. On several occasions when representatives of the union conferred with officers of the respondent and its parent company the latter requested postponement of discussion of the proposed agreements and the union acceded to the requests. In September 1935 the union pressed for immediate execution of agreements and took the position that no contract would be concluded by the one class of operators unless an agreement were simultaneously made with the other. Local No. 3 sent a representative to New York to be in touch with the negotiations and he kept its officers advised as to what there occurred. The local adopted a resolution to the effect that if satisfactory terms were not obtained by September 23 a strike of the San Francisco point-to-point operators should be called. The national officers determined on a general strike in view of the unsatisfactory state of the negotiations. This fact was communicated to Local No. 3 by its representative in New York and the local officers called out the employes of the San Francisco office. At midnight Friday, October 4, 1935, all the men there employed went on strike. The respondent, in order to maintain service, brought employes from its Los Angeles office and others from the New York and Chicago offices of the parent company to fill the strikers' places.

Although none of the San Francisco strikers returned to work Saturday, Sunday, or Monday, the strike proved unsuccessful in other parts of the country and, by Monday evening, October 7th, a number of the men became convinced that it would fail and that they had better return to work before their places were filled with new employes. One of them telephoned the respondent's traffic supervisor Monday evening to inquire whether the men might return. He was told that the respondent would take them back and it was arranged that the official should meet the employes at a downtown hotel and make a statement to

them. Before leaving the company's office for this purpose, the supervisor consulted with his superior, who told him that the men might return to work in their former positions but that, as the company had promised eleven men brought to San Francisco they might remain if they so desired, the supervisor would have to handle the return of the striking employes in such fashion as not to displace any of the new men who desired to continue in San Francisco. A little later the supervisor met two of the striking employes and gave them a list of all the strikers, together with their addresses, and the telephone numbers of those who had telephones, and it was arranged that these two employes should telephone the strikers to come to a meeting at the Hotel Bellevue in the early hours of Tuesday, October 8th. In furnishing this list the supervisor stated that the men could return to work in a body but he checked off the names of eleven strikers who he said would have to file applications for reinstatement, which applications would be subject to the approval of an executive of the company in New York. Because of this statement the two employes, in notifying the strikers of the proposed meeting, with the knowledge of the supervisor, omitted to communicate with the eleven men whose names had been checked off. Thirty-six men attended the meeting. Some of the eleven in question heard of it and attended. The supervisor appeared at the meeting and reiterated his statement that the men could go back to work at once, but read from a list the names of the eleven who would be required to file applications for reinstatement to be passed upon in New York. Those present at the meeting voted on the question of immediately returning to work, and the proposition was carried. Most of the men left the meeting and went to the respondent's office Tuesday morning, October 8th, where on that day they resumed their usual duties. Then or shortly thereafter, six of the eleven in question took their places and resumed

their work without challenge. It turned out that only five of the new men brought to San Francisco desired to stay.

Five strikers who were prominent in the activities of the union and in connection with the strike, whose names appeared upon the list of eleven, reported at the office at various times between Tuesday and Thursday. Each of them was told that he would have to fill out an application for employment; that the roll of employes was complete, and that his application would be considered in connection with any vacancy that might thereafter occur. These men not having been reinstated in the course of three weeks, the secretary of Local No. 3 presented a charge to the National Labor Relations Board that the respondent had violated § 8 (1) and (3) of the National Labor Relations Act.[4] Thereupon the Board filed a complaint charging that the respondent had discharged, and was refusing to employ, the five men who had not been reinstated to their positions, for the reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employes of the respondent, for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employes in the exercise of their rights guaranteed by § 7[5] of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of § 8 (1) of the Act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of § 8 (3) of the Act.

[4] U. S. C. Supp. II, Tit. 29, § 158 (1) and (3).

[5] U. S. C. Supp. II, Tit. 29, § 157.

The respondent filed an answer denying the allegations of the complaint, and moved to dismiss the proceeding on the ground that the Act is unconstitutional. The motion was taken under advisement by the Board's examiner and the case proceeded to hearing. After the completion of its testimony, the Board filed an amended complaint to comport with the evidence, in which it charged that the respondent had refused to re-employ the five operators for the reason that they had joined and assisted the labor organization known as Local No. 3 and engaged with other employes in concerted activities for the purpose of collective bargaining and other mutual aid and protection; that the refusal to re-employ them restrained and coerced the employes in the exercise of rights guaranteed by § 7 and so constituted an unfair labor practice within § 8 (1) of the Act. The amended complaint further asserted that the refusal to re-employ the men discriminated in regard to their hire and tenure of employment and discouraged membership in Local No. 3 and thus amounted to an unfair labor practice under § 8 (3) of the Act. The respondent entered a general denial to the amended complaint and presented its evidence. At the conclusion of the testimony, the Board transferred the cause for further hearing before the members of the Board at Washington, and after oral argument and the filing of a brief, made its findings of fact.

The subsidiary or evidentiary facts were found in great detail and, upon the footing of them, the Board reached conclusions of fact to the effect that Local No. 3 is a labor organization within the meaning of the Act; that "by refusing to reinstate to employment" the five men in question, "thereby discharging said employes," the respondent by "each of said discharges," discriminated in regard to tenure of employment and thereby discouraged membership in the labor organization known as Local No. 3, and, by the described acts "has interfered with, restrained,

and coerced its employes in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act." As conclusions of law the Board found that the respondent had engaged in unfair labor practices affecting commerce within the meaning of § 8, subsections (1) and (3), and § 2, subsections (6) and (7) [6] of the Act. It entered an order that respondent cease and desist from discharging, or threatening to discharge, any of its employes for the reason that they had joined or assisted Local No. 3 or otherwise engaged in union activities; from interfering with, restraining or coercing its employes in the exercise of the rights guaranteed by § 7 of the Act; offer the five men immediate and full reinstatement to their former positions, without prejudice to rights and privileges previously enjoyed, and make each of them whole for any loss of wages due to their discharge; post notices that the respondent would not discharge or discriminate against members of, or those desiring to become members of, the union, and keep the notices posted for thirty days.

As permitted by the Act, the Board filed in the Circuit Court of Appeals a transcript of the record of its proceeding, and a petition for enforcement of its order. In its answer the respondent denied the jurisdiction of the court on the ground that the Act violated Article III, and the Fifth, Seventh, and Tenth Amendments, of the Constitution; that the order amounted to an abuse of discretion because arbitrary and capricious, and was not supported by the evidence; that the trial examiner erred in his rulings on evidence; that the Board erred in overruling exceptions to his rulings, and that the Board's findings of fact and conclusions of law were erroneous.

Upon the hearing before the Circuit Court of Appeals, one judge held that the action of the Board was within

[6] U. S. C. Supp. II, Tit. 29, § 152 (6) (7).

the power sought to be conferred upon it by the statute but that the grant of power violated the due process clause of the Fifth Amendment, and the award of back pay to the employes, without a jury trial, violated the Seventh Amendment. Another judge held that as the statute defined employes to include a person whose work had ceased "as a consequence of, or in connection with, any current labor dispute," and since there was no allegation, evidence, or finding as to such a dispute, the strikers had ceased to be employes within the meaning of the Act and the respondent's treatment of them could not violate the Act. One judge dissented, holding that the Board's order was within its statutory authority and did not violate the Constitution. A petition and supplemental petition for rehearing were granted and, after argument, the court reaffirmed its former decision. The judge who had previously declared the Board's action within the terms of the statute, but unconstitutional, construed the Act as not intended to work the unconstitutional result of compelling an employer to enter into a contract of employment against his will and, hence, as requiring only that the strikers be reinstated to the position of applicants for employment rather than employes. The other judges adhered to the views they had previously expressed.

The petitioner contends the court erred in holding that men who struck because of a failure of negotiations concerning wages and terms of employment ceased to be employes within the meaning of the statute; erred in not holding it an unfair labor practice, forbidden by the statute, for an employer to discriminate because of union activities in the reinstatement of men who have gone on strike because of a failure of negotiations concerning wages and terms of employment; erred in failing to hold that the Act authorizes the Board to order reinstatement of persons thus discriminated against; and one of the

judges erred in holding that the Act, if construed to authorize the Board to require such reinstatement, violates the Fifth Amendment.

On the other hand, the respondent insists that it was not accorded due process of law, because the unfair labor practice charged in the original complaint was abandoned and the action of the Board was based upon a conclusion of fact not within the issues presented; that there is no basis for the Board's order, because there is no finding that the strikers ceased work as a consequence of, or in connection with, any labor dispute, as defined in the statute; that the Act does not empower the Board to compel an employer to re-employ or reinstate those who have abandoned negotiations and gone on strike prior to any unfair labor practice, where the employer, after the strike is effective, and before committing any unfair labor practice, has permanently employed others in place of the strikers; that, if the Act be held to authorize the Board's order, it violates the Fifth Amendment; that Article III of the Constitution requires that the court render its independent judgment upon the quasi-jurisdictional facts upon which the Board's order was based; that the Board's order was, in the light of the facts, so arbitrary and capricious as to warrant the court's refusal to enforce it; and that the case is not properly before us because certiorari was not sought within the time fixed by law.

We hold that we have jurisdiction; that the Board's order is within its competence and does not contravene any provision of the Constitution.

First. Within the thirty days prescribed by the rules of the Circuit Court of Appeals the petitioner moved for a rehearing and for leave, if deemed appropriate, to take further evidence and add the same to the record before the Board. While this application was pending a supplemental petition for rehearing was presented. During the term the court entertained both petitions and granted a re-

hearing and, after oral argument and submission of briefs, wrote further opinions based upon the petitions for rehearing. We think the court had not lost jurisdiction of the cause; that its final judgment was the order entered upon the petitions for rehearing; and that the three months within which the petitioner must apply for certiorari ran from the date of the order dismissing the petition for rehearing and confirming the original order.

Second. Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in § 2 (9) of the Act. That there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment of point-to-point operators cannot be denied. But it is said the record fails to disclose what caused these negotiations to fail or to show that the respondent was in any wise in fault in failing to comply with the union's demands; and, therefore, for all that appears, the strike was not called by reason of fault of the respondent. The argument confuses a current labor dispute with an unfair labor practice defined in § 8 of the Act. True there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike, but within the intent of the Act there was an existing labor dispute in connection with which the strike was called. The finding is that the strike was deemed "advisable in view of the unsatisfactory state of the negotiations" in New York. It was unnecessary for the Board to find what was in fact the state of the negotiations in New York when the strike was called, or in so many words that a labor dispute as defined by the Act existed. The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

Third. The strikers remained employes under § 2 (3) of the Act which provides: "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ." Within this definition the strikers remained employes for the purpose of the Act and were protected against the unfair labor practices denounced by it.

Fourth. It is contended that the Board lacked jurisdiction because respondent was at no time guilty of any unfair labor practice. Section 8 of the Act denominates as such practice action by an employer to interfere with, restrain, or coerce employes in the exercise of their rights to organize, to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ." There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations in New York. On the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employ-

ment, in order to create places for them.[7] The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by § 8.

Fifth. The Board's findings as to discrimination are supported by evidence. We shall not attempt a discussion of the conflicting claims as to the proper conclusions to be drawn from the testimony. There was evidence, which the Board credited, that several of the five men in question were told that their union activities made them undesirable to their employer; and that some of them did not return to work with the great body of the men at 6 o'clock on Tuesday morning because they understood they would not be allowed to go to work until the superior officials had passed upon their applications. When they did apply at times between Tuesday morning and Thursday they were each told that the quota was full and that their applications could not be granted in any event until a vacancy occurred. This was on the ground that five of the eleven new men remained at work in San Francisco. On the other hand, six of the eleven strikers listed for separate treatment who reported for work early Tuesday morning, or within the next day or so, were permitted to go back to work and were not compelled to await the approval of their applications. It appears that all of the

[7] Compare *National Labor Relations Board* v. *Bell Oil & Gas* Co., 91 F. 2d 509.

men who had been on strike signed applications for re-employment shortly after their resumption of work. The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.

As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the ground of skill or ability, but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike, but it is found that the preparation and use of the list, and the action taken by respondent, were with the purpose to discriminate against those most active in the union. There is evidence to support these findings.

Sixth. The Board's order does not violate the Fifth Amendment. The respondent insists that the relation of employer and employe ceased at the inception of the strike. The plain meaning of the Act is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employes for the remedial purposes specified in the Act. We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employes. The

requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employe in the case of a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision.

Seventh. The affirmative relief ordered by the Board was within its powers and its order was not arbitrary or capricious.

As we have held in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. On the basis of the findings, five men who took part in the strike were discriminated against in connection with a blanket offer to reinstate striking employes. The Board enjoined further discrimination against employes by reason of union affiliation, but it could not grant complete relief in respect of the five men short of ordering that the discrimination be neutralized by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon the respondent's discrimination. The order is criticized as arbitrary in that it is said to award back pay to date of reinstatement with deductions only for what was earned to the date of the order. We do not so read it, and the Board admits that credit must be given for all sums earned to date of reinstatement, and so construes the order. It is further said that the order arbitrarily and unreasonably requires the notices to be posted to state that respondent will not discharge its reinstated employes for any reason whatever. This clause of the order is inartificially drawn, and counsel for the Board admit that it should be read in connection with the remainder of the order forbidding discharge on the ground of union activity.

Eighth. The respondent was not denied a hearing with respect to the offense found by the Board. The respondent says that it was summoned to answer a complaint that it discriminated by discharging the five men and that, after all the evidence was in, this complaint was withdrawn and a new one presented asserting that its refusal to re-employ the five men was the head and front of its offending. Then it is said that when the Board came to make its finding it reverted to the position that what the respondent did had not been a failure to employ but a wrongful discharge. Thus the respondent claims that it is found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The position is highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities. If there was a current labor dispute the men were still employes by virtue of § 2 (3), and the refusal to let them work was a discharge. The respondent says that as the Board failed to find, in so many words, that there was a current labor dispute, its conclusion of fact that the men were discharged has no basis. But the Board found that the strike was called because the strikers were informed that the negotiations for a working agreement in New York were not proceeding satisfactorily. We think its action cannot be overturned for the mere reason that it failed to characterize the situation as a current labor dispute. The respondent further urges that, when the amended complaint was filed and the original one withdrawn, the charge it had to meet was a refusal to re-employ; that the phrase "re-employ" means "employ anew"; that if the Board had found a failure to employ the five men because of discrimination forbidden by the Act, the findings would have followed the complaint, whereas the Board, in its conclusions of fact, referred to respondent's action as "refusal to reinstate to

employment" and as a discharge; and the argument is that the findings do not follow the pleadings.

A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back in a body save for eleven men who were singled out for different treatment, six of whom, however, were treated like everyone else, the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.

At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of

the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States,* 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected.

Ninth. The other contentions of the respondent are overruled because foreclosed by earlier decisions of this court.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

TAFT, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 746. Argued April 25, 1938.—Decided May 16, 1938.

1. A decedent in her lifetime promised educational institutions to establish an endowment fund and to pay salaries of orchestral musicians and a director of art. The promises were accepted and acted upon, and under the state law were binding upon her estate. *Held* that in valuing the estate for taxation under the Revenue Act of 1926, the executor was not entitled to deduct the amounts payable under the promises, as being claims contracted "for an adequate and full consideration in money or money's worth," § 303 (a) (1), or as "transfers," to or for the use of the promisee corporations, *id.* § 303 (a) (3). Pp. 355, 357.

2. The legislative and administrative history of § 303 (a) (1) of the Revenue Act of 1926, shows that a promise by a decedent to pay money to a charitable or educational institution, where the only consideration was a stipulated application of the amount received, does not constitute a claim against the estate contracted for an adequate and full consideration in money or money's worth, notwithstanding the fact that under local law the promise is enforceable. P. 355.
3. A binding promise by a decedent to pay money to a charitable or educational institution, not attended by any allocation of funds in decedent's lifetime, is not a "transfer" within the meaning of § 303 (a) (3), Revenue Act of 1926; and payment by the executor does not make it such by relation. P. 357.
4. Only such transfers *inter vivos* as are testamentary in character are deductible under subsection (3), *supra*. P. 358.

92 F. 2d 667, affirmed.

CERTIORARI, 303 U. S. 631, to review a judgment of the Circuit Court of Appeals which affirmed a decision of the Board of Tax Appeals, 33 B. T. A. 671, sustaining the disallowance of certain deductions in the valuation of an estate for taxation.

Mr. Robert A. Taft for petitioner.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *L. W. Post* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented is whether the petitioner, as executor, may deduct from the gross estate amounts payable pursuant to the decedent's binding promises as claims against the estate incurred bona fide and for an adequate and full consideration in money or money's worth within the meaning of § 303 (a) (1), or as transfers to charitable or educational institutions under § 303 (a) (3), of the

Revenue Act of 1926.[1] The deductions were of amounts owing at the decedent's death upon the following contractual obligations.

By letter the decedent agreed with the University of Cincinnati to establish a fund as a memorial to her husband, stating that she would make available to the trustees of the fund, whom she named, during the ensuing year, $50,000, during the following year $75,000, and, in each succeeding year, $100,000 or such other income as might be derived from a fund of $2,000,000 which she would ultimately transfer to the trustees. The letter outlined the terms of the trust to which the income was to be devoted. The offer was formally accepted by the Board of Directors of the University and, pursuant to the agreement, the decedent made payments to the trustees and her executor continued to pay sums on account of interest and principal. The University is an educational institution and no profit enures to anyone from its operation.

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[1] "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property . . . to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth, . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, . . ."

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Being deeply interested in the Cincinnati Institute of Fine Arts and its work, and having jointly with her husband and as an individual contributed large sums to this work, the decedent, to obviate the necessity of reducing the personnel of the orchestra the Institute conducts, agreed with the Institute that if it would retain two musicians she would pay their salaries under contracts covering two years. In reliance upon her promise the Institute re-engaged the two men. The decedent paid the amount of their salaries prior to her death and petitioner, as executor, paid them to the end of the contract term. The Institute would not have re-employed these men except for the agreement. It is a charitable corporation organized for the maintenance of a symphony orchestra and other activities, and no profit enures to anyone from its operations.

The decedent agreed by letter addressed to the Cincinnati Institute of Fine Arts that if it would employ a director of art she would contribute $10,000 towards his salary. In reliance upon this undertaking the institution engaged such a director at a salary of $10,000 per annum. She paid the stipulated amount for one and one-half years prior to her death and the petitioner, as executor, paid for one year subsequent to her death. There were no available funds for the employment of a director except those received from the decedent and the Institute would not have employed one except for her agreement. It is an educational institution and does not operate for profit.

In 1930 the decedent agreed with the University of Cincinnati that if it would engage a named person as professor to give a specified course of instruction she would pay the University the amount of his salary. She had made similar arrangements for prior years. The University employed the professor and would not have done so except for her agreement. At the time of her death a

sum remained due according to her promise which the petitioner paid.

The total claimed as deductible on account of these obligations was $2,015,420. Under the law of Ohio, the decedent's promises were and are legally binding and enforceable against her estate. The Commissioner ruled, and the Board [2] and the court below [3] have held, that the estate's obligations in question, though contracted bona fide, were not incurred for an adequate and full consideration in money or money's worth as required by clause (1), and payments of the sums promised are not transfers to or for the use of any corporation organized and operating exclusively for charitable or educational purposes within the meaning of clause (3), of § 303 (a) of the Act. We granted certiorari because of an alleged conflict of decision.[4]

1. The claims against the estate were not incurred or contracted for an adequate and full consideration in money or money's worth within the meaning of the statute. The terms used, the legislative history of the section, and the regulations interpreting it, require this conclusion. The conditions imposed by the decedent as to the expenditure of the money promised and the stipulation on the part of the payee to expend it in that fashion, or its compliance with the conditions, do not constitute an adequate or a full consideration in money or money's worth within the meaning of the Act. If there were doubt about the matter the legislative history of the statute and the Treasury regulations would require us so

[2] 33 B. T. A. 671.

[3] 92 F. 2d 667.

[4] See *Turner* v. *Commissioner*, 85 F. 2d 919; *Commissioner* v. *Bryn Mawr Trust Co.*, 87 F. 2d 607; *Porter* v. *Commissioner*, 60 F. 2d 673; *Bretzfelder* v. *Commissioner*, 86 F. 2d 713; *Lockwood* v. *McGowan*, 86 F. 2d 1005.

to hold. The Revenue Act of 1916 permitted the deduction of the amount of claims against the estate "allowed by the laws of the jurisdiction . . . under which the estate is being administered." [5] The Acts of 1918 and 1921 contain like provisions.[6] Under these Acts the claims in question would have been deductible as enforceable by state law irrespective of the nature of the consideration.[7] The Act of 1924 altered existing law and authorized the deduction of claims against an estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth." [8] Congress had reason to think that the phrase "fair consideration" would be held to comprehend an instance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate.[9] The words "adequate and full consideration" were substituted by § 303 (a) (1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose.

The regulations of the Treasury promulgated under the Act of 1924 and the first edition applicable to that of 1926, paraphrased the statutory language.[10] The 1929 edition of Regulation 70, Art. 36, provides in part: "A pledge or a subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equiva-

[5] Revenue Act of 1916, § 203 (a) (1), 39 Stat. 756, 778.

[6] Revenue Act of 1918, § 403 (a) (1), 40 Stat. 1057, 1098; Revenue Act of 1921, § 403 (a) (1), 42 Stat. 227, 279.

[7] *Atkins* v. *Commissioner,* 30 F. 2d 761.

[8] Revenue Act of 1924, § 303 (a) (1), 43 Stat. 253, 305.

[9] See *Ferguson* v. *Dickson,* 300 F. 961, 964.

[10] Regulations 68, Arts. 29, 36; Regulations 70 (1926 Ed.) Arts. 29, 36.

lent received therefor by the decedent." [11] Since 1929 the regulations have excluded deductions such as those in issue here. Meantime the estate tax provisions have been amended four times and the section under which the regulations were promulgated has been amended twice. We must assume that Congress was familiar with the construction put upon the section by the Treasury and was satisfied with it. The Board of Tax Appeals[12] and the courts,[13] with the exception of the Circuit Court of Appeals for the Third Circuit,[14] have held that a promise to pay money to a charitable or educational institution, where the only consideration was a stipulated application of the amount received, does not constitute a claim against the estate contracted for an adequate and full consideration in money or money's worth notwithstanding the fact that under local law the promise is enforceable. In this view we agree.

2. Payments pursuant to the promises are not transfers within the meaning of § 303 (a) (3). The court below excluded the payments from the operation of that section upon two grounds. Both, as we think, are valid. The petitioner's payment, after the decedent's death, of a sum promised during her life, is not appropriately designated a transfer. True the decedent has promised to make a transfer but fulfillment of the promise by the executor does not relate back to the time the promise was

[11] See also Regulations 80, 1934 Ed., Art. 36; Regulations 80, 1937 Ed., Art. 36.

[12] Porter *v.* Commissioner, 23 B. T. A. 1016, 1025; Turner *v.* Commissioner, 31 B. T. A. 446; Safe Deposit & Trust Co. *v.* Commissioner, 35 B. T. A. 259, 265.

[13] *Porter* v. *Commissioner,* 60 F. 2d 673; *Bretzfelder* v. *Commissioner,* 86 F. 2d 713; *Glaser* v. *Commissioner,* 69 F. 2d 254; *Carney* v. *Benz,* 90 F. 2d 747, 749; *Lockwood* v. *McGowan,* 13 F. Supp. 966, affirmed 86 F. 2d 1005.

[14] *Turner* v. *Commissioner,* 85 F. 2d 919; *Commissioner* v. *Bryn Mawr Trust Co.,* 87 F. 2d 607, 609.

made so as to convert her promise into a transfer by her. Here the subject of the transfer was not identified by any allocation of decedent's funds during her life. This fact adds point to the view that she made no transfer.

Subsection (3) applies only to testamentary dispositions. The phrase is "the amount of all bequests, legacies, devises, or transfers" to certain specified religious, charitable, scientific, literary or educational uses. The right to the deduction is qualified by the provision "The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate." The only transfers required to be included in the gross estate are those made in contemplation of death or to take effect in possession or enjoyment at or after death.[15] In other words, only such transfers as are testamentary in character are to be included in the gross estate, and it follows that only those of that character are deductible under subsection (3). Those here in question were clearly not such. There is no claim that the agreements were made in contemplation of death or to take effect in possession or enjoyment at or after death.

3. The petitioner urges that all of the revenue acts have granted liberal deductions in respect of income tax and estate tax for contributions to charitable and educational purposes. He says that if the benefactions in question had been made in the form of bequests or gifts to take effect at death there would be no question of the right to the claimed deductions. He urges, therefore, that we

[15] See § 302 (c), 44 Stat. 70. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, . . . (c) To the extent of any interest therein of which the decedent has at any time made a transfer, . . . in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . ." See also subsection (d), 44 Stat. 71.

should adopt a liberal construction of the Act to effectuate the intent of Congress even though the payments in question do not fall within the strict meaning of the words used. But we are not permitted to speculate as to the reasons why the policy evidenced with respect to other forms of gift was not extended to claims upon promises enforceable by state law. We are bound to observe the alterations made in the successive acts which, in the plain meaning of the language employed, exclude deduction of enforceable claims of the sort here involved, even though the case be a hard one. The testatrix was bound to bring her transactions within the letter of the statutory provisions and the regulations at the risk that non-compliance might deprive her estate of tax immunity as respects the pledges.

The judgment is

Affirmed.

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

ZERBST, WARDEN, *v.* KIDWELL.*

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

No. 782. Argued April 27, 1938.—Decided May 16, 1938.

A prisoner sentenced to a federal penal institution for an offense committed while he was on parole from such an institution may be required by the Parole Board to serve the unexpired portion of his first sentence after the expiration of his second sentence. P. 363.

92 F. 2d 756, reversed.

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* Together with No. 783, *Zerbst, Warden,* v. *Smith;* No. 784, *Same* v. *Collins;* No. 785, *Same* v. *Owens;* No. 786, *Same* v. *Peel;* No. 787, *Same* v. *Jones;* No. 788, *Same* v. *Stone;* and No. 789, *Same* v. *Sullivan,* also on writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit.

CERTIORARI, 303 U. S. 632, to review judgments affirming orders of the District Court discharging prisoners from custody, in *habeas corpus* proceedings.

Mr. Bates Booth argued the cause, and *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Mr. W. Marvin Smith* were on a brief, for petitioner.

Mr. J. F. Kemp submitted on brief for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondents were paroled before completing sentences in federal prisons.[1] Before expiration of their sentences and while on parole, they committed second federal offenses, for which they were convicted, sentenced, and thereafter completely served sentences in the Atlanta Penitentiary. Respondents contend that, from the moment of their imprisonment in the Penitentiary under the second sentences, they also began service of the unexpired part of their original sentences. If this contention is correct respondents have also completely served the unexpired parts of the first sentences.

Petitioner contends, however, that when respondents violated their paroles by committing the second federal crimes, they were no longer in custody under the first sentences; service of the first sentences was interrupted and suspended and was not resumed before completion of service of the second sentences; and that after completion of the second sentences, the Board of Parole has authority to require completion of the first sentences, service of which ceased due to the interruption by parole violations.

[1] Some were released with credit for good conduct but are treated as on parole until their maximum terms have expired. 18 U. S. C., c. 22, § 716 (b).

After completion of service of the second sentences, respondents were held in custody by the warden of the Penitentiary under warrants of a member of the Board of Parole alleging violations of parole. The District Court, believing the first sentences "began to run again the moment . . . [respondents were] received at the Penitentiary," discharged respondents from custody on habeas corpus proceedings.[2] The Court of Appeals affirmed.[3] Due to the importance of the question involved, we granted certiorari.[4]

When respondent committed a federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended. Thereafter, his imprisonment was attributable to his second sentence only, and his rights and status as to his first sentence were "analogous to those of an escaped convict." [5] Not only had he—by his own conduct—forfeited the privileges granted him by parole, but since he was no longer in either actual or constructive custody under his first sentence, service under the second sentence can not be credited to the first without doing violence to the plain intent and purpose of the statutes providing for a parole system.

The Parole Board and its members have been granted sole authority to issue a warrant for the arrest and return to custody of a prisoner who violates his parole.[6] A member of the Board ordered that respondent be taken into custody *after* completion of the second sentence.

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[2] 19 F. Supp. 475. Respondents filed separate petitions for habeas corpus raising substantially identical issues, which will be treated together here, and the respondents will be dealt with as one.

[3] 92 F. 2d 756.

[4] 303 U. S. 632.

[5] *Anderson* v. *Corall*, 263 U. S. 193, 196, 197.

[6] 18 U. S. C., c. 22, § 723 (c).

Until completion of the second sentence—and before the warrant was served—respondent was imprisoned only by virtue of the second sentence. There is, therefore, no question as to concurrent service of sentences, unless—as respondent contends—§ 723 (c) [6] required that the unexpired part of respondent's first sentence begin when he was imprisoned under the second sentence. That section provides:

" . . . The Board of Parole . . . or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

Obviously, this provision does not require that a parole violator's original, unexpired sentence shall begin to run from the date he is imprisoned for a new and separate offense. It can only refer to reimprisonment on the original sentence under order of the Parole Board.

Since service of the original sentence was interrupted by parole violation, the full term of *that* sentence has not been completed. Just as respondent's own misconduct (parole violation) has prevented completion of the original sentence, so has it continued the authority of the Board over respondent until that sentence is completed and expires. Discretionary authority in the Board to revoke a parole *at any time before expiration of a parolee's sentence* was provided—and is necessary—as a means of insuring the public that parole violators would be punished.[7] The proper working of the parole system re-

[6] 18 U. S. C., c. 22, § 723 (c).

[7] The parole system was intended to make parole discretionary "and revocable at any time . . . [the parole authority] may elect to revoke it," Cong. Rec., Vol. 45, p. 6374. ". . . the prisoner is under

quires that the Board have authority to discipline, guide and control parole violators whose sentences have not been completed. It is not reasonable to assume that Congress intended that a parolee whose conduct measures up to parole standards should remain under control of the Board until expiration of the term of his sentence, but that misconduct of a parole violator could result in reducing the time during which the Board has control over him to a period less than his original sentence.

Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the Board.[8] Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offence committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified. If the parole laws should be construed as respondent contends, parole might be more reluctantly granted, contrary to the broad humane purpose of Congress to grant relief from imprisonment to deserving prisoners.[9]

Respondents have not completed service of their original sentences and were not entitled to release. The causes

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the absolute control of that board, and he may be apprehended and returned at any time on violation of his parole. *Those are the safeguards for the benefit of society.*" *Id.*, p. 6377.

The governing Act expressly provides that: ". . . if said [retaken] prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the Board of Parole, and the Board may then, or *at any time in its discretion,* revoke the order and terminate such parole or modify the terms and conditions thereof. . . ." (Italics supplied.) 18 U. S. C., c. 22, § 719.

[8] See Cong. Record, Vol. 45, p. 6374; *United States* v. *Murray*, 275 U. S. 347, 357.

[9] Cf., *United States* v. *Farrell*, 87 F. 2d 957, 961.

are reversed and remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of these cases.

GENERAL ELECTRIC CO. *v.* WABASH APPLIANCE CORP. ET AL.

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

No. 453. Argued March 4, 7, 1938.—Decided May 16, 1938.

1. Product claims 25–27, of Patent No. 1,410,499, to Pacz, for a filament for electric incandescent lamps or other devices, composed substantially of tungsten and made up mainly of a number of comparatively large grains of such size and contour as to prevent substantial sagging and offsetting during a normal or commercially useful life for such a lamp or other device, *held* void for want of a sufficiently definite disclosure. R. S. § 4888; 35 U. S. C. § 33. P. 368.
2. Claimed inventions, improvements and discoveries, turning on points so refined as the granular structure of products, require precise descriptions of the new characteristic for which protection is sought. In a limited field the variant must be clearly defined. P. 369.
3. A patentee may not broaden his product claims by describing the product in terms of function. P. 370.
4. A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable, but a characteristic essential to novelty may not be distinguished from the old art solely by its tendency to remedy the problems in the art met by the patent. P. 371.
5. The difficulty of making adequate description may have some bearing on the sufficiency of the description attempted, but it can not justify a claim describing nothing new except perhaps in functional terms. P. 372.

6. A patentee who does not distinguish his product from what is old except by reference, express or constructive, to the process by which he produced it, can not secure a monopoly on the product by whatever means produced. P. 373.
7. The product claims in question, which seek to monopolize the product however created, may not be saved by a limitation to products made in accordance with the processes set out in the specification. P. 374.

91 F. 2d 904, affirmed.

CERTIORARI, 302 U. S. 676, to review the reversal of a decree for injunction and accounting in a patent infringement suit.

Mr. Merrell E. Clark, with whom *Messrs. Hubert Howson* and *Alexander C. Neave* were on the brief, for petitioner.

Mr. Samuel E. Darby, Jr., with whom *Mr. Paul Kolisch* was on the brief, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner, General Electric Company, brought this patent infringement suit based on Pacz Patent No. 1,410,499, relating to a tungsten filament for incandescent lamps. The patent, issued March 21, 1922, on an application filed February 20, 1917, contains process and product claims; only the latter are here involved. The District Court for Eastern New York held claims 25, 26 and 27 valid and infringed, and gave petitioner a decree for an injunction and accounting. 17 F. Supp. 901. The Court of Appeals for the Second Circuit held that petitioner's product was anticipated by filaments produced under the teachings of the Coolidge Patent No. 1,082,933, and reversed with directions to dismiss the bill of complaint. 91 F. 2d 904. This decision conflicted with that handed down by the Court of Appeals for the Ninth Circuit, *Anraku* v. *General Electric Co.,* 80 F. 2d 958, which held

the same claims valid and infringed. To resolve the conflict, this Court granted certiorari.

In incandescent lamps, the tungsten filament, through which the electric current passes, grows more luminous than the carbon filament of the early days of the art. There were faults of "offsetting" and "sagging," however, affecting the efficiency of the first tungsten filaments. "Offsetting" occurs when, during heating in the use of the lamp, the filament forms crystals which extend their boundaries across the entire diameter of the filament, substantially perpendicular to its axis. The crystals in the filament thus come to have an appearance, somewhat analogous to the joints in a bamboo rod. Lateral slipping of the crystals reduces the cross-sectional area at the point of contact of the crystals with the result that the temperature at that point is increased, thus hastening the burnout, and the filament is weakened. "Sagging" is a change of position by the filament during incandescence. It elongates and thus is forced out of the plane it occupied between fixed supports. Sagging has many objections. The sagging filament may touch the glass and end the life of the lamp. In gas-filled lamps, when sagging causes the coils to spread apart, the gas flows in between the coils and unduly cools the filament. Combatting sagging by additional supports is also said to cool the filament, and reduce electrical efficiency.

Pacz undertook to remedy these faults. He carried out many experiments, and his 218th effort, made while he was in the employ of petitioner company, yielded the discovery disclosed by the patent in suit. The specification asserts that by means of his invention "the sagging is substantially eliminated and 'offsetting' of the filament is substantially prevented, during a normal or commercially useful life of the lamp." He brings "into intimate

association with tungsten a material [an alkaline silicate] which will have the desired influence upon the grain growth of the metal." The specification continues as follows:

"When the metal reaches the temperature at which extensive grain growth would ordinarily take place, the presence of this material intimately associated with the tungsten particles has a marked effect on the shape and size of the tungsten grains. The ingot of tungsten thus produced, whether it be due to the fact that the grains have not reached the equilibrium grain size or to other causes, is particularly susceptible to grain growth during subsequent heat treatments.

"The probable reason why filaments made according to my invention do not sag, is that the structure is comparatively coarse grained. The coarse grained filament produced by means of my invention does not 'offset' so as to cut short the life of the lamp appreciably."

The District Court found that Pacz's patent exhibited novelty and invention; that Pacz produced large crystals early in the life of the lamp; that although coarse-grained and thus non-sagging, filaments meant "offsetting" to the art, where it was "common knowledge" that grains large enough to extend across the filament induced slippage, Pacz procured a particular kind of coarse-grained filament which did not "offset" because of the nature of the boundaries of the grains, their contour being "a very important element."

The Circuit Court of Appeals held that the Pacz product was anticipated by Patent No. 1,082,933, issued December 30, 1913, to William D. Coolidge for a process of producing ductile tungsten for incandescent electric lamp filaments and for the product itself.

The question before this Court is the validity of the claims in suit. Claim 25, which is typical,[1] reads as follows:

"25. A filament for electric incandescent lamps or other devices, composed substantially of tungsten and made up mainly of a number of comparatively large grains of such size and contour as to prevent substantial sagging and offsetting during a normal or commercially useful life for such a lamp or other device."

We need not inquire whether Pacz exhibited invention, or whether his product was anticipated. The claim is invalid on its face. It fails to make a disclosure sufficiently definite to satisfy the requirements of R. S. § 4888, 35 U. S. C. § 33. That section requires that an applicant for a patent file a written description of his discovery or invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains . . . to make, construct, compound and use the same; . . . and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." We may assume that Pacz has sufficiently informed those skilled in the art how to make and use his filament. The statute has another command. Recognizing that most inventions represent improvements on some existing article, process or machine, and that a description of the

[1] "26. A drawn filament for electric incandescent lamps or other devices, composed substantially of tungsten and made up mainly of a number of comparatively large grains of such size and contour as to prevent substantial sagging and off-setting during a normal or commercially useful life for such a lamp or other device.

"27. A filament for electric incandescent lamps or other devices, composed of tungsten containing less than three-fourths of one per cent of non-metallic material and made up mainly of comparatively large grains of such size and contour as to prevent substantial sagging or offsetting during a normal or commercially useful life for such a lamp or other device."

invention must in large part set out what is old in order to facilitate the understanding of what is new, Congress requires of the applicant "a distinct and specific statement of what he claims to be new, and to be his invention." [2] Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public.[3] The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights.[4] The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not." [5] The claims "measure the invention." [6] Patentees may reasonably anticipate that claimed inventions, improvements and discoveries, turning on points so refined as the granular structure of products, require precise descriptions of the new characteristic for which protection is sought. In a limited field the variant must be clearly defined. This was one in a series of patents. *United States* v. *General Electric Co.*, 272 U. S. 476, 480.

Pacz did not adequately set out "what he claims to be new." The tungsten filament "made up mainly of a number of comparatively large grains," differentiates the

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[2] *Merrill* v. *Yeomans*, 94 U. S. 568, 570.

[3] Cf. *The Incandescent Lamp Patent*, 159 U. S. 465, 474 ff.

[4] See *Brooks* v. *Fiske*, 15 How. 212, 215.

[5] *Permutit Co.* v. *Graver Corp.*, 284 U. S. 52, 60; *Grant* v. *Raymond*, 6 Pet. 218, 247.

[6] *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 419.

claimed invention from tungsten drawn into a single crystal (Schaller No. 1,256,930), and from Coolidge's fine-grained thoriated filament, but serves aptly to describe the product of earlier manufacture, with its large regular grains subject to offsetting. According to the District Court, the earliest, so-called "squirted," tungsten filaments, also "consisted of comparatively large crystals, many of which were large enough to extend clear across the filament, but they shifted." 17 F. Supp. at 902. The failure of the patentee to make claim to a distinct improvement is made clear by comparison of the language of the claims under consideration with descriptions of offset difficulties recognized by other inventors.[7]

The claim further states that the grains must be "of such size and contour as to prevent substantial sagging and offsetting" during a commercially useful life for the lamp. The clause is inadequate as a description of the structural characteristics of the grains. Apart from the statement with respect to their function, nothing said about their size distinguishes the earliest filaments, and nothing whatever is said which is descriptive of their contour (termed by the District Court a "very important element"), not even that they are irregular.

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[7] "When this crystallization becomes excessive the crystals may, in the case of a filament, become so large as to extend across the entire section of the filament and thereupon the sections may move laterally upon each other and produce the condition known as 'offsetting.' I shall hereinafter describe more in detail the special method which I employ for minimizing the loss in ductility and for preventing this offsetting effect." Coolidge Patent, No. 1,082,933.

"Such crystals seem to increase in size in much the same manner as crystals formed in liquid solutions, and, if the crystals become large enough to extend almost or entirely across the filament, adjacent crystals tend to slip along their cleavage planes thereby giving the filament the offset or faulted appearance above referred to." Myers and Hall patent, No. 1,363,162.

The claim uses indeterminate adjectives which describe the function of the grains to the exclusion of any structural definition, and thus falls within the condemnation of the doctrine that a patentee may not broaden his product claims by describing the product in terms of function.[8] Claim 25 vividly illustrates the vice of a description in terms of function. "As a description of the invention it is insufficient and if allowed would extend the monopoly beyond the invention."[9] The Court of Appeals for the Ninth Circuit relied on the fact that the description in the claims is not "wholly" functional.[10] 80 F. 2d 958, 963. But the vice of a functional claim exists not only when a claim is "wholly" functional, if that is ever true, but also when the inventor is painstaking when he recites what has already been seen, and then uses conveniently functional language at the exact point of novelty.[11]

A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable, but a characteristic essential to nov-

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[8] *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 256–258, and cases cited.

[9] 277 U. S. at 258.

[10] Presumably that court would have assented to the condemnation of other product claims of the patent in suit, containing even less description than the ones under discussion:

"28. A coiled filament composed substantially of tungsten and capable of use in an electric incandescent lamp without either substantial sagging or offsetting during a normal or commercially useful life.

"29. A coiled filament composed mainly of drawn tungsten and capable of use in an electric incandescent lamp without substantial sagging and without substantial offsetting during a normal or commercially useful life."

[11] See *Gynex Corp.* v. *Dilex Institute*, 85 F. 2d 103, 105; *Davis Co.* v. *New Departure Co.*, 217 F. 775, at 782.

elty may not be distinguished from the old art solely by its tendency to remedy the problems in the art met by the patent. And we may doubt whether the language used in Claim 25, taken by itself, conveyed definite meaning to those skilled in the art of incandescent lighting.[12]

The Circuit Court of Appeals below suggested that "in view of the difficulty, if not impossibility, of describing adequately a number of microscopic and heterogeneous shapes of crystals, it may be that Pacz made the best disclosure possible, . . ." But Congress requires, for the protection of the public, that the inventor set out a definite limitation of his patent; that condition must be satisfied before the monopoly is granted.[13] The difficulty of making adequate description may have some bearing on the sufficiency of the description attempted, but it cannot justify a claim describing nothing new except per-

[12] There is no showing whether, under established principles in the science, the language indicated grains extending across the width of filament, and if so whether the boundaries were irregular, or regular but not perpendicular to the axis of the filament; or whether the language indicated grains larger than the fine grains of Coolidge's thoriated filament but not large enough to extend across the entire section, and if so what type of boundaries existed.

Indeed, those merely skilled might have suspected the absence of crystals large enough to extend across the entire section of the filament, in view of the efforts of other patentees to avoid such crystals, (Coolidge, No. 1,082,933, p. 2, l. 13; Myers and Hall, No. 1,363,162, p. 1, l. 56), and in view of the "common knowledge in the art that where grain boundaries, large enough to extend across the filament, were produced, there would be bound to be slippage" (17 F. Supp. 901, at 903); yet those are the crystals found in respondent's lamps.

[13] Different considerations may apply under the Act of May 23, 1930, c. 312, § 2, 46 Stat. 376, 35 U. S. C. § 33, providing that no "plant patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible."

haps in functional terms. It may be doubted whether one who discovers or invents a product he knows to be new will ever find it impossible to describe some aspect of its novelty.

The product claims here involved cannot be validated by reference to the specification. Assuming that in a proper case a claim may be upheld by reference to the descriptive part of the specification in order to give definite content to elements stated in the claim in broad or functional terms,[14] the specification of the Pacz patent does not attempt in any way to describe the filament, except by mention of its coarse-grained quality. Even assuming that definiteness may be imparted to the product claim by that part of the specification which purportedly details only a method of making the product,[15] the description of the Pacz process is likewise silent as to the nature of the filament product. Although in some instances a claim may validly describe a new product with some reference to the method of production,[16] a patentee who does not distinguish his product from what is old except by reference, express or constructive, to the process by which he produced it, cannot secure a monopoly on the product by whatever means produced. "Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be

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[14] Compare *Mitchell* v. *Tilghman,* 19 Wall. 287, 391; *Westinghouse* v. *Boyden Power Brake Co.,* 170 U. S. 537, 557–558.

[15] Compare *Holland Furniture Co.* v. *Perkins Glue Co.,* 277 U. S. at 255, with *United States Repair & Guarantee Co.* v. *Assyrian Asphalt Co.,* 183 U. S. 591, at 600–601.

[16] Cf. *Dunn Wire-Cut Lug Brick Co.* v. *Toronto Fire Clay Co.,* 259 F. 258, 261; *Trussell Mfg. Co.* v. *Wilson-Jones Co.,* 50 F. 2d 1027, 1029.

held to infringe the patent which is not made by that process." [17]

Finally, the product claims may not be saved by a limitation to products produced in accordance with the process set out in the specification. This construction, though possibly of no avail against respondent, might add to the protection afforded petitioner by the process claims, if they are valid, in view of its application to filaments produced abroad. But putting aside questions as to the general propriety of such a construction,[18] unless the claim uses language explicitly referring to the method of preparation, or describing the product in phrases suggestive of that process,[19] to save the product claim in this fashion would constitute an improper importation into the claim of a factor nowhere described there.[20] The claims in suit seek to monopolize the product however created, and may not be reworded, in an effort to establish

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[17] *Cochrane* v. *Badische Anilin & Soda Fabrik,* 111 U. S. 293, 310. See also *Hide-Ite Leather Co.* v. *Fiber Products Co.,* 226 F. 34, 36; cf. *Maurer* v. *Dickerson,* 113 F. 870, 874.

See also *National Carbon Co.* v. *Western Shade Cloth Co.,* 93 F. 2d 94, 97:

"It has been said that a claim for a product produced by any process which will produce a like result covers the product only when made by equivalent processes. *Pickhardt* v. *Packard* (C. C.), 22 F. 530."

[18] *Steinfur Patents Corp.* v. *William Beyer, Inc.,* 62 F. 2d 238, 241; *Buono* v. *Yankee Maid Dress Corp.,* 77 F. 2d 274, 279; *Dunn Wire-Cut Lug Brick Co.* v. *Toronto Fire Clay Co.,* 259 F. 258, 261–262.

[19] *Smith* v. *Goodyear Dental Vulcanite Co.,* 93 U. S. 486; *Cochrane* v. *Badische Anilin & Soda Fabrik,* 111 U. S. 293, 310; *Plummer* v. *Sargent,* 120 U. S. 442, 448; *Downes* v. *Teter-Heany Development Co.,* 150 F. 122; *Hide-Ite Leather Co.* v. *Fiber Products Co.,* 226 F. 34.

[20] Compare *McCarty* v. *Lehigh Valley R. Co.,* 160 U. S. 110, 116; *Altoona Publix Theatres* v. *American Tri-Ergon Corp.,* 294 U. S. 477, 487.

their validity, to cover only the products of the process described in the specification, or its equivalent.

For reasons set out, claims 25, 26, 27 are invalid. The judgment is

Affirmed.

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

FEDERAL POWER COMMISSION *v.* METROPOLITAN EDISON CO. ET AL.

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

No. 915. Argued May 2, 1938.—Decided May 23, 1938.

1. An order of the Federal Power Commission is not reviewable in the Circuit Court of Appeals under § 313 of the Federal Power Act, as amended, unless there has been an application to the Commission for a rehearing. Review does not extend to an order granting a rehearing. P. 381.
2. Section 313 (a) (b) of the Federal Power Act does not empower the Circuit Court of Appeals to review orders of the Power Commission which are preliminary or procedural, but relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case. P. 383.
3. Where the only orders made by the Federal Power Commission were, first, an order fixing a hearing and requiring the respondent corporations to appear and produce certain information and documents, and, second, an order purporting to grant a rehearing of the first, the Circuit Court of Appeals had no appellate jurisdiction to restrain proceedings under the original order until the questions raised by the petition for rehearing were determined or to define the scope of the rehearing and of evidence to be there considered. Pp. 385, 387.
4. Judicial Code § 262, which provides that the federal courts shall have power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective

jurisdictions, and agreeable to the usages and principles of law," *held* inapplicable. Pp. 383, 387.

5. The Federal Power Act confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a federal court under § 307 (c), and punishment for contempt is confined to failure to obey the order of the court. P. 386.
6. Upon such application by the Commission, respondents have full opportunity to contest the validity of the order sought to be enforced. *Id.*
7. One who refuses to attend and testify, or produce books and papers, in obedience to a subpoena of the Commission is not punishable under § 307 (c) of the Act, if the refusal is not wilful but made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled. P. 387.

94 F. 2d 943, 945, reversed.

CERTIORARI, *post*, p. 553, to review a judgment of the Circuit Court of Appeals restraining the Federal Power Commission from proceeding with an inquiry and investigation until questions raised by a petition for rehearing had been determined by it.

Mr. Oswald Ryan, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Paul A. Freund, Robert M. Cooper, William C. Koplovitz, Lambert McAllister,* and *Gregory Hankin* were on the brief, for petitioner.

Messrs. Walter Biddle Saul and *Edward F. Huber,* with whom *Messrs. C. Edward Paxson* and *George J. Banigan* were on the brief, for respondents.

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

On January 6, 1936, the Federal Power Commission instituted an investigation to determine the "conditions, practices, and matters regarding the ownership, operation, management, and control" of the respondent corpora-

tions. The order directed respondents to file with the Commission copies of contracts and statements of working arrangements between respondents and persons controlling them, and statements of charges on respondents' books for 1934 and 1935 representing payments made and obligations incurred to such persons. Respondents were also directed to make their books, records, etc., available for examination by the Commission's representatives. The investigation was instituted on representations of the Governor and Public Service Commission of Pennsylvania.

Respondents challenged the jurisdiction of the Commission to make the order, and, reserving their right to question its legality, they furnished various data and information. Following an examination of the books and records of respondents, the Commission's examiners submitted a report on December 10, 1936.

Thereupon the Commission, on January 26, 1937, made an order providing that a hearing should be held on March 3, 1937. The order recited that the respondents had reported charges appearing upon their books which represented payments made and obligations incurred to named persons as (a) "conceded affiliates" and (b) "not conceded affiliates," respectively; that the examination of the books and records of respondents and of admitted affiliates disclosed transactions between respondents and additional named persons, and that the accounting representatives of the Commission had submitted a report indicating that certain named persons "control respondents, or are controlled by the same persons which control respondents." The order then directed respondents to appear at the hearing, as stated, and to present information bearing upon the question of control and specifically showing (1) their form of organization, respectively, (2) their articles of incorporation, partnership agreements or other documents of organi-

zation, (3) the names and addresses of partners, directors, officers, trustees and agents, (4) the ownership held by such persons "in or over any other person named above," as well as the manner by which such ownership was maintained, and (5) such other data as might from time to time be required by the Commission. The order further directed that a copy of the report prepared by the accounting representatives of the Commission should be served on each person named, and the Commission gave notice that the hearing would be had by the Commission sitting jointly with the Public Service Commission of Pennsylvania. See Federal Power Act, § 209(b), 49 Stat. 853.

Respondents then filed with the Commission a petition for rehearing as to the order of January 26, 1937, asking for the vacating of that order and the termination of the proceeding initiated by the order of January 6, 1936. Respondents contended that the Commission lacked jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, and, in particular, (1) that the Commission was without power to investigate for the purpose of supplying information to a state commission for use in local proceedings for violations of local law, and, (2) that as to three of the respondents the Commission was without jurisdiction of their persons because they were not "public utilities" as defined in the Federal Power Act.

The Commission thereupon adjourned without day the hearing directed by the order of January 26, 1937. Later, the Commission granted the petition for rehearing and assigned "the matters involved" for hearing on April 14, 1937. Respondents then appeared and introduced evidence tending to support their objections to the Commission's jurisdiction. The Commission's counsel then in-

troduced evidence on its behalf. Respondents objected to its admissibility upon the ground that it was immaterial to the issues presented by the petition for rehearing. Their objection was overruled and respondents then asked the examiner to certify to the Commission the request to define the issues to be determined on the petition for rehearing and to instruct its representatives that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced. The examiner refused and respondents then presented a like request to the Commission, which was denied on April 20, 1937, for the reason that its rules of practice did not provide for that method "of *interim* review of the examiner's rulings." Upon remand to the examiner, he again ruled against respondents, stating that their rights could "be amply protected by the usual method of exceptions" and argument thereon.

Respondents then presented, on April 21, 1937, to the Circuit Court of Appeals a petition asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. The Circuit Court of Appeals, on July 6, 1937, issued the rule to show cause, as prayed, returnable on October 4, 1937, and on September 7, 1937, granted a temporary stay. The Commission made its return to the rule and asked for a dismissal of the petition. The Circuit Court of Appeals rendered its decision on January 27, 1938. Its decree remanded the case to the Commission "for determination in accordance with the opinion" of the court, and restrained the Commission "from proceeding with its proposed inquiry and investigation in

accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it."

In its opinion the court stated that the only issues of fact raised by the petition for rehearing and the evidence of the respondents were that three of the respondents were not "public utilities" as defined by the Federal Power Act and that the purpose of the investigation was to supply information to the Pennsylvania Commission for use in local proceedings designed to impose penalties under the state law. 94 F. 2d 943, 945. The court said (*id.*, p. 946):

"Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final and satisfactory.

"In remanding the case we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The act has provided a review by this court of the orders of the Federal Commission and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here."

This Court granted certiorari and the cause has been argued. We are of the opinion that the Circuit Court of Appeals had no jurisdiction to enter the decree.

First. There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.

The provision conferring appellate jurisdiction on the Circuit Court of Appeals in relation to orders of the Federal Power Commission is found in § 313 of the Federal Power Act, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 860, 861.[1] Section 313 (a) provides

[1] "Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which

that any person aggrieved by an order of the Commission may apply for a rehearing within thirty days after its issuance and that no proceeding to review any order of the Commission shall be brought unless there has been an application for a rehearing thereon.

Respondents say that under this provision they could not ask review of the order of January 26, 1937, until they had sought a rehearing. They did seek a rehearing and it was granted. No appeal from the order granting it would lie and none was attempted. Respondents do not contend that there was any appeal from an order, or any application for a review of an order, pending before the Circuit Court of Appeals. On the contrary, respondents say that the Commission "has never passed upon

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the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

the objections raised in respondents' petition for rehearing with respect to the order of January 26, 1937"; that "concededly, the minute of the Commission granting a rehearing did not purport to decide the objections raised in the petition for rehearing"; and that "until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal to the Circuit Court of Appeals should the Commission's determination make that necessary."

Second. Respondents seek to sustain the action of the Circuit Court of Appeals by virtue of the authority conferred by § 262 of the Judicial Code which provides that the federal courts shall have power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The argument is that the Circuit Court of Appeals could intervene to protect its prospective appellate jurisdiction. We are of the opinion that this contention is unsound and that the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect.

The argument proceeds on the view that the order of January 26, 1937, despite its preliminary character, was a reviewable order subject only to the requirement that an application for rehearing should first be made. Reliance is placed on § 313 (b) of the Federal Power Act that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals." But neither this language, nor that of § 313 (a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of re-

viewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

The context in § 313 (b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

There are persuasive analogies in the construction of provisions for the review of the orders of other administrative bodies. The Urgent Deficiencies Act of October 22, 1913,[2] provides for cases brought to enjoin, set aside, or suspend "*any order*" of the Interstate Commerce Commission. But this Court has held that "there are many orders of the Commission which are not judicially reviewable under this provision." See *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309, and cases cited. In *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, the Interstate Commerce Commission had made an order for a hearing upon an issue of reparation. The Railroad Company contended that the Commission had no jurisdiction to award damages in the case presented. A decree of the District Court, enjoining the Commission from proceeding with the hearing was re-

[2] 28 U. S. C. 47.

versed by this Court with directions to dismiss the petition. The "order" was not of the sort which brought it within the purview of the statute. It was a mere step in procedure. See, also, *New York, O. & W. Ry. Co.* v. *United States,* 14 F. 2d 850, affirmed 273 U. S. 652. Negative orders of the Commission are not reviewable. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, 414. A final report by the Commission on value under § 19a of the Interstate Commerce Act, though called an order, is not reviewable. *United States* v. *Los Angeles & Salt Lake R. Co., supra.* Compare *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522, 527; *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 181, 182; *United States* v. *Griffin,* 303 U. S. 226; *Shannahan* v. *United States,* 303 U. S. 596. With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for review by the Circuit Court of Appeals. *Chamber of Commerce* v. *Federal Trade Comm'n,* 280 F. 45, 48; *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board,* 73 F. 2d 489, 490; *Jones* v. *Securities & Exchange Comm'n,* 79 F. 2d 617, 619; 298 U. S. 1, 14. So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41. See, also, *Securities & Exchange Comm'n* v. *Andrews,* 88 F. 2d 441.

The Commission's order of January 26, 1937, (a) fixed a date for hearing, (b) required respondents to appear, and (c) required them to produce the information and documents described. In fixing a date for hearing, the

order was nothing more than a notice. *United States* v. *Illinois Central R. Co., supra,* p. 89. The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a federal court under § 307 (c).[3] Upon such an application, the court may require attendance, testimony and the production of books and papers touching the matter under investigation and failure to obey such an order of the court may be punished by it as a contempt. We think that this provision embraces all cases of alleged "contumacy" on the part of any person who is required to attend, give testimony, or produce documents. Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity. See *Jones* v. *Securities & Exchange Comm'n, supra.* In the in-

[3] Subdivision (c) of § 307 of the Federal Power Act is as follows:

"(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both."

stant case no such application by the Commission has been made. Section 307 (c) also provides that any person who willfully fails or refuses to attend and testify, or produce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and be subject to fine and imprisonment. The qualification that the refusal must be "willful" fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled.

The Commission's order of January 26, 1937, lay outside any appellate jurisdiction conferred by the statute upon the Circuit Court of Appeals. In that view, § 262 of the Judicial Code gives no support to the decree under review and its injunction and instructions to the Commission must be regarded as unauthorized.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded with directions to dismiss the respondents' petition.

Reversed.

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

OKLAHOMA EX REL. JOHNSON, BANK COMMISSIONER, *v.* COOK.

No. —, Original.—Decided May 23, 1938.

This Court can not take original jurisdiction of a suit by a State to enforce the statutory liability of a stockholder of a state bank, in process of liquidation through a state officer, where the State, although vested by its laws with legal title to the bank's assets and to the cause of action sued on, is acting merely for the benefit of the bank's creditors and depositors. Pp. 392–396.

Leave to file denied.

UPON application of the State for leave to bring an original action, and response of the proposed defendant to a rule to show cause.

Messrs. Francis C. Brown and *Houston E. Hill* were on a brief for plaintiff.

Messrs. R. B. Caldwell, Blatchford Downing, Lynn Webb, and *John W. Oliver* were on a brief for defendant.

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

The State of Oklahoma, upon the relation of its Bank Commissioner, asks leave to bring suit in this Court to enforce the statutory liability of a shareholder of a state bank which is in course of liquidation.

The statutes of Oklahoma provide that the shareholders of every bank organized under the state law "shall be additionally liable for the amount of stock owned." Okla. Stat. 1931, § 9130. The Bank Commissioner, when satisfied of the insolvency of a bank, may take possession of its assets and "proceed to wind up its affairs and enforce the personal liability of the stockholders." *Id.*, § 9172. That liability becomes due when the Bank Commissioner takes possession of the bank and his order finding the bank to be insolvent is conclusive evidence of that fact. *Id.*, § 9174. The Bank Commissioner is authorized to "prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and such suits are to brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner." If, after liquidation and payment in full of depositors and creditors, any assets remain in the hands of the Bank Commissioner, they revert to the stockholders. *Id.*, § 9173.

The statutes further provide that "The State of Oklahoma, on the relation of the Bank Commissioner, shall be deemed to be the owner of all of the assets of failed banks in his hands for the use and benefit of the depositors and creditors of said bank." *Id.*, § 9179. No costs are required to be paid by the State in any suit in which the State of Oklahoma, on the relation of the Bank Commissioner, is a party, and preference is directed to be given in the courts of the State to all matters pending in such suits. *Id.*

The proposed complaint alleges that in May, 1931, the Bank Commissioner took possession of the Osage Bank of Fairfax, Osage County, finding it to be insolvent, and proceeded to wind up its affairs and enforce the personal liability of its stockholders; that the defendant, R. M. Cook, was the owner of sixty-nine shares of the capital stock of the bank of the par value of $100, and became liable to the State of Oklahoma, upon the relation of its Bank Commissioner, in the sum of $6900, with interest; that the defendant has paid the sum of $2300 in part satisfaction and that the balance is due; that the Bank Commissioner has liquidated all the assets of the bank except the claim here presented and certain other claims against other stockholders; that dividends have been paid to depositors and creditors amounting to ninety-one per cent. of their claims and that the enforcement of the statutory liability of the defendant is necessary to discharge the liabilities of the bank.

In answer to the rule to show cause why leave to bring this suit should not be granted, the proposed defendant contends that the cause of action is not within Article III, § 2, Clause 2, of the Constitution providing for the original jurisdiction of this Court.

The purpose in creating the stockholder's liability, the authority conferred upon the Bank Commissioner to enforce it, and the relation of the State to its enforcement,

are clearly set forth in the decisions of the Supreme Court of Oklahoma. In *State ex rel. Mothersead* v. *Kelly,* 141 Okla. 36; 284 P. 65, the court said:

"What is this stockholder's liability and for whose benefit is it created?

"It was designed solely for the benefit of creditors and constitutes a fund available only when the bank is insolvent and thus rendered unable to meet its liabilities in full. The corporation itself has no authority over the fund and cannot either compel its payment or by any act on its part release the stockholder therefrom. It amounts, for all practical purposes, to a reserve or trust fund, to be resorted to only in proceedings in liquidation, when necessary to meet the payment of obligations of the corporation. It is limited to an amount equal to the par value of the stock held and owned by each stockholder and exists in favor of the creditors collectively, not separately, and in proportion to the amount of their respective claims against the corporation. . . ." (*Id.,* pp. 37, 38; 284 P. 66.)

The court added that "the Bank Commissioner alone is empowered by law to prosecute an action to enforce the stockholders' liability." *Id.,* p. 41; 284 P. 69. See also *American Exchange Bank* v. *Rowsey,* 144 Okla. 172, 173; 289 P. 726; *Griffin* v. *Brewer,* 167 Okla. 654, 655; 31 P. 2d 619.

In *State ex rel. Murray* v. *Pure Oil Co.,* 169 Okla. 507; 37 P. 2d 608, referring to the provision of the statute authorizing the Bank Commissioner to institute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and providing that such suits shall be brought in the name of the State, on the relation of the Bank Commissioner, the court said:

"Since the state is the proper party plaintiff by virtue of the above statute, it may maintain the action regardless of whether it is the real party in interest or merely

a nominal plaintiff for the use and benefit of depositors and creditors. An action may be maintained by one expressly authorized by statute even though that person is not in fact the real party in interest. Section 144, O. S. 1931. . . .

"The protection of depositors of insolvent state banks is a distinct economic policy of the state. . . . In so far as the object of this action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank.

"The statute (section 9173, supra) which authorizes the state to be a party plaintiff names the Bank Commissioner as the proper officer to institute legal actions and carry out this economic policy. . . .

"The nature of the powers vested by law in the Bank Commissioner *have* been many times considered by this court and their exclusive character recognized. . . .

"It was the legislative intent that litigation of this character should be instituted and conducted under the direct supervision of the Bank Commissioner through the staff of legal assistants provided by law for that purpose, and not by the Governor, nor through independent action." *Id.*, pp. 509–512; 37 P. 2d 610.

Again, in *Richison* v. *State ex rel. Barnett,* 176 Okla. 537, 539; 56 P. 2d 840, 843, the court observed:

"Under the provisions of article 6, chapter 40, O. S. 1931 (sec. 9168 *et seq.*) the state has assumed exclusive jurisdiction and control of the affairs of insolvent banking institutions. By operation of law the Bank Commissioner is the officer through which the state liquidates the assets and winds up the affairs of such institutions. While engaged in the performance of such statutory

duties and functions the Bank Commissioner is performing duties for the benefit of certain members of the public who were depositors in such institution."

The state court has also held that the statute of limitations does not run against the State in an action to enforce the statutory liability of the stockholders. *State ex rel. Shull* v. *McLaughlin,* 159 Okla. 4; 12 P. 2d 1106. And the same rule applies to actions on promissory notes and other claims taken over by the Bank Commissioner as assets of an insolvent bank. *White* v. *State,* 94 Okla. 7; 220 P. 624; *Lever* v. *State ex rel. Shull,* 157 Okla. 162; 111 P. 2d 498; *Richison* v. *State ex rel. Barnett, supra.*

May the State through its Bank Commissioner invoke our original jurisdiction to prosecute claims of this character for the benefit of creditors?

To bring a case within that jurisdiction, it is not enough that a State is plaintiff. *Florida* v. *Mellon,* 273 U. S. 12, 17. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire* v. *Louisiana, New York* v. *Louisiana,* 108 U. S. 76. In those cases, provision was made by statutes of New Hampshire and New York for the assignment to the State of the obligations of another State. Thereupon it became the duty of the Attorney General of the State, if in his opinion the claim was a valid one, to bring suit in the name of the State in this Court in order to enforce collection. The money collected was to be held in trust, as stated, and to be paid over to the assignor of the claim. *Id.,* pp. 77, 79. The States, respectively, acquired title to bonds of the State of Louisiana and filed in this Court bills in equity in the name of the State to enforce recovery. The bills were dismissed. The fact that the effort was made to use the name of the complainant States in order to evade the application of the Eleventh Amend-

ment was undoubtedly a controlling consideration, but that consideration derived its force from the fact that the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries.

The underlying point of the decision was that in determining the scope of our original jurisdiction under Clause 2 of § 2 of Article III of the Constitution, we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest. So, when it appeared in a later case that a State, invoking the original jurisdiction of this Court to enforce the bonds of another State, was the absolute owner of the bonds and was prosecuting the claim upon its own behalf, this Court took jurisdiction. *South Dakota* v. *North Carolina,* 192 U. S. 286. There the Court found that, while the State of South Dakota acquired by gift the bonds of North Carolina, there could not be "any question respecting the title of South Dakota." They were not held, the Court said, by the State as representative of indvidual owners as in the case of *New Hampshire* v. *Louisiana,* 108 U. S. 76, and the motive which induced the transaction was not deemed to "affect its validity or the question of jurisdiction." The case was thus one "directly affecting the property rights and interests of a State." *Id.,* pp. 314, 318.

In determining whether the State is entitled to avail itself of the original jurisdiction of this Court in a matter that is justiciable (see *Massachusetts* v. *Mellon,* 262 U. S. 447, 485), the interests of the State are not deemed to be confined to those of a strictly proprietary character but embrace its "*quasi-sovereign*" interests which are "independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237. Thus, we have held that a State may sue to restrain the diversion of water from

an interstate stream, *Kansas* v. *Colorado,* 206 U. S. 46, 95, 96, or an interference with the flow of natural gas in interstate commerce, *Pennslyvania* v. *West Virginia,* 262 U. S. 553, 592; or to prevent injuries through the pollution of streams or the poisoning of the air by the generation of noxious gases destructive of crops and forests, whether the injury be due to the action of another State or of individuals, *Missouri* v. *Illinois,* 180 U. S. 208, 200 U. S. 496; *Georgia* v. *Tennessee Copper Co., supra; North Dakota* v. *Minnesota,* 263 U. S. 365, 373, 374; *Wisconsin* v. *Illinois,* 278 U. S. 367, 281 U. S. 179.

But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy. In *Kansas* v. *United States,* 204 U. S. 331, the State asked leave to file a bill of complaint against the United States and others, seeking a decree adjudging the State to be the owner, as trustee for a railway company, of certain sections of land to the extent of a grant along the line of the railroad through the Creek Nation in the Indian Territory. The Court said that it appeared upon the face of the bill that the State was only nominally a party, that the real party in interest was the railroad company, and that our original jurisdiction "could not be maintained." *Id.,* pp. 340, 341. The Court also held that the United States was the real party in interest as defendant and could not be sued without its consent, but the other question was presented and passed upon.

In *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 277, the State sought to maintain an action in this Court against the carrier to restrain it from charging unreasonable rates within Oklahoma. Setting forth the congressional grant under which the railway in question was

operated and insisting that the Company was not entitled to charge the inhabitants of Oklahoma a greater freight rate for the transportation of certain commodities than that authorized for similar service in Kansas, the State alleged its interest in the development of its communities and in the success of its industries, and the menace to the future of the State through what was deemed to be a violation of the conditions of the grant. But the Court pointed out that the State was not seeking to protect a direct interest of its own in the transportation of the commodities in question, but was endeavoring to compel the railway company to respect the rights of the shippers of these commodities. *Id.,* pp. 286, 287. The bill was dismissed. The Court summarized its conclusion in these words:

"We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally." *Id.,* p. 289.

See, also, *Louisiana* v. *Texas,* 176 U. S. 1.

In the instant case, the State has taken the legal title to the assets of the insolvent bank which is being liquidated and to the claims against stockholders by reason of their statutory liability. But recovery is sought solely for the benefit of the depositors and creditors of the bank. *State ex rel. Mothersead* v. *Kelly, supra; State ex rel. Murray* v. *Pure Oil Co., supra; Richison* v. *State ex rel. Barnett, supra.* Constituting the State a virtual trustee for the benefit of the creditors of the bank did not alter the essential quality of the rights asserted or avail to con-

fer jurisdiction upon this Court to entertain a suit for their enforcement. *New Hampshire* v. *Louisiana, New York* v. *Louisiana, supra; Kansas* v. *United States, supra; Oklahoma* v. *Atchison, T. & S. F. Ry. Co., supra.* The taking of the legal title by the State is a mere expedient for the purpose of collection.

It will be noted that the State not only undertakes to enforce the statutory liability of stockholders but, as the State takes title to all the assets of the insolvent bank, suits upon promissory notes and various claims of the bank in the course of the liquidation are to be brought in the name of the State acting through its Bank Commissioner. The declared policy and asserted economic interest of the State attach as well to the prosecution of all such suits. If the contention of the State were accepted, it would follow that suits upon claims of the bank against citizens of other States could be brought in this Court. Many States have statutory provisions for the liquidation through state officers of insolvent banks, trust companies, insurance companies, etc., and if, by the simple expedient of providing that the title to the assets of such institutions should vest in the State and that suits in the course of liquidation should be prosecuted in the name of the State, resort to our original jurisdiction were permitted, the enormous burden which would thereby be imposed upon this Court can readily be imagined,—a burden foreign to the purpose of the constitutional provision. These considerations emphasize the importance of strict adherence to the governing principle that the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.

The motion for leave to file complaint is denied.

Motion denied.

Mr. Justice Cardozo took no part in the consideration and decision of this case.

HUDSON ET AL. *v.* MOONIER.

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

No. 938.—Decided May 23, 1938.

The liability of the lessor of a truck for personal injuries to a third party, in its operation, due to lessor's breach of a duty to maintain it in safe condition, depends upon the *lex loci delicti*. *Erie Railroad* v. *Tompkins*, *ante*, p. 64.

Certiorari granted; 94 F. 2d 193, reversed.

PETITION for certiorari to review a judgment affirming a recovery in an action for personal injuries, which had been removed from a state court.

Messrs. James C. Jones, Lon O. Hocker, and *James C. Jones, Jr.* were on a brief for petitioners.

Mr. Mark D. Eagleton entered an appearance for respondent.

PER CURIAM.

Respondent brought this suit to recover damages for personal injuries alleged to be due to the defendants' negligence. He was struck by a truck which was operated without proper equipment, in that it had no horn or other signaling device. He sued the driver and also the person who had leased the truck to the driver's employer upon the ground that the lessor was charged with the duty of maintaining the truck in a reasonably safe condition.

Judgment against both defendants was affirmed by the Circuit Court of Appeals. The court treated the question of the liability of the lessor as one of general law. The court should have applied the law of Missouri where the injury occurred. *Erie R. Co.* v. *Tompkins*, *ante*, p. 64.

Certiorari is granted, the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

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

LACLEDE GAS LIGHT CO. *v.* PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 947.—Decided May 23, 1938.

In a case involving the adequacy of rates fixed for a public utility, a judgment of a state court remanding the matter to the rate-fixing commission for a reëxamination which may result in a new basis of fair value and a new schedule of rates, is not final for purposes of review here.

Appeal from 341 Mo. 920; 110 S. W. 2d 749, dismissed.

Messrs. Jacob Chasnoff, George C. Willson, and *Hugo Monnig* were on a brief for appellant.

Messrs. H. G. Waltner, Jr., James H. Linton, and *Daniel C. Rogers* were on a brief for appellees.

PER CURIAM.

Appellee, the Public Service Commission of Missouri, moves to dismiss the appeal upon the ground that there is no final judgment.

The Supreme Court of Missouri had before it an appeal from a judgment of the Circuit Court which had affirmed an order of the Public Service Commission fixing the value for rate making purposes of the property of the Laclede Gas Light Company and ordering a reduction in rates. The Company contended that the Com-

mission's order was confiscatory, in violation of the Fourteenth Amendment of the Federal Constitution. The Supreme Court reviewed at length the findings of the Commission and concluded that there should be a re-examination by the Commission of certain questions of fact as to elements of value. After stating these questions, the opinion of the Supreme Court concluded as follows:

"Subject to the foregoing, the judgment is affirmed and the cause remanded, with directions to the circuit court to remand to the commission that it may rehear and determine the facts on the four points above mentioned in accordance with the views in this opinion." 110 S. W. (2d) 749, 780.

The Public Service Commission contends that under the statutes of Missouri (R. S. Mo. 1929, § 5234) the Supreme Court of Missouri reviews the order of the Commission judicially, *Lusk* v. *Atkinson,* 268 Mo. 109, 118; 186 S. W. 703; *State ex rel. Detroit-Chicago Motor Bus Co.* v. *Public Service Comm'n,* 324 Mo. 270, 275; 23 S. W. 2d 115; *State ex rel. St. Louis* v. *Public Service Comm'n,* 329 Mo. 918, 927; 47 S. W. 2d 102; *State ex rel. Kansas City P. & L. Co.* v. *Public Service Comm'n,* 335 Mo. 1248, 1265; 76 S. W. 2d 343; that the Commission acts legislatively (*id.*); that, on the remand in this case, each of the matters mentioned by the Supreme Court will be before the Commission and that it may proceed anew in the exercise of its discretion in their determination. The Commission adds:

"The Commission may, therefore, make a new finding of 'fair value' substantially different from the one found, as of the date of the former hearing. Moreover, such a new finding of 'fair value' together with new findings concerning the allowance for annual depreciation and amortization of cost of change-over expense would necessitate the fixing of a new rate schedule.

"From the very nature of the various items remanded for rehearing, it is conceivable that the Commission may reach conclusions which would constitute the basis of another appeal.

"For the reasons stated appellee contends that there is not yet a final judgment from which an appeal can be taken."

We think that the contention of the Commission is well taken.

Appellant urges that, under the mandate of the Supreme Court, it would be the duty of the Circuit Court to proceed at once to execute its judgment affirming the rate reduction order, by distributing to the customers of appellant the amounts which have been held by a designated depositary, under order of the court, pending the final determination of the validity of the rate order. No ruling of the state court for such a distribution is before us. The judgment of the Supreme Court does not direct the payment over of the amounts on deposit, and the direction of the court for remand to the Commission for further examination of the questions stated apparently leaves in abeyance the final determination of the validity of the rate order and may result, as the Commission states, in action which may constitute the basis of another appeal. The Supreme Court expressly states that the affirmance of the judgment of the Circuit Court is subject to the requirement of reëxamination by the Commission as directed.

As we are unable to conclude upon the record before us that the state court has finally disposed of the controversy the motion to dismiss the appeal must be granted.

Dismissed.

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

Counsel for Parties.

MAHONEY, LIQUOR CONTROL COMMISSIONER, ET AL. *v.* JOSEPH TRINER CORP.

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

No. 761. Argued April 25, 1938.—Decided May 23, 1938.

1. Since the adoption of the Twenty-first Amendment, the Equal Protection Clause is inapplicable to imported intoxicating liquor. P. 403.
2. A Minnesota statute provides that no licensed manufacturer or wholesaler shall import any brand of intoxicating liquors containing more than 25% of alcohol by volume, ready for sale without further processing, unless such brand is registered in the Patent Office of the United States. *Held* valid under the Twenty-first Amendment as applied to a foreign corporation, licensed in Minnesota and engaged there in wholesaling liquor imported, ready for sale, from another State, under brands not registered,—notwithstanding the discrimination arising in favor of liquor processed within the State and in favor of imported brands that are registered. P. 404.
3. Independently of the Twenty-first Amendment, a State has power to terminate licenses to sell intoxicating liquors. P. 404.

20 F. Supp. 1019, reversed.

APPEAL from a decree of a district court of three judges enjoining the enforcement of a liquor regulation. See also 11 F. Supp. 145.

Messrs. William S. Ervin, Attorney General, and *Roy C. Frank,* Assistant Attorney General, of Minnesota, for appellants.

Mr. Carl W. Cummins for appellee.

By leave of Court, *Messrs. Omer S. Jackson,* Attorney General, and *A. J. Stevenson,* First Assistant Attorney General, of Indiana, filed a brief as *amici curiae* on behalf of that State.

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MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 2 of the Twenty-first Amendment to the Federal Constitution provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The adoption of the Amendment was proclaimed December 5, 1933. In February, 1934, Joseph Triner Corporation, an Illinois corporation engaged there in the manufacture of intoxicating liquors, complied with the Minnesota foreign corporations law; secured from the Liquor Control Commissioner a license to sell such liquors within Minnesota at wholesale; and thereafter carried on in that State the business of selling to retailers liquors manufactured by it in Illinois. The Legislature of Minnesota enacted Chapter 390, approved April 29, 1935, which provides:

"No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent. of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

The business of Joseph Triner Corporation in Minnesota included selling many brands of liquors containing more than 25 per cent. of alcohol which had not been registered in the Patent Office; and at the time of the enactment of the statute it had there a stock of such liquors. To enjoin the Liquor Control Commissioner of Minnesota from interfering with the business, it brought this suit in the federal court for that State; alleged that the statute of 1935 violated the equal protection clause of the Fourteenth Amendment of the Federal Constitu-

tion; alleged danger of irreparable injury; and sought both a preliminary and a permanent injunction. The several state officials charged with the duty of enforcing the statute were joined as defendants.

The case was heard by three judges under § 266 of the Judicial Code. The court, holding that it had both federal and equity jurisdiction, granted a preliminary injunction, 11 F. Supp. 145; and later a permanent injunction, 20 F. Supp. 1019. The state officials appealed to this Court. The sole contention of Joseph Triner Corporation is that the statute violated the equal protection clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic.

First. The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. For only that locally processed may be sold regardless of whether the brand has been registered. That, under the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62, 63. There, it was contended that, by reason of the discrimination involved, a statute imposing a $500 license fee for importing beer violated both the commerce clause and the equal protection clause. In sustaining its validity we said:

"The words used [in the Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it [the State] prescribes. . . .

"The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed amendment. As we think the language of the Amendment is clear, we do not discuss these matters. . . .

"The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Second. Joseph Triner Corporation insists that the statute is unconstitutional because it permits unreasonable discrimination between imported brands. That is, the registered brands of other foreign manufacturers may be imported while its unregistered brands may not be, although "identical in kind, ingredient and quality." We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market* case, p. 62, "involve not a construction of the Amendment, but a rewriting of it."

Third. The fact that Joseph Triner Corporation had, when the statute was passed, a valid license and a stock of liquors in Minnesota imported under it, is immaterial. Independently of the Twenty-first Amendment, the State had power to terminate the license. *Mugler* v. *Kansas*, 123 U. S. 623; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 228.

Reversed.

MR. JUSTICE REED concurs in the result.

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

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

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

No. 779. Argued April 7, 8, 1938.—Decided May 23, 1938.

1. The immunity from federal taxation implied for the protection of the States is to be narrowly limited,

   First, because the method of exercise of the federal taxing power, by, and upon, all the people through their representatives in Congress affords a safeguard against its abuse at the expense of state sovereignty; and,

   Secondly, because the immunity is at the expense of the national sovereign power to tax and if enlarged beyond the necessity of protecting the States, its burden is thrown upon the National Government with benefit only to a privileged class of taxpayers. P. 416.

2. The immunity from federal taxation of income received by individuals as compensation for services rendered to a State, does not extend to cases where the burden of the tax to a state function is not shown to be actual and substantial, and not conjectural. P. 421.

   This principle applies even though the function be thought important enough to demand immunity from a tax upon the State itself. P. 420.

3. The Port of New York Authority is a bi-state corporation created by compact between the States of New York and New Jersey approved by Congress. Pursuant to the compact and legislation of the two States, it has acquired and operates terminal and transfer facilities within a district embracing the port of New York and lying partly in each of the States. It has constructed interstate bridges and tunnels for vehicles, using funds advanced by the two States or derived from sale of its bonds. It operates an interstate bus line over one of the bridges and a terminal for interchange of freight between trucks and railroads. It collects tolls for use of the bridges and tunnels, and derives income from operation of the bus line and terminal building but has no stock or

*Together with No. 780, *Helvering, Commissioner of Internal Revenue,* v. *Wilson;* and No. 781, *Same* v. *Mulcahy,* also on writs of certiorari to the Circuit Court of Appeals for the Second Circuit.

stockholders and is owned by no private persons or corporations. Its projects are said to be operated in behalf of the two States and in the interests of the public, and none of its profits enure to the benefit of private persons. Its property and the bonds and other securities issued by it are exempt by statute from state taxation. A resolution of Congress consenting to the Authority's comprehensive plan of port improvement declares that its activities will promote and facilitate interstate and foreign commerce, provide better and cheaper transportation, and aid in providing better postal, military, and other services of value to the Nation. Statutes of the two States declare that in the construction, maintenance and operation of the bridges and tunnels it shall be regarded as performing a governmental function and shall be required to pay no taxes or assessments upon any of the property therein acquired by it. *Held:*

(1) The salaries of a construction engineer and two assistant general managers, employees of the Port Authority, are taxable by the Federal Government. Pp. 408, 424.

These employees each took an oath of office. Neither the compact nor any state statute appears to have created an office or prescribed an oath or defined the function of such employees. Their occupations are not shown to be different in methods or duties from similar employments in private industry. A non-discriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by taxation. Even though, to some unascertainable extent, the tax deprives the States of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as States. The effect of the immunity if allowed, would be to relieve the taxpayers of their duty of financial support to the National Government, in order to secure to the State a theoretical advantage so speculative in its character and measurement as to be unsubstantial. Pp. 410 *et seq.*

(2) The Court expresses no opinion as to whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities. P. 424.

4. *Brush* v. *Commissioner*, 300 U. S. 352, is limited to the decision that the function of the State in connection with which the tax-

payer received the salary taxed was essentially governmental in character; the question whether the burden resulting to the State from the tax on his salary was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity, was not considered. Pp. 422–423.

5. The applicable provisions of § 116 of the Revenue Act of 1932 do not authorize exclusion from gross income of the salaries of employees of a State or state-owned corporation. P. 423.
6. Employees of the Port Authority of New York are not employees of the State or of a political subdivision of it within the meaning of Treasury Regulations 77, Art. 643, under the Revenue Act of 1932. P. 423.

92 F. 2d 999, reversed.

CERTIORARI, 303 U. S. 630, to review judgments of the Circuit Court of Appeals sustaining decisions of the Board of Tax Appeals holding the salaries of the present respondents immune from federal taxation.

Assistant Solicitor General Bell, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Berryman Green* and *Warner W. Gardner* were on the brief, for petitioner.

Mr. Julius Henry Cohen, with whom *Mr. Austin J. Tobin* was on the brief, for respondents.

Mr. Henry Epstein, Solicitor General of New York, argued the cause on behalf of that State and other States, as *amici curiae* by special leave of Court.*

By leave of Court, *Mr. Markell C. Baer* filed a brief as *amicus curiae,* on behalf of the American Association of Port Authorities, in support of respondents.

* These States, and the names of their respective Attorneys General appearing on an elaborate brief are: New York, by *Mr. John J. Bennett, Jr.;* Alabama, by *Mr. Albert A. Carmichael;* California, by *Mr. U. S. Webb;* Connecticut, by *Mr. Charles J. McLaughlin;* Delaware, by *Mr. P. Warren Green;* Indiana, by *Mr.*

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the imposition of a federal income tax for the calendar years 1932 and 1933 on salaries received by respondents, as employees of the Port of New York Authority, places an unconstitutional burden on the States of New York and New Jersey.

The Port Authority is a bi-state corporation, created by compact between New York and New Jersey, Laws of N. Y., 1921, c. 154; Laws of N. J., 1921, c. 151, approved by the Congress of the United States by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174. The compact authorized the Authority to acquire and operate "any terminal or transportation facility" within a specified district embracing the Port of New York and lying partially within each state. It directed the Authority to recommend a comprehensive plan for improving the port and facilitating its use, by the construction and operation of bridges, tunnels, terminals and other facilities. The Authority made such a recommendation in its report of December, 1921, adopted by the two states in 1922. Laws of N. Y., 1922, c. 43; Laws of N. J., 1922, c. 9.

In conformity to the plan, and pursuant to further legislation of the two states, the Authority has con-

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Omer S. Jackson; Louisiana, by *Messrs. Gaston L. Porterie,* and *Joseph A. Loret,* Special Assistant Attorney General; Massachusetts, by *Mr. Paul A. Dever;* Michigan, by *Mr. Raymond W. Starr;* Mississippi, by *Mr. Greek L. Rice;* Montana, by *Mr. Harrison F. Freebourn;* Nevada, by *Mr. Gray Washburn;* New Jersey, by *Mr. David Wilentz;* New Hampshire, by *Mr. Thomas P. Cheney;* North Carolina, by *Mr. A. A. F. Seawell;* Ohio, by *Mr. Herbert S. Duffy;* Oregon, by *Mr. I. H. Van Winkle;* Pennsylvania, by *Mr. Charles J. Margiotti;* Rhode Island, by *Mr. John P. Hartigan;* Utah, by *Mr. Joseph Chez;* Vermont, by *Mr. Lawrence C. Jones;* Virginia, by *Mr. Abram P. Staples;* Washington, by *Mr. G. W. Hamilton;* Wisconsin, by *Mr. Orland S. Loomis;* and Wyoming, by *Mr. Ray E. Lee.*

structed the Outerbridge Crossing Bridge, the Goethals Bridge, the Bayonne Bridge, and the George Washington Bridge, interstate vehicular bridges all passing over waters of the harbor or adjacent to it. It has also constructed the Holland Tunnel and the Lincoln Tunnel, interstate vehicular tunnels passing under the Hudson River. These enterprises were financed in large part by funds advanced by the two states and by the Port Authority's issue and sale of its bonds. In addition, the Authority operates an interstate bus line over the Goethals Bridge. It has erected and operates the Port Authority Commerce Building in New York City, which houses Inland Terminal No. 1, devoted to use as a freight terminal in connection with a plan to coördinate transportation facilities and reduce congestion. The terminal has no physical connection with any railroad facilities, dock or pier, but is used as a transfer terminal for interchange of freight brought by truck from and to the terminal and to and from eight railroad terminals.

The Port Authority collects tolls for the use of the bridges and tunnels, and derives income from the operation of the bus line and terminal building, but it has no stock and no stockholders, and is owned by no private persons or corporations. Its projects are all said to be operated in behalf of the two states and in the interests of the public, and none of its profits enure to the benefit of private persons. Its property and the bonds and other securities issued by it are exempt by statute from state taxation. The Joint Resolution of Congress consenting to the comprehensive plan of port improvement, Pub. Res. No. 66, 67th Cong., H. J. Resolution No. 337, July 1, 1922, declares that the activities of the Port Authority under the plan "will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better

postal, military, and other services of value to the Nation." Statutes of New York and New Jersey relating to the various projects of the Port Authority declare that they are "in all respects for the benefit of the people of the two States, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance and operation and in carrying out the provisions of law relating to the said [bridges and tunnels] and shall be required to pay no taxes or assessments upon any of the property acquired by it for the construction, operation and maintenance of such" bridges and tunnels. Laws of N. J., 1925, c. 37, § 7; Laws of N. Y., 1925, c. 210, § 7; Laws of N. J., 1926, c. 6, § 7; Laws of N. Y., 1926, c. 761, § 7; Laws of N. J., 1927, c. 3, § 7; Laws of N. Y., 1927, c. 300, § 7; Laws of N. J., 1931, c. 4, § 14; Laws of N. Y., 1931, c. 47, § 14.

The respondents, during the taxable years in question, were respectively a construction engineer and two assistant general managers, employed by the Authority at annual salaries ranging between $8,000 and $15,000. All took oaths of office, although neither the compact nor the related statutes appear to have created any office to which any of the respondents were appointed, or defined their duties or prescribed that they should take an oath. The several respondents having failed to return their respective salaries as income for the taxable years in question, the commissioner determined deficiencies against them. The Board of Tax Appeals found that the Port Authority was engaged in the performance of a public function for the States of New York and New Jersey, and ruled that the compensation received by the Authority's employees was exempt from federal income tax. The Court of Appeals for the Second Circuit, 92 F. 2d 999,

affirmed without opinion on the authority of *Brush* v. *Commissioner,* 85 F. 2d 32, rev'd, 300 U. S. 352; *Commissioner* v. *Ten Eyck,* 76 F. 2d 515, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. We granted certiorari because of the public importance of the question presented.

The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an implied limitation stems from *McCulloch* v. *Maryland,* 4 Wheat. 316, in which it was held that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, implied as an incident to the borrowing, taxing, war and other powers specifically granted to the national government by Article I, § 8 of the Constitution. It was held that Congress, having power to establish a bank by laws which, when enacted under the Constitution, are supreme, also had power to protect the bank by striking down state action impeding its operations; and it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the federal bank notes.[1] Cf. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 865–868.

[1] It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation. Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation. Congress may curtail an immunity which might otherwise be implied, *Van Allen* v. *The Assessors,* 3 Wall. 573, or enlarge it beyond

In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.[2]

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the point where, Congress being silent, the Court would set its limits. *Bank* v. *Supervisors,* 7 Wall. 26, 30, 31; see *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 588, 590; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 581, and cases cited; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 161.

The analysis is comparable where the question is whether federal corporate instrumentalities are immune from state judicial process. *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 234–235.

[2] "The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists,

It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities. *Miller* v. *Milwaukee,* 272 U. S. 713; cf. *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480, 493. But later cases have declared that federal instrumentalities are similarly immune from non-discriminatory state taxation—from the taxation of obligations of the United States as an interference with the borrowing power, *Weston* v. *Charleston,* 2 Pet. 449; and from a tax on "offices" levied upon the office of a captain of a revenue cutter. *Dobbins* v. *Erie County,* 16 Pet. 435.[3]

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and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme." Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 435–436.

[3] In these cases, and particularly in *Weston* v. *Charleston,* 2 Pet. 449, as in *McCulloch* v. *Maryland,* emphasis was laid on the fact that by state action an impediment was laid upon the exercise of a power with respect to which the national government was supreme. In *Weston* v. *Charleston, supra,* Chief Justice Marshall said (pp. 465, 466):

"Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the union which possesses the right of taxation, to burthen the exercise of this power [the borrowing power] at their discretion?

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burthened, impeded,

That the taxing power of the federal government is nevertheless subject to an implied restriction when applied to state instrumentalities was first decided in *Collector* v. *Day,* 11 Wall. 113, where the salary of a state officer, a probate judge, was held to be immune from federal income tax. The question there presented to the Court was not one of interference with a granted power in a field in which the federal government is supreme, but a limitation by implication upon the granted federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence.

The Court pointed out that the states were in existence as such entities when the Constitution was adopted; that the Constitution guaranteed to them a republican form of government and undertook to protect them from invasion and domestic violence; that it presupposes the continued existence of the states [4] and their continued

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if not arrested, by any of the organized parts of the confederacy." Compare Holmes, J., in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223.

[4] In 1871, when *Collector* v. *Day* was decided, the Court had not yet been called on to determine how far the Civil War Amendments had broadened the federal power at the expense of the states. The *Slaughterhouse Cases,* 16 Wall. 36, had not yet been decided, although they had already been once before the Court on motion for supersedeas, 10 Wall. 141. The fact that the taxing power had recently been used with destructive effect upon a state instrumentality, *Veazie Bank* v. *Fenno,* 8 Wall. 533, had suggested the possibility of similar

performance, free of inhibition by the national taxing power, of "the high and responsible duties assigned to them in the Constitution . . . And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it," the Court declared, "we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department . . . All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument." 11 Wall. 125, 126.

We need not stop to inquire how far, as indicated in *McCulloch* v. *Maryland, supra,* the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector* v. *Day, supra,* was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state "could long preserve its existence."

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attacks upon the existence of states themselves. Compare *Lane County* v. *Oregon,* 7 Wall. 71, 76–77; *Slaughterhouse Cases,* 16 Wall. 36, 82.

There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited. One, as was pointed out by Chief Justice Marshall in *McCulloch* v. *Maryland, supra,* 435–436, and *Weston* v. *Charleston, supra,* 465–466, is that the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

Another reason rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; cf. *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 588, 590. With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on

economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina* v. *United States,* 199 U. S. 437, 454–455. Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.[5]

In tacit recognition of the limitation which the very nature of our federal system imposes on state immunity from taxation in order to avoid an ever expanding encroachment upon the federal taxing power, this Court has refused to enlarge the immunity substantially beyond those limits marked out in *Collector* v. *Day, supra.* It has been sustained where, as in *Collector* v. *Day,* the function involved was one thought to be essential to the maintenance of a state government: as where the attempt was to tax income received from the investments of a municipal subdivision of a state, *United States* v. *Railroad Co.,* 17 Wall. 322; to tax income received by a private investor from state bonds, and thus threaten impairment of the borrowing power of the state, *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429; cf. *Weston* v. *Charleston, supra,* 465–466; or to tax the manufacture and sale to a municipal corporation of equipment for its

[5] Compare notes 1 and 2, *supra.*

police force, *Indian Motocycle Co.* v. *United States*, 283 U. S. 570.

But the Court has refused to extend the immunity to a state conducted liquor business, *South Carolina* v. *United States, supra; Ohio* v. *Helvering*, 292 U. S. 360, or to a street railway business taken over and operated by state officers as a means of effecting a local public policy. *Helvering* v. *Powers*, 293 U. S. 214. It has sustained the imposition of a federal excise tax laid on the privilege of exercising corporate franchises granted by a state to public service companies. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 157. In each of these cases it was pointed out that the state function affected was one which could be carried on by private enterprise, and that therefore it was not one without which a state could not continue to exist as a governmental entity. The immunity has been still more narrowly restricted in those cases where some part of the burden of a tax collected not from a state treasury but from individual taxpayers, is said to be passed on to the state. In these cases the function has been either held or assumed to be of such a character that its performance by the state is immune from direct federal interference; yet the individuals who personally derived profit or compensation from their employment in carrying out the function were deemed to be subject to federal income tax.[6]

[6] The following classes of taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state: Those who derive income or profits from their performance of state functions as independent engineering contractors, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, or from the resale of state bonds, *Willcuts* v. *Bunn*, 282 U. S. 216; those engaged as lessees of the state in producing oil from state lands, the royalties from which, payable to the state, are devoted to public purposes, *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Burnet* v. *Jergins Trust*, 288 U. S. 508; *Bankline Oil Co.* v. *Commissioner*, 303 U. S. 362, *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, overruling *Burnet* v. *Coronado*

In a period marked by a constant expansion of government activities and the steady multiplication of the complexities of taxing systems, it is perhaps too much to expect that the judicial pronouncements marking the boundaries of state immunity should present a completely logical pattern. But they disclose no purposeful departure from, and indeed definitely establish, two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. The state itself was taxed for the privilege of carrying on the liquor business in *South Carolina* v. *United States, supra,* and in *Ohio* v. *Helvering, supra;* and a tax on the income of a state officer engaged in the management of a state-owned corporation operating a street railroad was sustained in *Helvering* v. *Powers, supra,* because it was thought that the functions discouraged by these taxes were not indispensable to the maintenance of a state government. The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden

Oil & Gas Co., 285 U. S. 393. Similarly federal taxation of property transferred at death to a state or one of its municipalities was upheld in *Snyder* v. *Bettman,* 190 U. S. 249, cf. *Greiner* v. *Lewellyn,* 258 U. S. 384; and a federal tax on the transportation of merchandise in performance of a contract to sell and deliver it to a county was sustained in *Wheeler Lumber Bridge & Supply Co.* v. *United States,* 281 U. S. 572; cf. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. A federal excise tax on corporations, measured by income, including interest received from state bonds, was upheld in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162, *et seq.;* see *National Life Ins. Co.* v. *United States,* 277 U. S. 508, 527; compare the discussion in *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 389, and in *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480, 490.

is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons. *Metcalf & Eddy* v. *Mitchell, supra; Willcuts* v. *Bunn,* 282 U. S. 216.

With these controlling principles in mind we turn to their application in the circumstances of the present case. The challenged taxes laid under § 22, Revenue Act of 1932, c. 209, 47 Stat. 169, 178, are upon the net income of respondents, derived from their employment in common occupations not shown to be different in their methods or duties from those of similar employees in private industry. The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government and are not beyond the reach of its taxing power. A non-discriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in

an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see *Indian Motocycle Co.* v. *United States, supra,* p. 581, footnote 1) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far.

The fact that the expenses of the state government might be lessened if all those who deal with it were tax exempt was not thought to be an adequate basis for tax immunity in *Metcalf & Eddy* v. *Mitchell, supra,* in *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, in *Burnet* v. *Jergins Trust,* 288 U. S. 508; or in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.[7] When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural. *Willcuts* v. *Bunn, supra,* 231. The extent to which salaries in business or professions whose standards of compensation are otherwise fixed by competitive conditions may be affected by the immunity of state employees from income tax is to a high degree conjectural.

The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is

[7] Upon full consideration, the same principle was recently applied in *James* v. *Dravo Contracting Co.,* 302 U. S. 134, although the limitation there was upon the immunity of the federal government.

no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

During the present term we have held that the compensation of a state employee paid from the state treasury for his service in liquidating an insolvent corporation, where the state was reimbursed from the corporate assets, was subject to income tax. *McLoughlin* v. *Commissioner,* 303 U. S. 218. But the Court has never ruled expressly on the precise question whether the Constitution grants immunity from federal income tax to the salaries of state employees performing, at the expense of the state, services of the character ordinarily carried on by private citizens. The Revenue Act of 1917, considered in *Metcalf & Eddy* v. *Mitchell, supra,* exempted the salaries of all state employees from income tax. But it was held in that case that neither the constitutional immunity nor the statutory exemption extended to independent contractors. In *Brush* v. *Commissioner, supra,* the applicable treasury regulation upon which the Government relied exempted from income tax the compensation of "state officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State." The sole contention of the Government was that the maintenance of the New York City water supply system was not an essential governmental function of the state. The Government did not attack the regulation. No contention was made

by it or considered or decided by the Court that the burden of the tax on the state was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. If determination of that point was implicit in the decision it must be limited by what is now decided.

The pertinent provisions of the regulation applicable in the *Brush* case were continued in Regulations 77, Article 643, under the 1932 Revenue Act, until January 7, 1938, when they were amended to provide that "Compensation received for services rendered to a State is to be included in gross income unless the person receives such compensation from the State as an officer or employee thereof and such compensation is immune from taxation under the Constitution of the United States." The applicable provisions of § 116 of the 1932 Act do not authorize the exclusion from gross income of the salaries of employees of a state or a state-owned corporation. If the regulation be deemed to embrace the employees of a state-owned corporation such as the Port Authority, it was unauthorized by the statute. But we think it plain that employees of the Port Authority are not employees of the state or a political subdivision of it within the meaning of the regulation as originally promulgated—an additional reason why the regulation, even before the 1938 amendment, was ineffectual to exempt the salaries here involved.

The reasoning upon which the decision in *Indian Motocycle Co.* v. *United States, supra,* was rested is not controlling here. Taxation of the sale to a state, which was thought sufficient to support the immunity there, is not now involved. Whether the actual effect upon the performance of the state function differed from that of the present tax we do not now inquire. Compare *Wheeler Lumber Bridge & Supply Co.* v. *United States,* 281 U. S. 572.

As was pointed out in *Metcalf & Eddy* v. *Mitchell, supra,* 524, there may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of them would threaten such interference with the functions of government itself as to be considered beyond the reach of the federal taxing power. If the tax considered in *Collector* v. *Day, supra,* upon the salary of an officer engaged in the performance of an indispensable function of the state which cannot be delegated to private individuals, may be regarded as such an instance, that is not the case presented here.

Expressing no opinion whether a federal tax may be imposed upon the Port Authority itself with respect to its receipt of income or its other activities, we decide only that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government. So much of the burden of the tax laid upon respondents' income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government.

Reversed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring.

I agree that this cause should be reversed for the reasons expressed in that part of the opinion just read pointing out that: respondents, though employees of the New York Port Authority, are citizens of the United States;

the tax levied upon their incomes from the Authority is the same as that paid by other citizens receiving equal net incomes; and payment of this non-discriminatory income tax by respondents cannot impair or defeat in whole or in part the governmental operations of the State of New York. A citizen who receives his income from a State, owes the same obligation to the United States as other citizens who draw their salaries from private sources or the United States and pay Federal income taxes.

While I believe these reasons, without more, are adequate to support the tax, I find it difficult to reconcile this result with the principle announced in *Collector* v. *Day,* 11 Wall. 113, and later decisions applying that principle. This leads me to the conclusion that we should review and reëxamine the rule based upon *Collector* v. *Day.* That course would logically require the entire subject of intergovernmental tax immunity to be reviewed in the light of the effect of the Sixteenth Amendment authorizing Congress to levy a tax on incomes "from whatever source derived"; and, in that event, the decisions interpreting the Amendment would also be reëxamined.[1]

From time to time, this Court has relied upon a doctrine evolved from *Collector* v. *Day,* under which incomes received from State activities thought by the Court to be non-essential are held taxable, while incomes from activities thought to be essential are held non-taxable. The opinion of the Court in this case refers to that doctrine. Application of this test has created "a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.'" *Brush* v. *Commissioner,* 300 U. S. 352, 365. Under this rule the tax status of every state employee re-

[1] See, *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1; *Peck & Co.* v. *Lowe,* 247 U. S. 165, 172; *Eisner* v. *Macomber,* 252 U. S. 189; *Evans* v. *Gore,* 253 U. S. 245.

mains uncertain until this Court passes upon the classification of his particular employment. The result is a confusion in the field of intergovernmental tax immunity which I believe could be clarified by complete review of the subject. Testing taxability by judicial determination that state governmental functions are essential or non-essential, contributes much to the existing confusion. I believe the present case affords occasion for appropriate and necessary abandonment of such a test, particularly since recent decisions [2] have already substantially advanced toward a reëxamination of the doctrine of intergovernmental immunity.

The present controversy illustrates the necessity for further reëxamination. New York created the Port Authority with power to engage in activities which that State believed to be essential. Yet, under this test, New York's determination is not final until reviewed in a tax litigation between the government and a single citizen.

Conceptions of "essential governmental functions" vary with individual philosophies. Some believe that "essential governmental functions" include ownership and operation of water plants, power and transportation systems, etc. Others deny that such ownership and operation could ever be "essential governmental functions" on the ground that such functions "could be carried on by private enterprise." A federal income tax levied against the manager of the state-operated elevated railway company of Boston was sustained even though this manager was a public officer appointed by the Governor of Massachusetts "with the advice and consent of the council." [3] On the other hand, the federal government was denied—

[2] See, *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501 and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393).

[3] *Helvering* v. *Powers*, 293 U. S. 214, 222, 223.

although with strong dissent—the right to collect an income tax from the chief engineer in charge of New York City's municipally owned water supply.[4] An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the "essential" and "non-essential" test.

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

Surely, the Constitution contains no imperative mandate that public employees—or others—drawing equal salaries (income) should be divided into taxpaying and non-taxpaying groups. Ordinarily such a result is discrimination. Uniform taxation upon those equally able to bear their fair shares of the burdens of government is the objective of every just government. The language of the Sixteenth Amendment empowering Congress to "collect taxes on incomes, from whatever source derived"—given its most obvious meaning—is broad enough to accomplish this purpose.

MR. JUSTICE BUTLER, dissenting.

So far as concerns liability for federal income tax, the salaries paid by the Port Authority to its officers and employees are not distinguishable from salaries paid by

[4] *Brush* v. *Commissioner*, 300 U. S. 352; cf., *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

States to their officers and employees. The judgment of the Circuit Court of Appeals should therefore be affirmed on the principle applied in *McCulloch* v. *Maryland* (1819) 4 Wheat. 316, that under the Constitution States are without power to tax instrumentalities of the United States and in *Collector* v. *Day* (1871) 11 Wall. 113, that the United States is without power to tax the salary of a state officer. That principle has been followed in a long line of decisions. In *Indian Motocycle Co.* v. *United States* (1931) 283 U. S. 570, we held the United States without power to tax the sale of a motorcycle to a municipal corporation for use in its police service. The Court, speaking through Mr. Justice Van Devanter, said (p. 575):

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector* v. *Day,* 11 Wall. 113, 125, 127; *Willcuts* v. *Bunn,* 282 U. S. 216, 224–225. 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."

Following that case, we recently applied the principle in *N. Y. ex rel. Rogers* v. *Graves* (January 4, 1937) 299

U. S. 401, to prevent the State of New York from taxing the salary of counsel of the Panama Railway Company, a federal instrumentality, and in *Brush* v. *Commissioner* (March 15, 1937) 300 U. S. 352, to prevent the United States from taxing the salary of the chief engineer of the bureau of water supply for the city of New York. In *Helvering* v. *Therrell* (February 28, 1938) 303 U. S. 218, holding that the federal government has power to tax compensation paid to attorneys and others out of corporate assets for necessary services rendered about the liquidation of insolvent corporations by state officers proceeding under her statutes, we said (p. 223):

"Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

The Court seemingly admitting that it would be futile to attempt to distinguish the cases now before us from the *Brush* case, overrules it by declaring that it must be limited by what is now decided. The Solicitor General did not in any manner raise the point on which the Court puts this decision. He sought reversal on the grounds that the Port Authority's activities are proprietary in nature; that it is not an agency created by the States alone; that it operates in interstate commerce subject to the paramount power of Congress. Indeed, he expressly disclaimed intention to ask re-examination of the doctrine of immunity on which the *Brush* case rests. In substance, as well as in the language used, the decision just announced substitutes for that doctrine the

proposition that, although the federal tax may increase cost of state governments, it may be imposed if it does not curtail functions essential to their existence. Expressly or *sub silentio,* it overrules a century of precedents. Cf. *James* v. *Dravo Contracting Co.* (December 6, 1937) 302 U. S. 134, 152, 161; *Helvering* v. *Mountain Producers Corporation* (March 7, 1938) 303 U. S. 376. As they stood when the cases now before us were in the Circuit Court of Appeals, our decisions required it to hold that the salaries paid by the Port Authority to respondents are not subject to federal taxation. I would affirm its judgments.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

AETNA INSURANCE CO. *v.* UNITED FRUIT CO.*

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

No. 773. Argued April 25, 26, 1938.—Decided May 23, 1938.

1. The purpose of a stipulation fixing the value of the vessel in a marine hull insurance policy undertaking to indemnify insured irrespective of the actual value is to dispense with proof of value in establishing the extent of liability assumed on the policy. P. 434.
2. Such a valuation clause, beyond its controlling effect in determining the insurance liability, does not operate, either as an estoppel or by agreement, to exclude proof of actual value, when relevant. P. 435.
3. The valued policy, like an open policy, is a contract of indemnity; in either case the indemnitor is entitled to share in the insured's recovery of damages for loss of the ship only by

*Together with No. 774, *Union Marine & General Ins. Co.* v. *United Fruit Co.,* and No. 775, *Boston Insurance Co.* v. *Same,* also on writs of certiorari to the Circuit Court of Appeals for the Second Circuit.

way of subrogation, the sole object of which is to make indemnity to the insured up to the amount of the policy the measure of the liability of the insurer. P. 436.

4. There is no analogy between the insurer's right to be subrogated to the fruits of the insured's recovery from a wrongdoer and the insurer's right to a wreck which is his by abandonment. P. 437.

5. Underwriters insured the hull of a vessel by policies in which the value of the hull was agreed upon at an amount stated, and each of which provided for a stipulated indemnity to the owner irrespective of the actual value of the vessel. The agreed value was less than the actual value of the hull, so that the owner was uninsured for the difference. As protection against the risk, the owner procured from English underwriters additional P. P. I. (policy proof of interest) policies, which waived all right of subrogation and were "honor" policies payable only at the option of the insurers because unenforceable under the applicable Act of Parliament. Upon a total loss of the vessel by collision with a vessel of the United States, all the policies were paid in full. Thereafter the owner and the underwriters upon the valued policies joined in pressing their claims against the United States, and, in a suit under a special Act of Congress not allowing recovery of interest, there was recovery of the value of the vessel, much exceeding the total insurance. *Held* that in the adjustment, the insurers upon the valued policies were entitled by way of subrogation to no more than the amounts they had paid on their policies, without interest, less their respective shares of the expenses attending the recovery. *North of England Iron S. S. Ins. Assn.* v. *Armstrong,* (1870) L. R. 5 Q. B. 244, disapproved. P. 438.

The insurers submitted no interest computations and made no effort to sustain the burden of proving that the owner had received more than indemnity for the delay in payment of so much of the loss as was not covered by insurance.

92 F. 2d 576, affirmed.

CERTIORARI, 303 U. S. 631, to review affirmances, with modifications, of judgments for interest and expenses recovered by three marine insurance companies in actions at law against the owner of a lost vessel. By agreement, the actions were tried together to the court and one juror. The trial court directed verdicts.

Mr. D. Roger Englar, with whom *Messrs. T. Catesby Jones, Oscar R. Houston,* and *Martin Detels* were on the brief, for petitioners.

Mr. Cletus Keating, with whom *Mr. Richard Sullivan* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is how far hull insurers upon a valued marine insurance policy are entitled, in case of total loss, to participate by way of subrogation in a recovery by the insured against a tortfeasor responsible for the loss.

In 1918 petitioners, with several other underwriters, insured the hull of respondent's vessel, the "Almirante," by policies in which it was agreed that the value of the hull was $632,610, materially less than its true value. The policies provided for a stipulated indemnity to the owner "irrespective of the value of the vessel," and that the owner was free to effect other insurance to any amount and without disclosure of the amounts so insured. As the total of the valued policies was $582,002.25, respondent was co-insurer for about $50,000; and so far as the valued hull policies were concerned it was uninsured, to the extent of any loss, in excess of the stipulated value. As protection against these risks, respondent procured from English underwriters additional P. P. I. (policy proof of interest) insurance, aggregating £65,105, partly upon hull and partly against other losses incidental to total loss of the vessel. The P. P. I. policies waived all rights of subrogation and were "honor" policies, concededly payable only at the option of the insurers because unenforceable under the Act of Parliament of December 31, 1906, § 4. *Edwards & Co.* v. *Motor Union Ins. Co.,* [1922] 2 K. B. D. 249.

In 1918 the "Almirante" became a total loss as the result of a collision with the S. S. "Hisko," a vessel belonging to the United States Government. The underwriters of both the valued policies and the P. P. I. policies paid them in full. The former joined with respondent in retaining attorneys to press the claims for collision damages against the United States. Suit brought against the United States under a special act of Congress, resulted in a recovery which included $1,750,000 as the value of the vessel, but without interest since the act did not authorize allowance of interest. Compare *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 47. Distribution of the proceeds of the suit was made in accordance with a computation by insurance adjusters who apportioned the expenses of the suit among respondent and the underwriters, and allotted to the latter the amounts they had paid on their policies without interest, less their respective shares of the expenses.

Petitioners, who are underwriters on some of the valued hull policies, brought the present suit in the district court for southern New York to participate in respondent's recovery against the United States. Relying on the valuation clause of their policies as conclusively fixing the value of the vessel for all purposes of the adjustment, they contest the allotment, insisting that they should bear no part of the expenses, and that they are entitled to interest on the amounts of their policies from the several dates on which they were paid. They also make, but do not stress here, the point that the hull insurers are entitled to the whole recovery. The district court gave judgment for the full amount which petitioners had paid on their policies without deduction for expenses, but without addition of interest. 18 F. Supp. 441. On appeal by both parties, the Court of Appeals held that petitioners were entitled to neither

interest nor expenses, and modified the judgment accordingly. 92 F. 2d 576. We granted certiorari, 303 U. S. 631, because of the admitted conflict of the decision below with that of the Court of Queen's Bench in *North of England Iron S. S. Ins. Assn.* v. *Armstrong* (1870) L. R. 5 Q. B. 244. See *Queen Insurance Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 493; *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co.*, 279 U. S. 708, 715.

Petitioners' argument turns upon their contention that the valuation clause, either by estoppel or by contract, is conclusive between the parties for all purposes and that as respondent has recovered from the Government more than the stipulated value of the vessel, petitioners are entitled to the benefit of the recovery, at least to the full extent of the payments on their policies with interest. We think that the valuation clause in its usual form does not operate as an estoppel or by agreement to foreclose proof that actual value exceeds agreed value when the question is of the insurer's right to subrogation. The application of the agreed value to the insurance adjustment does not depend upon estoppel, *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co., supra,* 712; *British & Foreign Marine Ins. Co.* v. *Maldonado & Co.,* 182 F. 744, and there can be no basis for an estoppel at least where, as here, the policy provisions undertake to indemnify the insured irrespective of the value of the vessel and contemplate that the insured may effect other insurance. The valuation stipulation fixes in advance of loss the value of the vessel, so as to avoid the necessity of proof of value in order to establish the extent of the liability assumed on the policy. The agreed value, honestly arrived at, thus stands in the place of prime value under an open marine policy, *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co., supra,* 711; *St. Paul Fire & Marine Ins. Co.* v. *Pure Oil Co.*, 63 F. 2d 771, and resembles, in its practical operation, a stipulation for liquidated damages.

But beyond its controlling effect in determining the insurance liability, the clause does not operate to exclude proof of actual value when relevant. Even in an action on the policy the actual rather than the agreed value has been held to be controlling for the purpose of determining whether there is a constructive total loss. *Bradlie* v. *Maryland Ins. Co.,* 12 Pet. 378, 399; *Irving* v. *Manning,* 6 C. B. 391 (H. of L.). In the case of partial insurance of cargo under a valued policy the insured is treated as a co-insurer and is allowed to recover on the policy only such proportion of the loss as the insured value bears to the actual value, a computation which necessarily requires proof of the actual value in order to establish the co-insurance relationship. *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co., supra,* 710–711; see *International Navigation Co.* v. *Atlantic Mutual Ins. Co.,* 100 F. 304, 318, aff'd per curiam 108 F. 987; Arnould on Marine Insurance, 11th Edition, § 340; Eldridge on Marine Policies, 2nd Edition, p. 90. It is true, as was pointed out in *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co., supra,* that in case of valued hull policies losses resulting in repairs are customarily paid in full, not because of agreement or estoppel but because partial losses to hull usually result in repairs without any valuation of the hull and the rule that the recovery shall be measured by repairs has been found more convenient in practice than one requiring determination of the sound value of the ship. See *Lohre* v. *Aitchison,* L. R. 2 Q. B. D. 501, 507. The same rule as in the case of cargo insurance has been applied when repairs were not made, and value was established by the sale of the vessel, *Pitman* v. *Universal Marine Ins. Co.,* L. R. 9 Q. B. D. 192, and in the case of general average contribution by the hull. *S. S. "Balmoral" Co.* v. *Marten,* [1902] App. Cas. 511, 514, 515. The peculiar rule of the insurer's liability for partial loss to hull when repairs are made does not depend on the valuation clause and affords

no basis for treating it as excluding the insured as co-insurer when there is a total loss.

These variations in the effect of the valuation clause, in fixing the liability of the insurer, do not alter the character of the valued policy as a contract of indemnity, or afford any basis for alteration of his rights as an indemnitor. Whether upon a valued or an open policy, he is entitled to share in the insured's recovery of damages only by way of subrogation, whose sole object and justification is to make indemnity to the insured up to the amount of the policy, the measure of the liability of the insurer. *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284, 288; *Aetna Casualty & Surety Co.* v. *Phoenix National Bank & Trust Co.*, 285 U. S. 209, 214; *Chapman* v. *Hoage*, 296 U. S. 526, 531. The doctrine now contended for, would require a radical departure from the principle on which subrogation is founded. Consistently applied, it would in some cases deprive the insured of indemnity, and indeed might enable the insurer to make a profit by recovering more from the insured than the amounts paid on the policy. We are unable to sanction a doctrine involving such consequences.

No question is raised by the petition for certiorari or appears to have been raised below as to the correctness of the adjustment statement, if the valuation clause does not foreclose proof of actual value and if respondent is therefore to be regarded as a co-insurer of the hull in event of total loss. Petitioners make no contention that respondent, if so regarded, has received more than appropriate indemnity after the distribution of the proceeds of the collision suit. The total insurance received by respondent from the insurers in 1918 and 1919, aggregating $886,068, was approximately $863,932 less than the prime value of the vessel, which some thirteen years later it recovered in the collision suit, without allowance of interest and after the expenditure of more than $300,000 as

costs of the litigation. Petitioners submit no interest computations and have otherwise made no effort to sustain the burden of proving that respondent has received more than indemnity for the delay in payment of as much of the loss as was not covered by insurance.

Since the expenses have been apportioned by charging the insured with a proportion greater than its share of the risk, and the apportionment is not assailed except as it may be wholly precluded by the valuation clause, it is unnecessary to consider whether the distribution of expense should be upon principles of co-insurance or whether the insured should be fully indemnified for it before the insurer is entitled to subrogation.

Petitioners point to no practice of underwriters with respect to the valued policy or its rate of premium as compared with that for the open policy, which supports the rule for which they contend. But they insist that it has been adopted in England and has become so well settled in New York where the insurance was effected, that it must be taken to be an implied term of the policies. It is true that *North of England Iron S. S. Ins. Assn.* v. *Armstrong, supra,* lends support to petitioners' argument. There, upon a total loss, the insured had recovered as collision damages an amount less than the agreed valuation and it was held that the insurer, who had paid the policy in full, was entitled to have the benefit of the entire recovery. The court thought that the case was analogous to that of abandonment in case of a constructive total loss where the underwriter, by virtue of the abandonment, is entitled to the wreck and to such profit from it as he can make. Pursuing the logic of its reasoning, the court declared that the insurer would have been entitled to the insured's full recovery even if it exceeded the agreed value. But it seems plain that there is no analogy between the insurer's right to be subrogated to the fruits of the insured's recovery from a wrongdoer

and the insurer's right to a wreck which is his by abandonment. *The Potomac,* 105 U. S. 630, 634; *The St. Johns,* 101 F. 469, 472 (S. D. N. Y.); Arnould on Marine Insurance, 11th Edition, §§ 1228–1230.

North of England Iron S. S. Ins. Assn. v. *Armstrong, supra,* was cited in *The Potomac, supra,* 635, and in *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 594, 595, neither of which involved the question now presented. It was followed in *The St. Johns,* but not to the extent of allowing a profit to the insurer. In *The Livingstone,* 130 F. 746 (C. C. A. 2), the claim of a valued hull insurer to the whole collision recovery, which exceeded the agreed value, was denied upon reasoning which rejected that of *North of England Iron S. S. Ins. Assn.* v. *Armstrong, supra,* and *The St. Johns, supra,* and calls for affirmance of the judgment here. Interest was allowed to the insurer, apparently because interest on the full value of the vessel had been recovered in the damage suit. Without discussing the point the court by its mandate directed payment to the underwriters of the full amount of their policies without deduction for expenses. But as it considered that the insurer's right of recovery rested upon subrogation unaffected by the valuation clause, we cannot regard the case as an intentional departure from the rule that the insurer is entitled to subrogation only after the insured is appropriately indemnified, or as establishing any rule that the valuation clause forecloses proof of actual value as a step in measuring the insurer's recovery by way of subrogation.

We recognize that established doctrines of English maritime law are to be accorded respect here, *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co., supra,* 493; *Gulf Refining Co.* v. *Atlantic Mutual Ins. Co., supra,* 715, but the pronouncement in *North of England Iron S. S. Ins. Assn.* v. *Armstrong, supra,* has never been adopted by

an English appellate court. It was doubted by eminent judges in *Burnand* v. *Rodocanachi Sons & Co.*, [1882] L. R. 7 App. Cas. 333, 342, and in *Thames & Mersey Marine Ins. Co.* v. *British & Chilean S. S. Co.*, [1915] L. R. 2 K. B. 214, 221. Its reasoning, conflicting as it does with established principles of maritime insurance law, and found to be incapable of consistent application both in *The St. Johns, supra,* 474–475, and in *The Livingstone, supra,* 750, should be rejected here.

Affirmed.

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

ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

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

No. 882. Argued April 28, 29, 1938.—Decided May 23, 1938.

1. Substitution of the official successor to a collector of internal revenue who resigned and died pending a suit to restrain collection of a tax assessment, *held* proper under § 11, Act of February 13, 1925. P. 444.
2. R. S. § 3224, providing that "no suit for the purpose of restraining the collection or assessment of any tax shall be maintained in any court," is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. P. 445.
3. A corporation, created by a State as an instrumentality of the State, and having control and management of state educational institutions, sought to restrain collection by distraint of sums assessed by the Commissioner of Internal Revenue in consequence of neglect to collect and pay over the federal tax, Revenue Act of 1926, § 500 (a) (1), as amended, on admissions to intercollegiate football games played at those institutions. The corporation con-

tended that the exaction would unconstitutionally burden a governmental activity of the State. The tickets of admission to the games in question bore printed notices to the effect that the corporation was not liable for any admission tax, but that an amount equivalent thereto was being collected as part of the price of admission and would be retained as such, unless it should later be determined that the corporation was liable for the tax. *Held,* the suit was within the equity jurisdiction of the federal court. Pp. 445, 448.

The State was entitled to a determination of the question whether the statute as construed and applied imposed an unconstitutional burden, and the issue could not adequately be raised by any other proceeding.

4. A corporation created by the State as an instrumentality of the State and having control and management of state educational institutions, at which athletic exhibitions are held and the public are charged for admission, may constitutionally be required to collect, make return of, and pay to the United States the admissions tax imposed by Revenue Act of 1926, § 500 (a) (1), as amended by Revenue Act of 1932, § 711. P. 449.
5. The tax immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain. P. 453.

93 F. 2d 887, reversed.

CERTIORARI, 303 U. S. 634, to review the affirmance of a decree enjoining a United States collector of internal revenue from distraining bank deposits representing moneys claims by the Regents of the University System of Georgia, a state instrumentality, respondent in this case. See also 10 F. Supp. 901; 18 *id.* 62; 81 F. 2d 577.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Carlton Fox* were on the brief, for petitioner.

Mr. Marion Smith, with whom *Messrs. M. J. Yeomans,* Attorney General of Georgia, *M. E. Kilpatrick* and *Hamilton Lokey* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. William S. Ervin,* Attorney General of Minnesota, *John H. Mitchell,* Attorney General of Iowa, *Gaston L. Porterie,* Attorney General of Louisiana, *Richard C. Hunter,* Attorney General of Nebraska, and *Henry H. Foster,* Attorney for University of Nebraska, *Orland S. Loomis,* Attorney General of Wisconsin, *Raymond W. Starr,* Attorney General of Michigan, *Clarence V. Beck,* Attorney General of Kansas, *Roy McKittrick,* Attorney General of Missouri, *A. A. F. Seawell,* Attorney General of North Carolina, *Alvin C. Strutz,* Attorney General of North Dakota, and *Herbert S. Duffy,* Attorney General of Ohio, on behalf of their respective States; by *Messrs. Roy H. Beeler,* Attorney General, *Nat Tipton,* Assistant Attorney General, of Tennessee, and *Mr. Henry B. Witham,* on behalf of that State and its University; by *Messrs. Otto Kerner,* Attorney General of Illinois, and *Sveinbjorn Johnson,* on behalf of that State; and by *Messrs. E. W. Mullins, Harold Major, D. W. Robinson, Jr.,* and *James F. Dreher,* on behalf of the University of South Carolina, and other educational institutions of that State; all in support of respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The question on the merits is whether the exaction of the federal admissions tax, in respect of athletic contests in which teams representing colleges conducted by the respondent participate, unconstitutionally burdens a governmental function of the State of Georgia. The petition also challenges the respondent's ability to maintain a suit to enjoin the collection of the tax and to substitute as defendant the successor in office of the Collector originally impleaded. The court below decided all the ques-

tions involved against the petitioner.[1] Because of their importance we granted certiorari.

Section 500 (a) (1) of the Revenue Act of 1926,[2] as amended by § 711 of the Revenue Act of 1932[3] imposes "a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . . to be paid by the person paying for such admission; . . ."[4] Subsection (d) commands that the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket is sold shall be conspicuously printed, stamped, or written on the face or back of that portion of the ticket which is to be taken up by the management and imposes a penalty for failure to comply with its terms. Section 502 requires the person receiving payments for admissions to collect the tax and make return in such form as the Commissioner of Internal Revenue may prescribe by regulation. Section 1102 (a)[5] imposes the duty on persons who collect the tax to keep records and render statements, under oath, and to make returns as required by the Secretary of the Treasury. Section 1114[6] (b) and (d) fixes penalties for failure to collect or pay over and subsection (e) provides for the personal liability of one collecting the admission charge

[1] The defendant in the District Court was W. E. Page, the petitioner's predecessor in office. That court dismissed the bill. 10 F. Supp. 901. The Circuit Court of Appeals reversed. 81 F. 2d 577. After answer and a hearing on the merits the District Court awarded an injunction. 18 F. Supp. 62. The Circuit Court of Appeals permitted the substitution of the petitioner for Page and affirmed the decree by a divided court. 93 F. 2d 887.

[2] c. 27, 44 Stat. 9, 91; U. S. C. Tit. 26, §§ 940–944.

[3] c. 209, 47 Stat. 169, 271; U. S. C. Tit. 26, § 940 (a) (2).

[4] Exemptions touching admissions of certain persons and all admissions to specified types of entertainment or exhibitions are not involved. Subsection (e), 47 Stat. 271.

[5] 44 Stat. 112; U. S. C. Tit. 26, § 960.

[6] 44 Stat. 116; U. S. C. Tit. 26, §§ 494, 856, 921.

and for distraint by the Collector of Internal Revenue for taxes and penalties. Section 607 of the Revenue Act of 1934 [7] requires the person charged with the collection of the tax to hold the amount collected as a special fund in trust for the United States, confers the right to assess him with the amount so collected and withheld, including penalties, and, in connection with R. S. 3187,[8] authorizes the Collector of Internal Revenue to distrain therefor.

The respondent is a public corporation, created by Georgia as an instrumentality of the State, having control and management of The University of Georgia and the Georgia School of Technology. Athletics at these institutions are conducted under the respondent's authority by two corporations, the University of Georgia Athletic Association and the Georgia Tech. Athletic Association. The expense of physical education and athletic programs at each school is defrayed almost entirely from the admission charges to athletic contests and students' athletic fees collected for the purpose. During September and October 1934 football games were played at the institutions, for which admissions were charged and collected by the associations. Each ticket showed on its face the admission price, the amount of the tax, and the total of the two, and also carried the following printed notice:

"The University of Georgia [or Georgia School of Technology] being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

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[7] c. 277, 48 Stat. 680, 768; U. S. C. Tit. 26, § 1551.

[8] U. S. C. Tit. 26, § 1580.

Each association deposited the total collected as the disputed tax in a separate bank account, apart from its other funds, but made no return thereof. The Collector prepared returns for the amounts. In consequence of the associations' neglect to pay the amounts so returned, the Commissioner assessed each association in the amount shown by return made for it and certified the assessments to the Collector, who made demands for payment. These were ignored and the Collector filed liens, issued warrants, and levied upon the deposit accounts. The respondent then brought suit in which it prayed a decree that, as an agency of the State performing an essential governmental function in the conduct of the games, it was immune from the tax, and sought injunctions, temporary and permanent, to restrain the Collector from proceeding further to collect the sums demanded. From a decree awarding a final injunction the Collector appealed; but, pending appeal, he resigned and, before the hearing, died. Over objection the Circuit Court of Appeals ordered the petitioner substituted as appellant and affirmed the decree. We are of opinion that the court below rightly decided the procedural questions but erred as to the merits.

First. If the suit was maintainable against his predecessor in office the substitution of petitioner was lawful. We are not unmindful of the principle that suits against officers to restrain action in excess of their authority or in violation of statutory or constitutional provisions are in their nature personal and that a successor in office is not privy to his predecessor in respect of the alleged wrongful conduct.[9] As a result of the inconvenience resulting from the lack of power to substitute one who succeeded to the office of an alleged offending official, to

[9] *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10; *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 603–604; *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 620–621; *Irwin* v. *Wright,* 258 U. S. 219, 222.

which this court has called attention,[10] Congress adopted the Act of February 13, 1925,[11] which provides:

". . . Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, . . ."

The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade,* 289 U. S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted.

Second. If the tax, the collection of which was threatened, constituted an inadmissible burden upon a governmental activity of the State, the circumstances disclosed render the cause one of equitable cognizance and take it out of the prohibition of R. S. 3224.[12] The respondent has long been of opinion that exaction of the tax in respect of games played under the auspices of The University of Georgia and the Georgia School of Technology constitutes an unconstitutional burden upon an essential governmental activity of Georgia. At first

[10] See *Ex parte La Prade,* 289 U. S. 444, 456–459.

[11] c. 229, 43 Stat. 936, U. S. C. Tit. 28, § 780.

[12] U. S. C. Tit. 26, § 1543.

the respondent collected the tax as required by the Act, paid it over to the Treasury, and made claim for refund. The claim was rejected on the ground that the tax was paid by the patron of the game, and that the athletic associations and the respondent were mere collecting agents having no interest in the fund which would justify repayment to them if it had been illegally collected. Believing the basis of the Commissioner's refusal to refund was sound,[13] the respondent then resorted to the expedient of collecting the amount of the tax under the reservation printed upon the tickets.

The bill, after reciting the facts as above summarized, alleges that the statute imposes a tax upon the individuals who purchase tickets, but, properly construed, is inapplicable to those purchasing tickets to the football games in question. It further asserts that, in respect of those games, neither the respondent nor the athletic associations collected any tax from purchasers of admissions; that if the statute be construed to justify the Collector in seeking to force respondent to pay sums representing alleged taxes due from numerous individuals it is unconstitutional as an attempt to interfere with and control and to burden the state's educational activities and unlawfully to impose on the state government the duty of collecting taxes for the federal government; that the action of the petitioner in issuing warrants of distraint is either an attempt to collect from respondent taxes alleged to be due from various individuals, or to impose upon the respondent penalties, criminal and punitive in nature.

The petitioner insists the bill shows the tax was in fact collected from the patrons of the games, and the allega-

[13] Compare *Shannopin Country Club* v. *Heiner,* 2 F. 2d 393; *Lafayette Worsted Co.* v. *Page,* 6 F. 2d 399; *Union Pacific Ry. Co.* v. *Bowers,* 33 F. 2d 102; *Wourdack* v. *Becker,* 55 F. 2d 840; but see *Builders' Club* v. *United States,* 14 F. Supp. 1020.

tion that no tax was collected is a mere conclusion of law which the court should ignore; that the trial court was without jurisdiction to determine in this suit for injunction whether or not taxes had been collected by respondent; that the Revenue Act imposes no liability for the tax upon the vendor of the tickets who fails to collect, although it does impose a penalty for wilful failure to collect the tax and other penalties; that, as the respondent collected the tax, it has no standing in its capacity as a collecting agent to deny the validity of the exaction, and, as a collecting agent, could not create a right to resist collection by the government by forcing a stipulation upon purchasers of tickets that the amount collected should belong to the agent if it were able to defeat the government; that, as such agent, respondent has no interest adverse to the United States; that the stipulation in question did not amount to an assignment of a ticket purchaser's claim for refund or, if it did, the purchaser has thereby lost his right to recover the tax by reason of the prohibition of assignment of claims against the United States embodied in R. S. 3477; [14] that respondent or the athletic associations would have had an adequate remedy at law for recovery of the amounts assessed against them had they paid the assessments; and finally that R. S. 3224 [15] prohibits the issue of an injunction against collection.

To these contentions respondent replies that while it placed the required information on the ticket and segregated the equivalent of the tax from the proceeds of tickets sold to avoid the imposition of penalties on its personnel, the notation on the tickets shows that it did not undertake to collect and did not in fact collect the tax;

[14] U. S. C. Tit. 31, § 203.

[15] "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." U. S. C. Tit. 26, § 1543.

that, by refusal to collect, it took itself out of the category of an agent who voluntarily acted on behalf of the government; that, while the statute places no liability upon respondent for the tax as such, it imposes upon the respondent civil and criminal penalties for refusal to collect it; that respondent is not an assignee of the claims of its patrons, but, if the tax is invalid, is owner in its own right of the entire amount paid by each purchaser; that respondent has no remedy at law because if it had paid the tax out of its own funds it could not have claimed refund of payment thus voluntarily made for its patrons' accounts; that state officials may not be required to collect an illegal tax as a condition precedent to contesting its validity; that § 3224 has no application to this suit.

The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity.

What we have said indicates that R. S. 3224, *supra*, does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law.[16] This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another. The argument that no remedy need be afforded the respondent is bottomed on the assumption that it is a mere collecting agent which cannot be hurt by collecting and paying over the tax; but this argument assumes first, that respondent did in truth collect a tax and, second, that the imposition of the tax on the purchase of admissions cannot burden a state activity. This is arguing in a circle, for these are the substantial matters in controversy. We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment.

Third. We come then to the merits. For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the state government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the state authorities, and their determination is not subject to review by any branch of the federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the state activity and

[16] *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 509.

directly burdens that activity; that the burden of collecting the tax is placed immediately on a state agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.

The record discloses these undisputed facts: The stadium of the University of Georgia has a seating capacity of 30,000, cost $180,000, and was paid for by borrowed money which is being repaid by the Athletic Association, whose chief source of revenue is admissions to the contests in the stadium. $158,000 of the amount borrowed has been repaid since the stadium was completed in 1929. The student enrollment is about 2,400. Each student pays an annual athletic fee of $10.00 which confers the privilege of free admission to all the school's athletic events. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association from all sources for the year ending August 31, 1935, were $91,620.25 of which $71,323.27 came from admissions to football games.

The stadium of the Georgia School of Technology has a seating capacity of 29,000. It cost $275,000 and was paid for by a gift of $50,000 and from admissions charged and student fees. The enrollment is about 2,000 students, each of whom pays an annual athletic fee of $7.50 which gives the privilege of free admission to all games. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association for the six months ended December 31, 1934, were $119,436.75 of which $74,168.51 came from admissions to football games.

[17] Student athletic fees are not treated as admissions subject to the tax. See Cumulative Bulletin XI–2 (July–December 1932), p. 522.

It is evident that these exhibition enterprises are comparatively large and are the means of procuring substantial aid for the schools' programs of athletics and physical education. In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a State may withdraw the business from the field of federal taxation.

When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. In *South Carolina* v. *United States,* 199 U. S. 437, it appeared that South Carolina had established dispensaries for the sale of liquor and prohibited sale by other than official dispensers. It was held that the United States could require the dispensers to take licenses and to pay license taxes under the Internal Revenue laws applicable to dealers in intoxicating liquors, and this notwithstanding the State had established the dispensary system in the valid exercise of her police power. In *Ohio* v. *Helvering,* 292 U. S. 360, it was shown that Ohio, in the exercise of the same power, had created a monopoly of the distribution and sale of intoxicating liquors through stores owned, managed, and controlled exclusively by the State. It was sought to enjoin the Commissioner of Internal Revenue and his subordinates from enforcing against the State, her officers, agents, and employes, penalties for the nonpayment of federal excises on the sale of liquor. Relief was denied and the views expressed in the *South Carolina* case were reaffirmed. In *Helvering* v. *Powers,* 293 U. S. 214, the court found that Massachusetts, in the exercise of the police power, had appointed a Board of Trustees to operate a street railway company's properties for a limited time. It was held that though the

trustees were state officers, their salaries were subject to federal income tax because the State could not withdraw sources of revenue from the federal taxing power by engaging in a business which went beyond usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend.

The legislation considered in *South Carolina* v. *United States, supra,* provided for a division of the profits of the dispensary system between the state treasury and cities and counties. Thus the enterprise contributed directly to the sustenance of every governmental activity of the State. In the present instance, instead of covering the proceeds or profits of the exhibitions into the state treasury, the plan in actual operation appropriates these monies in ease of what the State deems its governmental obligation to support a system of public education. The difference in method is not significant. The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.

Under the test laid down in *Helvering* v. *Gerhardt, ante,* p. 405, however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged.

The opinion in *South Carolina* v. *United States, supra,* at pages 454–457, points out the destruction of the federal power to tax which might result from a contrary decision.[18]

Moreover, the immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain. As was said in *South Carolina* v. *United States, supra,* at p. 457: "Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it." Compare *Helvering* v. *Therrell,* 303 U. S. 218. The decree is

Reversed.

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

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE STONE, concurring in the result.

Congress, by R. S. § 3224, has declared that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." While

[18] "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down." (p. 454.)

"The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty." (p. 455.) (Compare *Board of Trustees* v. *United States,* 289 U. S. 48, 59.)

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National

I agree with the decision of the Court on the merits, I am not persuaded that this statute does not mean what it says, or that the suit is not one to restrain collection of the tax. I can only conclude, as I did in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 511, that the statute deprived the district court of jurisdiction to entertain respondent's suit, and that the judgment should be reversed with direction that the cause be dismissed.

MR. JUSTICE REED concurring in the result.

Except for the holding that injunction is a proper remedy to test the position of the Regents, I agree with the opinion of the Court. As even a small breach in the general scheme of taxation gives an opening for the disorganization of the whole plan, it seems desirable to express dissent from the conclusion that the Regents may utilize the summary remedy of injunction, over the objection of the Government, as a means of testing the applicability of a tax law to them.

The facts set out in the opinion of the circumstances and agreement under which the money threatened to be distrained was collected make it quite clear, it seems to me, that the Regents collected tax moneys from the spectators. Any allegation in the petition to the contrary is an erroneous conclusion of law. The Collector sought to cover this money into the Treasury. Section 502 (a) of the Revenue Act of 1926[1]; § 607 of the Rev-

Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government." (p. 455.)

[1] Sec. 502 (a). Every person receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such

enue Act of 1934 [2] and § 3224 of the Revised Statutes [3] make it clear that no injunction will lie to restrain such action.[4]

Section 3224 was enacted in 1867, and until recent years was followed by the courts without deviation. Exceptions were made to protect taxpayers against collection of penalties.[5] In an exceptional case of "special and extraordinary" circumstances,[6] where a "valid . . . tax could by no legal possibility have been assessed against respondent . . ." this Court permitted an injunction. "Special and extraordinary" circumstances have multiplied. Here the lower court found them "demonstrated by the fact that the Regents had actually paid the tax in former years, and filed a claim for refund which was denied on the ground that they had not

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members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the principal office or place of business is located. (U. S. C., Title 26, §§ 955, 956.)

[2] Sec. 607. Enforcement of Liability for Taxes Collected. Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, § 1551.)

[3] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, § 1543.)

[4] *Gouge* v. *Hart,* 250 F. 802 (W. D. Va.), appeal dismissed, 251 U. S. 542; *Ralston* v. *Heiner,* 24 F. 2d 416 (C. C. A. 3d); *Calkins* v. *Smietanka,* 240 F. 138 (N. D. Ill.); *Seaman* v. *Guaranty Trust Co.,* 1 F. 2d 391 (S. D. N. Y.).

[5] *Lipke* v. *Lederer,* 259 U. S. 557; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386.

[6] *Miller* v. *Nut Margarine Co.,* 284 U. S. 498.

borne the burden of any part thereof." It may be assumed, and petitioner admits, that respondents may not pay the moneys and then sue to recover them. The fallacy underlying the opinion of the Court is the assumption that some remedy is necessary. Respondents, being merely collectors of tax moneys, are not entitled either to enjoin collection of these moneys or to pay and sue to recover them.

There is no reason why the State of Georgia should risk or ask its agents to risk penalties to determine whether this tax is collectible. Respondents would lose nothing by collecting the tax and turning it over to the United States. If they desire to stand upon their own conception of the law and refuse to collect the tax, they must take the risks of such action. Every other taxpayer or collector of admission taxes must make the same choice.

The prompt collection of revenue is essential to good government. Summary proceedings are a matter of right.[7] The Government has been sedulous to maintain a system of corrective justice.[8] Any departure from the principle of "pay first and litigate later" threatens an essential safeguard to the orderly functioning of government. Here an injunction is approved when the petitioner below had little more legitimate interest in the collection of the tax than a curiosity to know whether the customers of its athletic spectacles, the real taxpayers, were constitutionally subject to such an exaction.

I am authorized to say that MR. JUSTICE STONE concurs in this opinion. MR. JUSTICE BLACK concurs in this opinion except in so far as it approves the reasoning of the Court on the question of state immunity from interference by federal taxation.

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[7] *Cheatham* v. *United States*, 92 U. S. 85, 88, 89.

[8] Compare *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

MR. JUSTICE BUTLER, dissenting.

I am of opinion that the District Court had jurisdiction.

So far as concerns the validity of the tax, the University is the State. It is an instrumentality carrying on the state's program of public education. The holding of the athletic contests in question is an integral part of that program and does not cease to be such because it produces income. The tax is imposed directly on and burdens that activity of the State. The Court assumes the facts above stated and decides the case on that basis. The tax is laid on the charge paid for admission, is to be borne by the person paying for admission, and is to be collected by the State and handed over to the United States. It is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of federal taxation, its work of education to the level of selling intoxicating liquor, *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360, operating a railway, *Helvering* v. *Powers,* 293 U. S. 214, or conducting any other commercial activity. The tax seems plainly within the rule of state immunity from federal taxation as hitherto understood and applied. I would affirm the judgment of the Circuit Court of Appeals.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

JOHNSON *v.* ZERBST, WARDEN.

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

No. 699. Argued April 4, 1938.—Decided May 23, 1938.

1. A person charged with crime in a federal court is entitled by the Sixth Amendment to the assistance of counsel for his defense. P. 462.
2. This right may be waived; but the waiver must be an intelligent one; and whether there was such must depend upon the particular facts and circumstances, including background, experience, and conduct of accused. P. 464.
3. It is a duty of a federal court in the trial of a criminal case to protect the right of the accused to counsel, and, if he has no counsel, to determine whether he has intelligently and competently waived the right. It would be fitting that such determination be made a matter of record. P. 465.
4. If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. P. 468.
5. The question whether the assistance of counsel was intelligently and competently waived by the prisoner at his trial may be determined in *habeas corpus* proceedings on proofs *aliunde*. P. 467.

92 F. 2d 748, reversed.

CERTIORARI, 303 U. S. 629, to review the affirmance of a judgment of the District Court discharging a writ of *habeas corpus*. See 13 F. Supp. 253.

Mr. Elbert P. Tuttle for petitioner.

Mr. Bates Booth, with whom *Solicitor General Jackson*, *Assistant Attorney General McMahon*, and *Mr. William W. Barron* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, while imprisoned in a federal penitentiary, was denied *habeas corpus* by the District Court.[1] Later,

[1] 13 F. Supp. 253.

that court granted petitioner a second hearing, prompted by "the peculiar circumstances surrounding the case and the desire of the court to afford opportunity to present any additional facts and views which petitioner desired to present." Upon consideration of the second petition, the court found that it did "not substantially differ from the" first, "and for the reasons stated in the decision in that case" the second petition was also denied.

Petitioner is serving sentence under a conviction in a United States District Court for possessing and uttering counterfeit money. It appears from the opinion of the District Judge denying *habeas corpus* that he believed petitioner was deprived, in the trial court, of his constitutional right under the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." [2] However, he held that proceedings depriving petitioner of his constitutional right to assistance of counsel were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal."

The Court of Appeals affirmed [3] and we granted certiorari due to the importance of the questions involved.[4]

The record discloses that:

Petitioner and one Bridwell were arrested in Charleston, South Carolina, November 21, 1934, charged with

[2] The Sixth Amendment of the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

[3] 92 F. 2d 748.

[4] 303 U. S. 629.

feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to court and there first given notice of the indictment; immediately were arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary; and January 25, were transported to the Federal Penitentiary in Atlanta. While counsel had represented them in the preliminary hearings before the commissioner in which they—some two months before their trial—were bound over to the Grand Jury, the accused were unable to employ counsel for their trial. Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of counsel.

"Both petitioners lived in distant cities of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds. They testified that they had never been guilty of nor charged with any offense before, and there was no evidence in rebuttal of these statements."[5] In the *habeas corpus* hearing, petitioner's evidence developed that no request was directed to the trial judge to appoint counsel, but that such request was made to the District Attorney, who replied that in the State of trial (South Carolina) the court did not appoint counsel unless the defendant was charged with a capital crime. The District Attorney denied that petitioner made request

[5] Opinion of the District Judge, 13 F. Supp. 253, 254.

to him for counsel or that he had indicated petitioner had no right to counsel. The Assistant District Attorney testified that Bridwell "cross-examined the witnesses"; and, in his opinion, displayed more knowledge of procedure than the normal layman would possess. He did not recall whether Bridwell addressed the jury or not, but the clerk of the trial court testified "that Mr. Johnson [Bridwell?] conducted his defence about as well as the average layman usually does in cases of a similar nature." Concerning what he said to the jury and his cross-examination of witnesses, Bridwell testified "I tried to speak to the jury after the evidence was in during my trial over in the Eastern District of South Carolina. I told the jury, 'I don't consider myself a hoodlum as the District Attorney has made me out several times.' I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

"I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof."

Reviewing the evidence on the petition for *habeas corpus,* the District Court said [6] that, after trial, petitioner and Johnson " . . . were remanded to jail, where they asked the jailer to call a lawyer for them, but were not permitted to contact one. They did not, however, undertake to get any message to the judge.

[6] 13 F. Supp. 253, 254.

" . . . January 25th, they were transported by automobile to the Federal Penitentiary in Atlanta, Ga., arriving . . . the same day.

"There, as is the custom, they were placed in isolation and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution, but they did see the officers daily. They made no request of the officers to be permitted to see a lawyer, nor did they ask the officers to present to the trial judge a motion for new trial or application for appeal or notice that they desired to move for a new trial or to take an appeal.

"On May 15, 1935, petitioners filed applications for appeal which were denied because filed too late."

The " . . . time for filing a motion for new trial and for taking an appeal has been limited to three and five days." [7]

One. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." [8] It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect

[7] 13 F. Supp. at 256; see, Rules of Practice and Procedure (Criminal Appeals Rules), adopted May 7, 1934, II, III.

[8] Cf., *Palko* v. *Connecticut*, 302 U. S. 319, 325.

himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to " . . . the humane policy of the modern criminal law . . ." which now provides that a defendant " . . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state." [9]

The " . . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." [10] The Sixth Amendment withholds from federal courts,[11] in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

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[9] *Patton* v. *United States,* 281 U. S. 276, 308.

[10] *Powell* v. *Alabama,* 287 U. S. 45, 68, 69.

[11] Cf., *Barron* v. *The Mayor,* 7 Pet. 243, 247; *Edwards* v. *Elliott,* 21 Wall. 532, 557.

Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights [12] and that we "do not presume acquiescence in the loss of fundamental rights." [13] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Patton v. *United States,* 281 U. S. 276, decided that an accused may, under certain circumstances, consent to a jury of eleven and waive the right to trial and verdict by a constitutional jury of twelve men. The question of waiver was there considered on direct appeal from the conviction, and not by collateral attack on *habeas corpus.* However, that decision may be helpful in indicating how, and in what manner, an accused may—before his trial results in final judgment and conviction—waive the right to assistance of counsel. The *Patton* case noted approvingly a state court decision [14] pointing out that the humane policy of modern criminal law had altered conditions which had existed in the "days when the accused could not testify in his own behalf, [and] was not furnished Counsel," and which had made it possible to convict a man when he was "without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, . . ."

[12] *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393; *Hodges* v. *Easton,* 106 U. S. 408, 412.

[13] *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 307.

[14] *Hack* v. *State,* 141 Wis. 346, 351; 124 N. W. 492.

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Three. The District Court, holding petitioner could not obtain relief by *habeas corpus*, said:

"It is unfortunate, if petitioners lost their right to a new trial through ignorance or negligence, but such misfortune cannot give this Court jurisdiction in a habeas corpus case to review and correct the errors complained of."

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial;[15] and the "writ of *habeas corpus* cannot be used as a writ of error."[16] These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth

[15] Cf., *Ex parte Watkins*, 3 Pet. 193; *Knewal* v. *Egan*, 268 U. S. 442; *Harlan* v. *McGourin*, 218 U. S. 442.

[16] *Woolsey* v. *Best*, 299 U. S. 1, 2.

Amendment. In such a proceeding, "it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court" [17] and the petitioned court has "power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry . . . [involves] an examination of facts outside of, but not inconsistent with, the record." [18] Congress has expanded the rights of a petitioner for *habeas corpus* [19] and the " . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . .

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[17] *Frank* v. *Mangum,* 237 U. S. 309, 327.

[18] *In re Mayfield,* 141 U. S. 107, 116; *Cuddy, Petitioner,* 131 U. S. 280.

[19] 28 U. S. C., ch. 14, § 451, *et seq.*

" . . . it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, . . ." [20]

Petitioner, convicted and sentenced without the assistance of counsel, contends that he was ignorant of his right to counsel, and incapable of preserving his legal and constitutional rights during trial. Urging that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal. If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said—as in *Mooney* v. *Holohan,* 294 U. S. 103, 113—that it "falls with the premise." To deprive a citizen of his only effective remedy would not only be contrary to the "rudimentary demands of justice" [21] but destructive of a constitutional guaranty specifically designed to prevent injustice.

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this

[20] *Frank* v. *Mangum, supra,* 330, 331; cf., *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103; *Hans Nielsen, Petitioner,* 131 U. S. 176.

[21] Cf., *Mooney* v. *Holohan, supra,* 112.

right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.[22] If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus*.[23] A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine "the facts for himself when if true as alleged they make the trial absolutely void." [24]

It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity.[25] Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional

[22] Cf., *Frank* v. *Mangum*, *supra*, 327.

[23] *Hans Nielsen, Petitioner*, *supra*.

[24] Cf., *Moore* v. *Dempsey*, 261 U. S. 86, 92; *Patton* v. *United States*, 281 U. S. 276, 312, 313.

[25] *Cuddy, Petitioner*, *supra*

right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ.

In this case, petitioner was convicted without enjoying the assistance of counsel. Believing *habeas corpus* was not an available remedy, the District Court below made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. If—on remand—the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ.

The cause is reversed and remanded to the District Court for action in harmony with this opinion.

Reversed.

MR. JUSTICE REED concurs in the reversal.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment of the court below should be affirmed.

MR. JUSTICE BUTLER is of the opinion that the record shows that petitioner waived the right to have counsel, that the trial court had jurisdiction, and that the judgment of the Circuit Court of Appeals should be affirmed.

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

DENVER UNION STOCK YARD CO. *v.* UNITED STATES ET AL.

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

No. 798. Argued April 27, 1938.—Decided May 31, 1938.

1. In fixing rates, property not used or useful in rendering the services of the public utility need not be included in rate base. P. 475.
2. In fixing rates of a stockyard company, the Secretary of Agriculture properly excluded from the rate base:
   (a) Land and improvements used for an annual stock show but not for the performance of the services covered by the rates regulated. P. 475.
   (b) Trackage and facilities, for unloading and loading livestock, leased to railroad companies for substantial rentals, the stockyard services being confined to the period between the end of unloading and the beginning of loading. P. 476.
3. The facts that he had not dwelt in the locality and had never appraised land in that vicinity or assembled or appraised any large industrial tracts, did not disqualify a witness, otherwise experienced in land valuation, from testifying to the value of land of a stockyard company, in a proceeding by the Secretary of Agriculture in which rates for stockyard services were fixed. P. 477.
4. In valuing the property of a public utility, an allowance for going-concern value need not be itemized separately but may be included in the valuation of the physical elements. P. 478.
5. Where the practice of a stockyard company was to charge on sales of livestock made at the yard by producers, but not on resales made there by traders who bought there from producers, it was within the province of the Secretary of Agriculture, in regulating rates and in avoidance of discrimination, under the Stockyards Act, to require that reasonable rates on such resales be charged the traders. P. 481.

   Such a requirement did not create unjust discrimination as between producers, nor unlawfully invade the right of the company, as owner, to manage the yard and control its business policy.

6. Whether a stockyard company is entitled, as of constitutional right, to have any of a number of contributions to local charities and civic organizations, subscriptions etc. included in its operating expenses in the fixing of its rates for the future, the Court finds it unnecessary to consider, in view of the variability of its prospective income, its control over the items in controversy, and their trivial amount. P. 482.
7. A claim that the costs and expenses of this litigation, amortized over a reasonable period, should be included in the operating costs of the appellant stockyard company, in determining the adequacy of rates fixed by the Secretary of Agriculture, can not be considered, it not having been presented by the bill or in the request for findings. P. 484.
8. The evidence is not sufficient to require or warrant a finding that in the immediate future a return of six and one-half per cent. on the value of the stockyard company's property will be inadequate. P. 485.

21 F. Supp. 83, affirmed.

APPEAL from a decree of a District Court of three judges dismissing the bill in a suit to set aside an order of the Secretary of Agriculture prescribing maximum rates to be charged by the appellant Stock Yard Company.

Mr. Robert G. Bosworth, with whom *Mr. Winston S. Howard* was on the brief, for appellant.

Mr. Wendell Berge, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Raymond J. Heilman,* and *Mastin G. White* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

November 8, 1934, the Secretary of Agriculture initiated proceedings in which, February 17, 1937, after extended investigation, taking of much evidence and full hearing, he made findings of fact and an order, prescribing maximum rates to be charged by appellant for services

rendered by it.[1] March 9, 1937, it commenced this suit [2] to set aside the order on the ground that the prescribed rates are confiscatory and that enforcement of the order would deprive the company of its property without due process of law in violation of the Fifth Amendment. The case was submitted on stipulations and the evidence before the Secretary. The court made findings of fact, stated conclusions of law, announced opinion, 21 F. Supp. 83, and entered decree dismissing the bill.

The challenged rates include marketing charges per head; they are applicable only when sales are made, and are the same without regard to the time the stock remains in the pens. These are called "yardage charges." Appellant makes no charge for use, as such, of pens or other facilities; its charges for feed, bedding and other services are regulated by the order. About three-fourths of the total number of animals received at the yard are sold there. Some are sold to traders, also called dealers and speculators, and held in the yard until sold again.

[1] 7 U. S. C. § 211. "Whenever after full hearing . . . the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

[2] 7 U. S. C. § 217; 28 U. S. C. §§ 44, 47 (a).

Appellant has never made any charge against traders for resales or reweighing for sale except when the resale was through commission men. For that service, the order prescribes rates which for convenience may be referred to as "yardage charges to traders." Appellant's activities are not confined to services covered by the order. It unloads and loads livestock from and into cars of railroads serving the yard, and receives from the carriers compensation not regulated by the Secretary. If enforced, the order will reduce revenue from charges for yardage services by about eight and one-half per cent, and from charges for other services by about nineteen per cent; miscellaneous revenues in a substantial amount are not affected; total revenue will be reduced by about eight and one-half per cent.[3]

To ascertain the amount on which appellant is entitled to earn a return, the Secretary determined what land and structures were used and useful for performance of the services, and to present value of land added cost of reproduction new less depreciation of structures, and allowances on account of a bridge and sewage disposal plant being built, and working capital. The total is slightly less than $2,792,700, which the Secretary adopted as rate base. He found six and one-half per cent to be a reasonable rate of return, $530,117 the revenue procurable if prescribed charges be put in effect, and $346,545 the operating expenses, leaving a net return of $183,572, slightly more than six and one-half per cent on the value of the property.

Appellant accepts as correct the Secretary's estimate of cost of reproduction less depreciation of property found to be used and useful, and also the allowances above men-

[3] The Secretary in his brief furnishes the Court the following statement. "The revenues produced from an application of the rates prescribed by the Secretary to the volume of business used by him as a

tioned. But it objects to his exclusion of land and improvements used for a stock show and for trackage and facilities for unloading and loading livestock, to his valuation of the land, to his treatment of going concern value, to his refusal to allow certain items that it claims to be operating expenses, and to the rate of return found by him to be reasonable.

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rate factor are $530,117. The revenues produced by an application of the rates under investigation to the volume used by the Secretary as a rate factor are $579,342. The $530,117 produced by the prescribed rates is 91.5% of the $579,342 produced by the rates under investigation.

"The following table shows the method and computations by which these results were obtained:

	Volume used as a rate factor	Rates under investigation	Revenues from rates under investigation	Rates prescribed	Revenues from rates prescribed
Yardage:					
Cattle:					
Rail	325,000	$0.35	$113,750	$0.30	$97,500
Truck-ins	75,000	.40	30,000	.35	26,250
Resales	56,000			.15	8,400
Bulls	850	1.00	850	1.00	850
Calves:					
Rail	20,000	.25	5,000	.20	4,000
Truck-ins	30,000	.27	8,100	.25	7,500
Resales	3,000			.10	300
Hogs:					
Rail	25,000	.12	3,000	.12	3,000
Directs	145,000	.12	17,400	.06	8,700
Truck-ins	225,000	.14	31,500	.14	31,500
Resales	250			.06	15
Sheep:					
Rail	2,000,000	.08	160,000	.075	150,000
Truck-ins	80,000	.10	8,000	.10	8,000
Resales	75,000			.03	2,250
Horses & mules	6,000	.35	2,100	.35	2,100
Total yardage			$379,700		$350,365
Feed, Bedding, Etc.:					
Hay, cwt. on fence	136,000	.609	82,824	.50	68,000
Hay, cwt. fed	34,000	.609	20,706	.60	20,400
Corn, bu	20,000	.651	13,020	.45	9,000
Straw, bales	18,500	.44	8,140	.40	7,400
Misc. feed, lbs	150,000		1,000		1,000
Total revenue procurable			$125,690		$105,800
Misc. Revenue			73,952		73,952
Total revenue procurable			$579,342		$530,117
			100.0%		91.5%

The rate base. As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 41. *Minnesota Rate Cases,* 230 U. S. 352, 434. *Bluefield Water Works Co.* v. *Public Service Comm'n,* 262 U. S. 679, 690. *Board of Commissioners* v. *New York Telephone Co.,* 271 U. S. 23, 31. *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 414. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 305. But it is not entitled to have included any property not used and useful for that purpose. Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 56.

The stock show property excluded. The stock show is held on property owned by appellant and is conducted by an incorporated association not organized for pecuniary profit. It continues for about one week in January of each year. The Secretary found a part of that property, which is operated by the Colorado Horse and Mule Company, to be used and useful for performance of services covered by the rates regulated by him, and included it in the rate base. He appraised the rest of the show property, which consists of 2.633 acres and improvements thereon, at $219,033, but excluded it as not used for the performance of services covered by the rates he regulates.

For payment of expenses of the show there is used the money received for admission to it and to other events on the property, and also some that is donated for that purpose. Appellant assumes the carrying charges, including interest and taxes; when the show is unable to pay rental sufficient to cover all charges, appellant ab-

sorbs the deficit. It requested findings in substance as follows: Large quantities of livestock are entered in the show and much is sold on the show property. Some is sold in the yards operated by appellant. The show attracts buyers and throughout the year widens the outlet for producers' stock, operates to increase receipts, makes for improvement of stock raised and for higher prices, has educational value, and advertises the market. It is supported by appellant in good faith and in the belief that it stimulates its business and that of livestock producers. These facts are not in substantial conflict with the Secretary's findings, and may be taken as established by the evidence. But they are not sufficient to prove that the property excluded is used and useful for the performance of services covered by rates being regulated by the Secretary. None of those services is performed on or by the use of any of that property. The Secretary rightly says "If it is appellant's contention that the stock show increases the stockyard business, then it should request that a reasonable allowance be made for advertising expense as a charge against its income." In support of that view he adds "Advertising or developmental expenses to foster normal growth are legitimate charges upon income for rate purposes if confined within the limits of reason. *West Ohio Gas Co.* v. *Comm'n,* 294 U. S. 63, 72." Appellant's contention that the court erred in upholding the Secretary's exclusion of that item is not sustained.

Trackage and unloading and loading facilities. The Secretary appraised that property at $177,108. He excluded it as not used for performance of any stockyard service. Appellant leases the trackage to railroad carriers for substantial rentals. It does not claim that exclusion of that part of the item is confiscatory and fails to show it prejudicial. It follows that the court did not err in upholding the Secretary's determination. The unloading

and loading facilities include ways between docks and the pens where the stockyard services are rendered. Appellant uses these facilities to unload and load livestock. That is a service for which the carriers pay appellant. Stockyard services do not commence until unloading ends; they end when loading begins. See *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, 198. The court rightly refused to disturb the Secretary's ruling as to these facilities.

Land value. The Secretary's finding depends on the appraisal and testimony of his valuation engineer. Appellant maintains that it is not supported by evidence because the engineer was not a qualified expert witness. It concedes that, if he was competent, the valuation must be sustained. To support its point, appellant relies on the fact that the appraiser had never lived in Denver or previously appraised any land there or in that vicinity or assembled or appraised any large industrial tracts. The significance adverse to competency that might be attributed to these facts if they stood alone is negatived by others disclosed by the record. The appraiser is an experienced civil engineer; he was long engaged in land appraisal work under the Interstate Commerce Commission. He later had private practice as consulting engineer and in 1934 became principal valuation engineer of the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture; in that capacity he has given testimony in a number of rate proceedings. His report submitted to the Secretary discloses elaborate investigation and consideration of prices paid for land, of the Interstate Commerce Commission's appraisals of lands in the vicinity and of other facts material to the ascertainment of value of the land in question. It cannot reasonably be said that, because of his lack of earlier knowledge of local conditions, the finding was made without evidence.

Going concern value. Appellant maintains that, while admitting it exists in the property, the Secretary failed to include in rate base any allowance on account of it, and that the evidence requires addition of at least $325,000 to cover that element.

In substance, the Secretary's findings state: The stockyard is a going concern; it has a long history of efficient management and has won a reputation for good service; it has been financially successful. His valuation engineer (whose figures and valuation are the basis of the Secretary's appraisal) considered going concern value but did not include a separate amount for it. In adopting the value of the land and the cost of reproduction new less depreciation of structures, consideration was given to the element of going concern value. Adequate allowance has been included, although no separate item on its account has been set forth. The findings contain a "summary of the value of used and useful land, the cost of reproduction new of structures and equipment, including direct construction overheads, indirect overheads, interest on used and useful land during construction, and working capital, and the cost of these, less depreciation where depreciation exists, of respondent [appellant] as a going concern.[4] . . . It is found that the fair value of the property of respondent as a going concern is $2,792,681 . . ."

[4] See table below:

	Cost of reproduction new	*Condition per cent*	*Cost of reproduction new less depreciation*
Land—Used and Useful	$536,825	100	$536,825
Total Material, Labor, Direct Construction Overhead and Indirect Construction Overhead	2,532,484	80.545	2,039,789
Interest on Used and Useful Land during Construction	37,578	80.545	30,267
Working Capital	139,300	100	139,300
Total on Basis of Original Testimony			$2,746,181
Bridge in Process of Construction at Date of Oral Argument			22,500
Sewage Disposal Plant in Process of Construction at Date of Oral Argument			24,000
Total			$2,792,681

The substance of appellant's claim is that these figures are exclusively attributable to physical elements. Assuming that to be true, it does not follow that the Secretary failed to include proper allowance for going concern. *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 309. The value of appellant's property used in stockyard services is single in substance. *West* v. *Chesapeake & P. Tel. Co.,* 295 U. S. 662, 672. While it may be considered as made up of tangible and intangible elements, it is not necessarily to be appraised by adding to cost figures attributable to mere physical plant something to cover the value of the business. *Kennebec Water District* v. *Waterville,* 97 Me. 185, 220; 54 A. 6. Value depends upon use and is measured, or at least significantly indicated, by the profitableness of present and prospective service rendered at rates that are just and reasonable as between the owner of and those served by the property. *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439, 445. *National Waterworks Co.* v. *Kansas City,* 62 F. 853, 864–866. *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 165. *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 192. Cf. *Public Service Comm'n* v. *Great Northern Utilities Co.,* 289 U. S. 130. It is elementary that value of a going concern may be less than, equal to, or more than, present cost of plant less depreciation plus necessary supplies and working capital. See *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 396. *Los Angeles Gas Co.* v. *Railroad Comm'n, supra,* 313, 314. *Dayton P. & L. Co.* v. *Comm'n, ubi supra.* Appellant's plant without business, present or prospective, would be worth much less than the cost figures found by the Secretary to represent value. Appellant's claim, that the rate base includes nothing on account of going concern value, is without foundation in fact.

The considerations upon which appellant claimed to have established an amount to be added to rate base to

cover going value may be summarily stated: (1) The sales charge is for the privilege of the market. The value of the market is not reflected in reproduction cost of structures. It is over and above value of or investment in plant. (2) Appellant has spent large sums and made gifts of money and land as a result of which large packers have their plants at Denver and buy on appellant's market. (3) Cattle of various owners arriving at the Denver market by rail for the same market session from different shipping points may be sorted into uniform carloads to move to another destination on the through rate from point of shipment to point of destination. The privilege is not open at Chicago or any Missouri River market. (4) A high percentage of the stock received at appellant's yard is sold there; this percentage has progressively increased. (5) Volume, appraised at $10 per car, applied to the 35,000 cars annually received at the yard.

None of these considerations has much, if any, bearing on the ascertainment of going value or the application of the rule that it is to be taken into account in confiscation cases. That element is not separate from or necessarily in excess of reasonable cost figures, attributable to the plant. The Secretary considered its location, the volume and flow of shipments, percentages of sales to receipts, privileges in transit, cost of service, past history, future prospects, and other pertinent facts. Appellant does not claim that its past operations clearly reflect excellence of service and low cost per unit in comparison with results attained by other stockyards, or that conditions affecting performance give dependable assurance of future growth and capacity to earn net returns at relatively low rates. See e. g. *McCardle* v. *Indianapolis Water Co., supra,* 413–415. Its evidence falls far short of condemning as arbitrary and confiscatory the Secre-

tary's refusal to add a separate amount to his rate base to cover going concern value.

Yardage charges to traders. These are prescribed as reasonable maximum rates to cover sales for which, as above stated, appellant has made no charge. Its failure so to do is found by the Secretary and the lower court to be unreasonably and unjustly discriminatory, in that it does make charges for similar privileges it furnishes producers and others selling in its market. The prescribed charges apply to animals sold by producers or others to traders and by the latter resold or reweighed for sale at the yard. On cattle, calves and hogs they are 50 per cent of those charged producers, on sheep and goats 40 per cent, and on horses, mules and pure-bred bulls, 100 per cent. The Secretary estimates that if appellant exacts the prescribed charges to traders it will obtain revenue from that source of $10,960 per year, and he includes that amount in his calculation of reasonable return.

There is controversy between the parties as to space assigned to traders and details of service attributable to sales by them. But the evidence clearly shows that, as found by the Secretary and lower courts, appellant does provide them facilities and privileges similar to, though not precisely the same as, those furnished to others making sales in the market. These charges are not discriminatory as between producers; they directly bear but one charge. Assuming that the charge for selling by traders would operate to lessen prices obtainable by producers from them, no unjust discrimination results, for obviously charges for the two sales of the same animals reasonably may be more than that exacted for the first one. These rates are prescribed, and revenues obtainable from them are included by the Secretary in his estimate of appellant's income, to the end that it may not exact from producers and others selling at the

yard charges sufficient to cover the part of its operating expenses that is fairly attributable to the sales made by traders. The statute denounces unjust discrimination and requires appellant as a public market to charge, and empowers the Secretary to prescribe, rates that are non-discriminatory. There is no ground for the appellant's suggestion to the effect that the order unlawfully invades its right as owner to manage the yard and control its business policy. Cf. *Interstate Commerce Comm'n* v. *Chicago G. W. Ry. Co.*, 209 U. S. 108, 118. *Norfolk & W. Ry. Co.* v. *West Virginia*, 236 U. S. 605, 609. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595, 596. *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 421.

Dues, donations and subscriptions. Appellant claims an allowance in operating expenses of $3000 to $4000 a year. The Secretary found that it has regularly made disbursements ranging between those figures to local charities, philanthropies, civic organizations, etc.[5] He held that only those of peculiar benefit to respondent's employees and patrons should be included, and on that basis allowed in estimated future operating expenses $325 a year. Appellant says that the exclusion leaves return about $1000 short of six and one-half per cent, that no contributions were made to charities which did not carry

[5] There were over one hundred recipients of dues, donations and subscriptions during the five years ending with 1934. The contributions made in 1934 are fairly illustrative. They are listed below. Those in italics were made (in varying amounts) in each of the five years; those underscored were allowed by the Secretary.

Denver Community Chest, $1000; *Denver Chamber of Commerce*, $240; *U. S. Chamber of Commerce*, $50; Junior Chamber of Commerce, $15; *Tickets and Boxes—Stock Show*, $395.50; American Stockyards Association, $832.56; *Church Donations*, $115; Flowers, $4; United Appeal, $75; *Volunteers of America*, $10; Veteran Volunteer Firemen, $5; Firemen's Protective Association, $15; *Denver Traffic Club*, $18; *Denver Commercial Traffic Club*, $18; *I. C. C. Traffic Reports*, $25.25; *Traffic Service Corp.*, $10; *Brand Inspectors—Christmas*, $70; *Denver Live Stock Exchange*, $95.53; *Denver Post*, $12;

on in the stockyards area, and that nearly all other items were business expenses.

But decision here cannot be made to turn on an estimated margin relatively so small. Appellant's annual receipts and sales at the yard vary considerably. Operating expenses may be less or more per head than the estimates therefor. Property value may decline or advance. None of the expenditures in question is compulsory. Appellant may withhold dues, donations or subscriptions as it sees fit. It was not, and probably could not have been, proved that failure to respond would adversely affect its revenue. The Secretary is not required to prescribe rates so low as to be barely sufficient to withstand attack on the ground of confiscation, but is at liberty within limits that he may find to be just and reasonable to establish higher rates. *Banton* v. *Belt Line Ry., supra,* 422. *Dayton P. & L. Co.* v. *Comm'n, supra,* 308. *Columbus Gas Co.* v. *Comm'n,* 292 U. S. 398, 414. *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 317. Cf. *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 484. In view of the variable elements to which appellant's prospective income is subject, its control over the items in controversy, and their triviality, we find it unnecessary to decide whether appellant as of constitutional right is entitled to have any of them included in its future operating expenses.

Tax Payers Review, $5; Policemen's Protective Association, $50; Lunches at Auction, $55; 4–H Club Luncheon, $34; Traffic Red Book, $8; Old Folks Home, $10; Christmas Seals, $1; Rescue Mission, $2.50; Chicago Drovers Journal Yearbook, $1; Church Messenger, $11; Joint Labor Day Committee, $10; Denver Tourists Bureau, $100; Wedding Gift, $250; Gents Driving & Riding Club, $10; Colorado Womens College, $100; International Vet. Congress, $25; Police & Sheriffs Association, $25; Federal Income Tax Service, $66; Western Legionnaire, $5; National Federation of Federal Employees, $11; American Legion, $5; Program—Holy Name Basket Ball, $5; Office Employees Hay Ride, etc., $3; Guldman Community Center, $2.50; President's Ball—Tickets, $18.

Expenses of hearings under the Act. The Secretary found it reasonable to include in estimated operating costs some of the expenses incident to future hearings under the Act, suggested that they will be less than heretofore, and allowed $100 a month. The court below reached the same conclusion. Appellant does not attack this allowance as insufficient to cover expense on account of future hearings. Here, it complains that nothing is included "to amortize over a reasonable future period or at all the costs and expenses of the present litigation."

But we are not called on to decide that question. Appellant's bill challenges the Secretary's allowance, refers to expenses theretofore incurred in rate investigations and alleges that the allowance "is wholly inadequate to permit petitioner [appellant] either to reimburse itself for expenditures forced upon it by the Secretary or to meet probable reasonable expenditures for said purposes in the future, and that the . . . finding . . . is arbitrary . . ." At the trial the Secretary, without conceding materiality of the facts, stipulated that expense of the present proceeding from its commencement, about January 1, 1935, to the date of the order was $24,654.27 and that a reasonable estimate of the expense of litigation in the lower court was $15,785. Appellant requested the court to find that its average annual expense on account of hearings under the Act for the five-year period ending with 1934 was $8,786.88, and to find the facts stipulated by the Secretary and that its average annual expense on account of enforcement of the Act for the eleven-year period ending with 1934 was $6,216.

The burden was on appellant by direct allegations plainly to set forth the facts on which it intended at the trial to maintain that the rates are confiscatory. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447, and cases there cited. *New Orleans Public Service* v. *New Orleans,* 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry. Co.* v. *United*

States, 282 U. S. 74, 88–89. *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 255. Its complaint failed to disclose the claim it now makes. It is that for each of the five years following the effective date of the order, there should be added to estimated cost of operation about $8,000 to cover expenses of hearings before the Secretary and of litigation in the district court. Its request for finding was not sufficient to present the question. Probable expense of future hearings being in issue, the Secretary's stipulation as to actual cost of past hearings and probable expense of future litigation cannot be regarded as consent to litigate the question of amortization not raised by the bill. As the issue was not appropriately presented below, appellant is not entitled to have it decided here.

Rate of return. Upon consideration of the testimony of the Secretary's economist and a local investment banker of high standing, who is also a stockholder and director of appellant, the Secretary and lower court found that six and one-half per cent per annum of the value of the property is a reasonable return. We need not restate the considerations to be taken into account in determining a reasonable rate of return.[6] Plainly the evidence is not sufficient to require or warrant a finding that in the immediate future a return of six and one-half per cent on the value of the property will be confiscatory.

The judgment of the District Court must be

Affirmed.

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

MR. JUSTICE BLACK concurs in the result.

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[6] *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19. *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679, 692. *Lindheimer* v. *Illinois Tel. Co.,* 292 U. S. 151. *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 311. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 72.

IN THE MATTER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRITS OF PROHIBITION AND MANDAMUS.

No. 21, Original. Argued May 23, 1938.—Decided May 31, 1938.

1. To confer jurisdiction upon the Circuit Court of Appeals to review an order of the National Labor Relations Board, the filing and service of the petition are not enough, but a transcript of the Board's proceedings also must be filed with the court. National Labor Relations Act, § 10 (d) (e) (f). P. 491.
2. Where a petition for review has been filed and served on the Board, and the petitioner has requested the Board to furnish a certified transcript of its proceedings but none has been furnished and filed in the court, the Board retains authority, under § 10 (d) of the Act, to vacate or modify its order for the purpose of correcting errors which render it inadequate or unjust, and the court has no jurisdiction to restrain the Board from so doing and to require it to file the transcript. Pp. 491–494.

   In the present case there is no occasion to determine what, if any, relief may be needed by or available to a party who has filed his petition for review, where the Board does not desire to modify or set aside its order but fails or refuses to furnish a transcript of its proceedings.
3. The investiture of the court with jurisdiction to review an order of the Labor Board on the merits, only upon the filing of a transcript exhibiting the Board's final action, is not a denial of due process. P. 495.
4. Mandamus and prohibition are appropriate remedies, in the absence of adequate remedy by certiorari, for unwarranted assumption by the Circuit Court of Appeals of jurisdiction over proceedings of the National Labor Relations Board. P. 496.

ORIGINAL application by the National Labor Relations Board for writs of mandamus and prohibition directed to the judges of the Circuit Court of Appeals for the Third Circuit. The cause was submitted by the respondents, Hon. Joseph Buffington, Hon. J. Warren Davis, and Hon. J. Whitaker Thompson, Circuit Judges, upon their return to the rule to show cause.

Mr. Robert B. Watts, with whom *Solicitor General Jackson* was on a memorandum, for petitioner.

Mr. Luther Day, with whom *Messrs. Thomas F. Patton, Joseph W. Henderson, Thomas F. Veach,* and *Mortimor S. Gordon* were on the brief, opposed the relief sought. They appeared as counsel for the Republic Steel Corporation, party to the proceedings in the lower court against which the petition was directed.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The motion before us involves a construction of § 10 (d) (e) and (f) of the National Labor Relations Act,[1] providing for review of orders of the National Labor Relations Board.

May 16, 1938, the Board filed in this court a motion for leave to file a petition for writs of prohibition and mandamus directed to the judges of the United States Circuit Court of Appeals for the Third Circuit. Attached to the motion was the petition which set forth the following facts.

April 8, 1938, the Board, in a cause pending before it, issued an order directing the Republic Steel Corporation to desist from certain unfair labor practices and to take certain affirmative action. April 18 Republic filed in the Circuit Court of Appeals a petition for review alleging that the order violated the constitutional guarantee of due process because it was entered without an opportunity to Republic to support its contentions by argument or brief and thus the Board had denied it the hearing to which it was entitled. On the same day Republic requested of the Board a transcript of the entire record of its proceedings and the General Counsel of the Board

[1] 49 Stat. 454; U. S. C., Supp. II, Tit. 29, § 160 (d) (e) (f).

replied: "I have your letter of April 18th, and received today a copy of your petition for review of the Board's order filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the court."

The rules of the Board extend to any party the right, within a reasonable period after the close of a hearing, to present oral argument before the trial examiner and, with his permission, to file briefs. They further provide that the Board may decide a cause with or without allowing the parties to present oral argument before the Board itself or to submit briefs to the Board. It is the Board's practice to grant leave to submit briefs to it or to make oral argument before it whenever so requested, but the rules do not expressly state that such a request may be made or that the request, if made, will be granted. No such request was made by Republic and no brief was received or oral argument heard before the entry of the order of April 8, 1938. The rules also provide for hearing before a trial examiner of causes initiated by the filing of charges before a regional director unless the cause is transferred for hearing before the Board in Washington. If the hearing is before an examiner he is to render an intermediate report containing findings of fact and recommendations as to the disposition of the cause, which are to be served upon the parties, and they are entitled to take exceptions to the intermediate report. In cases initiated by charges filed with the Board in Washington, or transferred for hearing before the Board, it may direct the trial examiner to prepare an intermediate report, but the rules do not require that such a report shall be prepared or served, or that the Board shall serve its own proposed findings of fact and conclusions of law. The complaint against Republic was initiated by charges filed with the Board. The Board did not direct the trial examiner to prepare an intermediate report and none was

prepared or served, nor did the Board serve its own proposed findings of fact and conclusions of law prior to the entry of its order.

Subsequent to April 25, 1938, the Board instituted the practice of notifying the parties in all proceedings before it of their right to submit briefs to the Board and, upon request, to present oral argument to the Board; and further determined that, in cases thereafter to be decided, which had been initiated before it, or transferred to it for hearing (except for special reasons in particular cases) an intermediate report should be prepared by the trial examiner and served upon the parties or, in the alternative, proposed findings of fact and conclusions should be prepared by the Board and similarly served with express notice to the parties of their right to take exceptions to the report or the proposed findings and, upon request, to be heard by the Board, orally or upon brief in support of the exceptions. In cases already decided, in which complaint had been made of the omission of an intermediate report or proposed findings, or of the lack of written or oral argument, the Board determined to vacate its orders, to restore the causes to its docket, and to reconsider and redetermine them after granting full opportunity of exception to proposed findings and conclusions and after the service of notice of the right of the parties to submit briefs and to be heard by the Board if they should so request. Among the cases in this category was that involving Republic.

April 30, 1938, Republic moved the Circuit Court of Appeals for a stay of the Board's order and, upon the hearing of the motion, the Board advised the court that it was considering vacating the order. May 3, upon *ex parte* application of Republic, the court issued a rule, returnable May 13, requiring the Board to show cause why it should not file in the court a certified transcript of the record of the proceedings against Republic, and

made an order restraining the Board from taking any steps or proceedings whatsoever in the cause until the return day of the rule.

May 13 the Board answered the rule of May 3 stating that the record was incomplete because the Board had determined on May 3 to vacate the order and to restore the cause to the docket for further proceedings and had been prevented from so doing by the restraining order issued May 3; the answer further set out that the provisions of § 10 (d) of the National Labor Relations Act deprive the court of jurisdiction to issue the restraining order and of jurisdiction to forbid the vacation of the Board's order and to compel the filing of a transcript of the Board's record as it stood prior to the decision to vacate the order. The court made the rule absolute and enjoined the Board from taking any further steps or proceedings in the cause until the transcript was filed.

The petition of the National Labor Relations Board asserts that the court was without jurisdiction to take this action and prays a writ of mandamus directing the judges who participated to vacate the order of May 13, and a writ of prohibition against the exercise of jurisdiction upon the petition of Republic to set aside the order of April 8 without affording the Board a reasonable opportunity to vacate it.

Upon presentation of the papers we granted leave to file them and entered a rule upon the judges of the Circuit Court to show cause why the relief should not be granted as prayed, returnable May 23, and directed that, on the return day, the parties should be heard upon the question of the jurisdiction of the court to make the challenged order.

May 21, the judges filed their return admitting the allegations of the petition, except those as to the rules and practice of the Board, and its determination to vacate the orders in the Republic and other cases, which it

neither admitted nor denied. The return showed that the order of May 13 was made in the view that, under § 10 (f) of the Act, Republic, by filing and serving its petition for relief, and by requesting the Board to file, or to deliver for filing, a certified transcript, complied with the jurisdictional requirements of the statute so far as was within Republic's power; that thereupon it became the duty of the Board forthwith to file a transcript and that, in the judges' opinion, jurisdiction of the court attached upon service of the petition for review and could not be defeated by the Board's failure to perform its statutory duty, which was to file the transcript. The return further shows that the court was of opinion that possible damage would result to Republic from delay due to the failure to file the transcript and this consideration moved the court to a construction of the Act which called for the entry of its order. The return concludes as follows: "Recognizing the debatable character of the question presented on this record, the respondents submit themselves to the judgment of this court as to whether or not they had jurisdiction to enter the order complained of and record their readiness to vacate the same if, in the opinion of this court, jurisdiction of the cause was lacking."

As is indicated by our action on the motion of the Board for leave to file, and by the return to the rule, the question is solely of the jurisdiction of the Circuit Court of Appeals. This question is to be answered in the light of § 10 (d) (e) and (f) of the National Labor Relations Act, the pertinent portions of which are in the margin.[2]

[2] "(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals . . . for the enforcement of such order and for appropriate

Counsel for the petitioner and for Republic have presented their views in oral argument and briefs.

The Board's proceedings are administrative in character. Its final action is subject to judicial review in the manner specified in the Act. Subsection (d) of § 10, in plain terms, invests the Board with authority, at any time before the transcript shall have been filed in court, to modify or set aside its order in whole or in part. The purpose of the provision obviously is to afford an opportunity to correct errors or to consider new evidence which would render the order inadequate or unjust. The words used are "Until a transcript of the record . . . shall have been filed in a court, as hereinafter provided," the Board may vacate or modify. The following subsections, (e) and (f), are those to which we turn for the connotation of the qualifying phrase. Subsection (e) grants the Board resort to a court for the enforcement of its order. That enforcement is to be obtained by filing a petition for enforcement and filing a certified

temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, . . .

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e). . . ."

transcript of the Board's proceedings. The subsection proceeds: "Upon such filing, the court shall cause notice thereof to be served upon" the person against whom enforcement is asked. Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until the transcript shall have been filed and notice of the filing of the petition and the transcript has been served. Subsection (f) affords relief to "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought, . . ." Such a person, the statute declares, "may obtain a review" of the Board's order by filing in court "a written petition praying that the order of the Board be modified or set aside." A copy of the petition is to be served forthwith upon the Board, and "thereupon the aggrieved party shall file in the court a transcript" of the Board's proceedings. "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), . . ." Plainly the court may not proceed to review the Board's order under either section until a transcript is filed.

Counsel for Republic urge, in support of the Circuit Court's action, that the words, "as hereinafter provided," in subsection (d), refer to the filing of the transcript required in an enforcement proceeding initiated by the Board authorized by subsection (e) but cannot have reference to a proceeding for review initiated by any other party before the Board pursuant to subsection (f). The words of the statute do not warrant this construction. Two filings are required by subsection (f), the first of a petition, the second of a transcript. After prescribing the second, the Act provides that "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), . . ." The reference clearly is to the filing of the transcript and not to the filing of the petition. The con-

tention that the Act cannot be applied in accordance with its apparent intent is that, as only the Board can certify the proceedings, and the petitioner under subsection (f) must file the certified transcript, such a construction would enable the Board to hold the transcript for an indefinite period and thus harass and embarrass a litigant, and delay, and perhaps deny, any effective judicial review. No such case is here presented. We have no occasion to determine what, if any, relief may be needed by or available to a party who has filed his petition for review, where the Board does not desire to modify or set aside its order but fails or refuses to furnish a transcript of its proceedings.

Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed, but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith. Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power. It is obvious that Congress intended to confer no jurisdiction upon the reviewing court to prevent the Board from seasonably vacating or modifying its order so as to make it comport with right and justice. The Act plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board's order in the respects indicated by the Act once the transcript of the Board's proceedings is before it. It is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.

Counsel for Republic urges that the Board's petition to this court indicates that it does not intend irrevocably to abandon its former order but merely to regularize it and re-enter it after regularization and that the Act gives no power to do this after the Board has heard the case and issued an order. We have no occasion to speculate upon the future proceedings before the Board. It is enough that the petition shows that the Board desired to and would have vacated its order had it not been restrained by the action of the court. What the legal effect of its future proceedings may be we need not decide.

Counsel insist that Republic is aggrieved, within the meaning of subsection (f), by the Board's attempt to retain jurisdiction of the proceeding and take further steps in it. But the Act grants a review and relief only to a person aggrieved by an order of the Board, and had the court not restrained the Board its order would have been vacated and there now would be no order outstanding. The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court. Statutory authority to the Board to vacate its order prior to the filing of the transcript does not seem to us to differ materially from a like statutory authority to a master in chancery to modify or recall his report to a court after submission but before action by the court. No one could successfully claim to be aggrieved in a legal sense by such a statutory provision or assert that the legislature is incompetent to confer such power upon a master with consequent lack of jurisdiction in the court to forbid its exertion.

The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think the writs prayed are appropriate remedies in the circumstances disclosed.[3] The Circuit Court was without jurisdiction of the subject matter. If the Board had complied with the orders made, a hearing would have resulted respecting the legality of supposed action of the Board which was not in law or fact the final action, review of which the statute provides. No adequate remedy would be open to the Board by way of certiorari from the court's ultimate review of an order which the Board was authorized and desired to set aside.

The expression in the return of readiness to vacate the order entered in the Circuit Court, if this court is of opinion that the tribunal lacked jurisdiction, renders the present issue of process supererogatory. Should the order not be vacated and occasion thus arise for the award of process, the clerk may issue it upon the order of a Justice of this Court.

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

MR. JUSTICE BUTLER, dissenting.

The case is not here as if on writ of certiorari or appeal for review of error alleged to have been committed by the lower court. This is an application for the writs of mandamus and prohibition to command and restrain action by the judges named. These may not be granted unless the lower court was plainly without jurisdiction to hear and determine the case or the particular issue. *In re New York & P. R. S. S. Co.*, 155 U. S. 523, 531. *Ex parte*

[3] Compare *Virginia* v. *Rives*, 100 U. S. 313, 329; *In re Rice*, 155 U. S. 396, 402; *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523; *In re Atlantic City Railroad*, 164 U. S. 633; *In re Winn*, 213 U. S. 458, 466–468; *Ex parte Harding*, 219 U. S. 363, 377; *Ex parte Oklahoma*, 220 U. S. 191, 208; *Ex parte Chicago, R. I. & P. Ry.*, 255 U. S. 273, 275.

Oklahoma, 220 U. S. 191, 208. *Ex parte Chicago, R. I. & P. Ry.,* 255 U. S. 273, 275. Precisely, the question is whether, on the facts here disclosed, the court was without power to consider and decide upon the corporation's application for an order directing the Board to certify and file a transcript of the record and restraining in the meantime any other action by it. The decision just announced answers affirmatively, and that is the basis on which the Court commands vacation of the order of the lower court and prohibits it from reviewing the order of the Board without first giving it a reasonable opportunity to vacate its order; that is, without giving the Board more time to proceed under § 10 (d). Obviously jurisdiction of the circuit court of appeals attached upon the filing of the corporation's petition for review and service of a copy on the Board. Any other construction of § 10 (f) would let the Board, by refusing to certify a transcript of proceedings before it, prevent judicial review of its orders. Congress did not so intend. While the statute expressly requires the person aggrieved to file a certified transcript, it impliedly, but not less plainly, commands the Board to certify the record. This Court's decision rests on the statement that, as the term is to be applied in this instance, jurisdiction is the power to hear and determine the controversy presented in a given set of circumstances. If the lower court had jurisdiction to entertain and decide the corporation's motion, writs of mandamus and prohibition may not be granted, for they are not available for correction of mere error or even abuse of discretion. *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178, 203–204. *Ex parte Whitney,* 13 Pet. 404, 408. *Ex parte Taylor,* 14 How. 3, 13. *Ex parte Railway Co.,* 101 U. S. 711, 720. *In re Hawkins, Petitioner,* 147 U. S. 486, 490. *In re Atlantic City Railroad,* 164 U. S. 633, 635. *In re James Pollitz,* 206 U. S. 323, 331. Cf. *Ex parte Simons,* 247 U. S. 231, 240.

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Stripped of unnecessary details and language, the circumstances under which the lower court made the challenged order may be stated briefly.

Upon charges made by the Steel Workers' Organizing Committee, the Board, July 15, 1937, issued complaint alleging that the corporation was engaging in unfair labor practices. The corporation joined issue. Before it filed answer, hearings were held by the Board, from July 21 to July 24. After answer, there were hearings before an examiner at various times and places between August 9 and September 27. April 8, 1938, the Board made its decision and order. It found the corporation guilty of practices denounced by the Act. It ordered it to cease and desist, to reinstate certain persons, to pay sufficient to equalize what certain persons would have earned if employed by the corporation during specified periods, less the amount they earned at other work during those periods.

April 18, the corporation filed in the circuit court of appeals its petition to have the Board's order adjudged invalid. The petition charges that, in violation of the corporation's rights under the due process clause of the Fifth Amendment, the Board ordered the corporation to reinstate persons not alleged in the complaint to have been unlawfully discharged or discriminated against by the corporation; and so directed notwithstanding the corporation had never been accorded or offered a hearing or opportunity of making defense as to the asserted rights of those persons; that the Board made the order without affording the corporation opportunity to present its case by argument, orally or upon brief. It alleges that, under the terms of the order, about five thousand persons may claim reinstatement, petitioner is required to reinstate or pay them as specified, the average wage is $6.50 per day. And it asserts that to defer reinstatement, pending decision by the court as to validity of the order, would

involve a risk of such magnitude as imminently to threaten its right to have review in court. And the petition avers that unless the order be stayed, irreparable injury and loss will result to the corporation and that it will be denied review of a substantial part of the order. It prays service of a copy on the Board, certification by the Board of the transcript as required by law, invalidation of the order, direction to the Board to dismiss its complaint, and a stay of the order and of proceedings by the Board to enforce it, excepting such as may be taken in court.

April 18, the day on which the corporation filed petition for review, the Board, consistently with the corporation's claim as to its duty under the Act, agreed promptly to certify the transcript and to file it in court. April 22, the corporation filed an application for stay and temporary relief. Its application cited § 10 (g), which declares that commencement of proceedings under § 10 (f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. It stated: The purpose of the application was to prevent irreparable loss and denial of review. If, pending final determination of the case, petitioner should fail to make reinstatements in accordance with the order, its potential weekly liability would exceed $95,000. On that basis the corporation sought suspension of the portion of the order that relates to reinstatement or payment of wages, so that, if it should be upheld, the corporation's liability to reinstate or to pay would commence ten days after the final decree of the court. In a brief submitted in support of its motion, the corporation maintained that the order is invalid because the corporation was not afforded a fair and full hearing and because the order is one for reemployment and not for reinstatement; and that unless the stay be granted, the corporation will suffer irreparable financial losses.

April 30 the corporation's motion came on for hearing. The Board appeared and argued against it. The court neither granted nor denied the application. The rule to show cause, issued May 3, recites that at the hearing, April 30, the Board stated that it "was seriously considering withdrawing, modifying or changing its order in the case and reopening same." The Board's application for vacation of that order states that at the hearing on April 30 the Board advised the court that it was contemplating vacating its order, and would advise the court of its final position not later than May 4, 1938; that, on May 3, it notified the corporation that it had definitely decided to vacate the order; but that, before any steps to do so could be taken, the court had issued the restraining order. The Board maintained that as the transcript had not been filed, § 10 (d) was applicable and that the Board then had the right to withdraw or vacate the order.

In its answer to the rule to show cause, the Board says that it was not guilty of refusal to certify or of dilatory tactics, and that on April 18 its counsel informed the corporation's counsel that the Board would as promptly as possible prepare the record for certification. "This task of considerable magnitude was forthwith commenced and was incomplete a week later when the supervening decision of the Supreme Court in *Morgan* v. *United States*, 304 U. S. 1, was rendered. . . . There is no question in this case, therefore, whether the court had jurisdiction to require the Board to file a record when such filing has been long delayed or refused by the Board. The Board has with all promptness elected to exercise its power to vacate its order under § 10 (d), and there is no merit in petitioner's claim that that section is inapplicable because the Board has evaded its obligations under the Act."

In these circumstances the court did not lack jurisdiction to hear and determine the controversy presented by

the corporation's application for an order directing the Board to certify the record for filing in court. The Act contemplates prompt action. Section 10 (i) declares that petitions filed under it shall be heard expeditiously "and if possible within ten days after they have been docketed." Power under § 10 (d) to change or vacate its order does not enable the Board to delay filing the record. At the bar counsel expressed the opinion that the Board may *vacate* an order without notice, § 10 (d). It had fifteen days, April 18 to May 3, to decide whether to vacate the order or join issue. That period included a week before and a week after our decision in *Morgan* v. *United States, supra.* The Board does not claim that it needed until May 3 to certify the transcript. So the issue before the lower court was the very narrow one, whether for an unreasonable length of time the Board withheld the record. And that question involves consideration of subsidiary ones: To what extent, if at all, a certification may be delayed by the choice of the Board to enable it to consider modification or repeal of its order. Whether after decision in *Morgan* v. *United States* more than a reasonable time had elapsed. While there is room for difference of opinion on these questions, it is very hard to perceive on what ground it may be held that the court was without jurisdiction to decide them, or even to conclude that the order was an arbitrary exertion of power, or that restraint against further delay by the Board involved an abuse of discretion.

I am of opinion that the lower court had jurisdiction of the case and of the issues decided by the challenged order, and that therefore the Board's application for writs of mandamus and prohibition should be denied.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO.

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

Nos. 715 and 716. Argued April 6, 1938.—Decided May 31, 1938.

1. The filing by a farmer debtor of a petition for composition and extension, and an amended petition to be adjudged bankrupt, under § 75 of the Bankruptcy Act before its amendment by the Act of August 28, 1935, did not bring within the control of the bankruptcy court mortgaged land listed in the schedules as his property and of which he acquired the equity during the proceeding, but in which he held no interest when the petitions were filed. P. 507.
2. Land in which a farmer debtor had an equity of redemption, but which was not subject to administration in a pending proceeding under § 75 of the Bankruptcy Act because his interest in it was acquired after the filing of his petition, was not brought within the jurisdiction by the enactment of the amendatory Act of August 28, 1935, and the filing of an amended petition under subsection (s) as amended, where those events occurred after his interest had been extinguished by a foreclosure of the mortgage in a state court followed by a judicial sale of the land and expiration of the period for redemption allowed by the state law. P. 508.
3. Land subject to mortgage was scheduled by a farmer debtor as his property, in a proceeding for composition and extension brought under § 75 of the Bankruptcy Act. He had no interest in the land when the petition was filed, but later received a conveyance of it from owners of the equity of redemption. The mortgage was foreclosed and the mortgagee bought in the land at a judicial sale, but the period for redemption allowed by the state law had not expired before § 75 was amended by the Act of August 28, 1935, and the debtor filed his petition to be adjudged bankrupt, under subsection (s), as so amended. *Held*, applying amended subsection (n), that upon the filing of the amended petition the property was brought within the control of the bankruptcy court and the time for redemption was extended. P. 509.
4. The provision of § 75 (n) of the Bankruptcy Act, as amended, for extension of period for redemption, *held* constitutional as

applied against a mortgage creditor who foreclosed by suit in an Indiana court and bought in the land at a judicial sale, but as to whom the right of the debtor to redeem, under the Indiana law, had not expired when his petition to be adjudged bankrupt was filed under § 75, as amended. P. 513.

The provision is within the bankruptcy power and not inconsistent with the rights of the creditor-purchaser under the due process clause of the Fifth Amendment. It is not an invasion of power reserved to the State by the Tenth Amendment. P. 515.

91 F. 2d 894, affirmed in part, reversed in part.

CERTIORARI, 303 U. S. 630, to review the affirmance of two orders of the District Court in bankruptcy, the one striking certain described real estate from the debtor's schedules, the other refusing to permit an amendment of the schedules.

Messrs. Samuel E. Cook and *Wm. Lemke,* with whom *Messrs. Walter L. Clements, Elmer McClain* and *Ray M. Foreman* were on the brief, for appellant.

Mr. Arthur S. Lytton, with whom *Messrs. Stanley K. Henshaw* and *Virgil D. Parish* were on the brief, for appellee.

MR. JUSTICE REED delivered the opinion of the Court.

Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit was granted by this Court to review the judgments in two appeals brought to the lower court by petitioner here. *Wright* v. *Union Central Life Ins. Co.,* 91 F. 2d 894. The judgments affirmed two orders of the District Court of the United States for the Northern District of Indiana, entered there in proceedings under § 75 of the Bankruptcy Act instituted by Wright.

The earlier order approved the recommendation of the Conciliation Commissioner to strike certain described real estate from the debtor's schedules, and the later

order refused to permit the debtor to amend the schedules by showing the circumstances under which the debtor claimed an interest in the same real estate covered by the earlier motion. The correctness of the orders depends largely upon the constitutional validity of certain provisions of § 75 (n) of the Bankruptcy Act, as amended by § 4 of the Act of August 28, 1935. 49 Stat. 942. These provisions, held unconstitutional by the lower court, operate to extend the period of redemption from a foreclosure sale allowed the mortgagor under state law. To decide this important constitutional question, our writs of certiorari were issued. In view of § 1 of the Act of August 24, 1937, c. 754, 28 U. S. C. § 401,[1] enacted subsequent to the decision of the case below, the Court certified to the Attorney General the fact that the constitutionality of an Act of Congress affecting the public interest was drawn in question in this cause. The Attorney General disclaimed intention to intervene.

The controversy as to whether or not the land in question was subject to the administration of the court of bankruptcy had its origin in this plexus of facts. Petitioner James M. Wright on October 1, 1925, together with his wife, executed a mortgage to respondent com-

[1] "Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act.

pany on a tract of land in Indiana, containing 80.31 acres, to secure a note of $3,000. At the same time, the same parties executed another mortgage to the respondent on a different tract of land containing 200 acres, also in Indiana, to secure a note of $9,000. In 1931, the first tract was deeded to petitioner's son, and three separate forty-acre parcels from the second tract were deeded to his wife, daughter and son-in-law respectively. The property was conveyed subject to definite portions of the indebtedness but without an assumption of any of the obligation by the grantees.

On January 3, 1934, respondent brought suit to foreclose the smaller mortgage, joining as defendants petitioner and his son. Judgment of foreclosure was entered, June 9, 1934, and on July 12, 1934, the 80.31-acre tract was sold, on the foreclosure sale, to respondent. Respondent received a duly executed sheriff's certificate of sale. Delivery of final deed was delayed in view of the one-year period of redemption allowed to mortgagors by Indiana statute. Ind. Ann. Stat. (Burns, 1933) §§ 2–3909, 2–4001.

Wright filed a petition under § 75 of the Bankruptcy Act, October 29, 1934. In listing his property on his schedules, he set forth all 280.31 acres, despite his previous conveyances of 200.31 acres. On December 19, 1934, stating that no agreement of creditors could be had, he amended his petition under § 75 (s), asking to be adjudged a bankrupt.[2] On April 13, 1935, petitioner's son

[2] This fact is stated in respondent's brief. Petitioner's answer to respondent's motion to strike out from the schedules the real estate in controversy alleges "that all the steps under said Section 75 were taken; that later petitioner (Wright) amended his petition under Subsection (s) of Section 75, as amended August 28, 1935." By stipulation the allegations of the answer were admitted as evidence. There is apparently no issue as to the fact of the filing of a petition in bankruptcy on December 19, 1934.

and daughter and their spouses delivered to him a quitclaim deed for all the property, 200.31 acres, he had previously deeded to them and his wife.[3]

On May 27, 1935, respondent obtained a personal judgment against petitioner on the $9,000 note, and a decree of foreclosure of the 200-acre tract, which respondent purchased at the sheriff's sale on July 20, 1935, receiving a certificate of sale. On August 2, 1935, petitioner's one-year period for redeeming from sale the 80.31-acre tract having expired July 12, 1935, respondent surrendered its certificate of sale and received a sheriff's deed to this land.

On October 11, 1935, petitioner amended his petition as authorized by § 75 (s) of the Bankruptcy Act, as amended August 28, 1935, following the invalidation by the decision in *Louisville Bank* v. *Radford,* 295 U. S. 555, of § 75 (s) as originally drafted, and again asked to be adjudged a bankrupt.

On July 20, 1936, the one-year redemption period having expired, respondent received from the sheriff a final deed for the 200-acre tract. On July 29, 1936, respondent filed a motion in the District Court for Northern Indiana, where the proceedings under § 75 (s) were pending, to strike from petitioner's schedules, which had been filed October 29, 1934, these 280.31 acres of land.

On December 14, 1936, the District Court granted this motion, and entered an appropriate order. Apparently the order struck from the schedules eighty acres still owned by Wright in October, 1934, and properly scheduled at that time. Later in December, 1936, petitioner asked leave to amend his schedules to set forth the reconveyances by his children on April 13, 1935. On December 31, 1936, the District Court denied the application to amend the schedules. Petitioner appealed from

[3] Apparently his wife had died in the meanwhile. The record indicates that she died prior to May 27, 1935.

both orders of the District Court, striking the land from the schedules and denying leave to amend. The appeals were consolidated in the Circuit Court of Appeals. As stated in the opening paragraph of this opinion, that court affirmed both orders of the District Court. These judgments are under review here.

A further aspect of the controversy between petitioner and respondent may be noted. On September 13, 1935, prior to the debtor's filing of an amended petition under § 75 (s) as amended, respondent instituted an action in the state court for possession of the 80.31 acres. A judgment overruling a defense grounded on the bankruptcy proceedings, and awarding possession and damages to respondent, was affirmed by the Supreme Court of Indiana on April 2, 1937. *Wright* v. *Union Central Life Ins. Co.,* 212 Ind. 214. A similar judgment with respect to the rest of the land was affirmed October 26, 1937, *Wright* v. *Union Central Life Ins. Co.,* 212 Ind. 563. By temporary restraining order of the Circuit Court of Appeals, and subsequent stay of mandate, respondent has been restrained from taking possession of the land.

First. (a). By October 30, 1934, when petitioner sought adjustment and extension of debts under § 75, the 80.31-acre tract had been deeded away to petitioner's son. Accordingly, although this tract was listed on petitioner's schedules, it did not at that time pass into the hands of the bankruptcy court for administration. Nor was the amended petition under § 75 (s), filed on December 19, 1934, any more effective in bringing the tract within the purview of the bankruptcy court. On April 13, 1935, the members of Wright's family relinquished all their right and interest in his lands, including this 80.31-acre tract, so that petitioner then acquired an interest in the land. But Wright's receipt of this gift of land was not effective in and of itself to bring the land within the control of the bankruptcy court. This

is the rule applicable to property received by a bankrupt subsequent to the filing of an ordinary petition in bankruptcy,[4] and we see no reason why the same rule should not apply to debtor proceedings under § 75.[5]

There is no substance in any contention that this 80.31-acre tract was brought within the purview of the bankruptcy court by the Act of August 28, 1935, amending § 75 (s), or the filing of an amended petition under this section on October 11, 1935. Prior thereto, judgment of foreclosure had been entered in the state court and a judicial sale (at which respondent bought in the 80.31-acre tract) held on July 12, 1934. Conveyance and delivery of possession to the purchaser was deferred for one year, the period of redemption under the statutes of Indiana. This period expired on July 12, 1935, and the sheriff's deed was executed on August 2, 1935. With the delivery of the deed, prior to any effective extension of the period of redemption, the purchaser's rights, flowing from the judicial sale, were no longer affected by the court's jurisdiction of petitioner and petitioner's

[4] *Everett* v. *Judson*, 228 U. S. 474, 478; *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244; 4 Remington, Bankruptcy, §§ 1377, 1395, 1400; 1 Collier, Bankruptcy, p. 1641.

[5] In considering this 80.31-acre tract we are not concerned with such property acquired subsequent to the filing under § 75 as would be controlled by § 75 (n) as amended by the Act of August 28, 1935. "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

estate under the Bankruptcy Act.[6] Nothing in § 75 as it now stands indicates any intention that the bankruptcy courts assume control over land not previously within the jurisdiction of a bankruptcy court, and already completely divorced from any title of the debtor.

(b). On October 29, 1934, when Wright filed his original petition under § 75, he was undoubtedly the owner of 80 acres out of the 200-acre tract. He had never conveyed away these 80 acres; no proceedings to foreclose them had been begun. These 80 acres were clearly within the jurisdiction of the bankruptcy court, but we shall not give them separate discussion, for they are controlled *a fortiori* by our ruling with respect to the other 120 acres out of the 200-acre tract.

(c). The status of these 120 acres, deeded in forty-acre parcels, to three members of the family, is governed by other facts. These parcels passed to the other members of the family prior to the filing of the petition for composition on October 29, 1934. Petitioner, however, included them in his schedules. The grantees had title on December 19, 1934, when petitioner filed his first amendment to the petition for composition. On April 13, 1935, these parcels were reconveyed to petitioner; on May 27 judgment for foreclosure was entered and on July 20, 1935, a sale was had. Respondent became the purchaser. The right of redemption expired July 20, 1936. Between the sale and the expiration of the period of redemption, two events occurred. The Congress enacted the Act of August 28, 1935, which added to the Bankruptcy Act, § 75, a new subsection (s) to take the

[6] "A sheriff's certificate, however, after the expiration of the year for redemption, invests the holder with an equitable estate in the land, of such high character that it only requires his demand for a deed, to ripen it into an absolute legal title." *Hubble* v. *Berry*, 180 Ind. 513, 519.

place of the subsection (s) held invalid in *Louisville Bank* v. *Radford,* 295 U. S. 555. This new subsection (s) was sustained in *Wright* v. *Vinton Branch,* 300 U. S. 440. Secondly, the petitioner, on October 11, 1935, filed a second amendment to his petition for composition and was "duly adjudged a bankrupt." Both of these events are significant in reasoning out the status of the 120 acres.

If the rule of the General Bankruptcy Act is followed, property acquired after the filing of a petition for composition under the provisions of § 75 would not be subject to bankruptcy administration. Section 75 (n) in effect at the time of the filing of the petition leads to the conclusion that, at that time, a similar rule, as to property subsequently acquired, would apply.[7] At the time petitioner filed his first amendment, seeking to be adjudged a bankrupt, subsection (n) continued in the same form. It was changed by the Act of August 28, 1935, to the language shown below.[8] By the terms of the second and

[7] "(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

[8] "(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the

third paragraphs of § 4 of that Act, all rights of redemption of petitioner which had not expired in land within the jurisdiction of the court of bankruptcy were extended. By the earlier subsection (n) the line of cleavage, between property subject to the bankruptcy jurisdiction and property free from it, came at the date when the "farmer's petition or answer was filed." When this language was adopted there was no provision for a petition in bankruptcy under § 75. There was provision only for a petition for composition or extension.[9] By § 4 of the Act of

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period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

[9] Act of March 3, 1933, § 75 (c):

"(c) At any time within five years after this section takes effect, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is

August 28, 1935, subsection (n) was changed to comport with subsection 75 (s), permitting a petitioner to amend and ask "to be adjudged a bankrupt." We are of the opinion that it is the date of filing this request for adjudication as bankrupt which fixes "the line of cleavage" as to the property. This conclusion is really in conformity with the reasoning governing the rule in the General Bankruptcy Act. There the first petition seeks an adjudication in bankruptcy. Under § 75, it is only the later amendment which does.[10] As the 120 acres had been reconveyed to the petitioner prior to his filing of the petition of October 11, 1935, seeking adjudication as a bankrupt, his interest in the 120 acres was subject to bankruptcy jurisdiction. As the land was reconveyed to the petitioner prior to the decree of foreclosure, petitioner was an owner entitled to redeem after the sale. Ind. Stat. Ann. (Burns, 1933) c. 40. The amendment of October 11, 1935, was the first opportunity to bring the 120 acres

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desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section."

[10] Section 75 as originally enacted was a part of Chapter VIII of the Bankruptcy Act, approved March 3, 1933, and did not contemplate an adjudication in bankruptcy. Section 73 of that Chapter reads as follows:

"Sec. 73. Additional Jurisdiction.—In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 74, 75, and 77 of this Act."

The Amendments of Bankruptcy Rules, Order of June 1, 1936, 298 U. S. 695, are based upon petitions for composition rather than bankruptcy. See particularly General Order L, p. 701.

into the jurisdiction of the Bankruptcy Court, and we think it had that effect.

Second. The conclusion that all the lands in controversy, except the 80.31-acre tract, are within the jurisdiction of the Bankruptcy Court under the petitioner's amendment asking to be adjudged a bankrupt and are lands subject to petitioner's right of redemption, as extended by subsection (n) of § 75, requires the reversal of the judgments below, as to these lands, unless the provisions of § 75 (n), extending the period of redemption, are unconstitutional. Respondent insists that these provisions are a direct invasion of the State's rights under the Tenth Amendment and violative of the respondent's own rights, by virtue of its title acquired by purchase at the judicial sale, in contravention of the Fifth Amendment.

The right of the Congress to legislate on the subject of bankruptcies is granted by the Constitution in general terms. "The Congress shall have power . . . To establish . . . uniform laws on the subject of Bankruptcies throughout the United States," Article I, § 8, clause 4. To this specific grant, there must be added the powers of the general grant of clause eighteen. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ." The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution.[11] An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his

[11] *Adair* v. *Bank of America Assn.*, 303 U. S. 350, 354; *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 668.

creditors, extending to his and their relief." [12] This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here.[13]

The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness and permitting him to start afresh.[14] By the Act of March 3, 1933, the Congress deliberately undertook the rehabilitation of the debtor as well as his discharge from indebtedness.[15] This legislation for rehabilitation has been upheld as within the subject of bankruptcies.[16] But respondent urges that under the Bankruptcy Clause Congress is confined to legislation for the adjustment of the debtor-creditor relationship, and insists that the purchaser at an Indiana judicial sale is not a creditor but a grantee with rights acquired by the purchase, separate and distinct from the rights and obligations arising from the creation of the debt. While there may be no relation of debtor and creditor between the bankrupt and the purchaser of his property at judicial sale, we think the purchaser at a judicial sale does enter into the radius of the bankruptcy power over debts. His purchase is in the liquidation of the indebtedness. The debtor has a right of redemption of which the purchaser is advised, and until that right of redemption expires the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor and its power to legislate for the rehabilitation of the debtor. The person whose land has been sold at fore-

[12] *In re Reiman,* 20 Fed. Cas. 490.

[13] *Continental Bank* v. *Chicago, R. I. & P. Ry. Co., supra,* 672; *United States* v. *Bekins, ante,* pp. 27, 47; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187.

[14] *Williams* v. *U. S. Fidelity & G. Co.,* 236 U. S. 549, 554, 555; *Louisville Bank* v. *Radford,* 295 U. S. 555, 582.

[15] *Adair* v. *Bank of America Assn., supra,* pp. 354, 355, notes 2 and 3.

[16] *Wright* v. *Vinton Branch,* 300 U. S. 440, 456.

closure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default: both are faced with the same ultimate prospect, either of paying a certain sum of money, or of being completely divested of their land. We think the provision for the extension of the period of redemption comes clearly within the power of the Congress under the bankruptcy clause. But respondent presses a further argument that the Fifth and Tenth Amendments are violated.

(a) The Fifth Amendment is said to be violated and the property of respondent, the purchaser at the judicial sale, taken without due process,[17] by the provision for extension of the time of redemption. Section 75 (n) provides that "the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section." The stay may be approved for the period during which the debtor seeks to effect a composition,[18] and, as contemplated by § 75 (s), for a moratorium period not exceeding three years, during which the court's equitable supervision over the land continues, and a reasonable rental is required.[19] That such an extension is consonant with the due process clause of the Fifth Amendment is indicated by our decision in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, where we held that neither the due process clause of the Fourteenth Amendment nor the contracts clause was violated by an emergency state statute authorizing extension of the period of redemption from foreclosure sales, for a just and equitable period not exceeding two years, conditioned on payment by the mortgagor of a reasonable rental, as directed by the court.

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[17] Compare *Louisville Bank* v. *Radford,* 295 U. S. 555, 601.

[18] Cf. *Adair* v. *Bank of America Assn.,* 303 U. S. 350.

[19] See *Wright* v. *Vinton Branch,* 300 U. S. 440, 460 *et seq.*

The mortgage contract was made subject to constitutional power in the Congress to legislate on the subject of bankruptcies. Impliedly, this was written into the contract between petitioner and respondent. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." [20] And the fact that in this case the purchaser at the foreclosure sale was also the mortgagee is not a determining factor. Any purchaser at a judicial sale must purchase subject to the possibility of the exercise of the bankruptcy power in a manner consonant with the Fifth Amendment.

We have held that § 75 (s) does not unconstitutionally affect the rights of the mortgagee.[21] We do not think the provision for extension of the period of redemption in § 75 (n) is invalid. The rights of the purchaser are preserved, the possibility of enjoyment is merely delayed. The rights of a purchaser, who under the state law is entitled to the redemption money or possession within a year, are not substantially different from those of a mortgagee entitled, on the maturity of the obligation, to payment or sale of the property.

(b) In view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment. Respondent argues that to subject property bought in at a foreclosure sale to the extended redemption period and other provisions of § 75 (s) "would be a direct invasion of the powers reserved to the State by the Constitution, and a violation of [respondent's] property rights theretofore determined by the courts of the State of Indiana in accordance with the law of that State."

[20] *Home Bldg. & Loan Assn.* v. *Blaisdell, supra,* at page 435.

[21] *Wright* v. *Vinton Branch, supra.*

If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made. Recent decisions illustrate other instances:

"A court of bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property forming a part of the bankrupt's estate be marshalled; or that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale. *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 227. Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a plan of reorganization. *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 680-681. It may enjoin like action by a mortgagee which would defeat the purpose of [§ 75] subsection (s) to effect rehabilitation of the farmer mortgagor." *Wright* v. *Vinton Branch*, 300 U. S. at 470.[22]

Such action does not indicate a disregard of the property rights created by state law. The state law still establishes the norm to which Congress must substantially adhere; a serious departure from this norm, i. e., from the quality of the property rights created by the state law, has led to condemnation of the federal action as constituting a deprivation of property without due process.[23]

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[22] See also *Adair* v. *Bank of America Assn.*, *supra*, restricting the enforcement of a mortgage upon the gross proceeds of a crop.

[23] *Louisville Bank* v. *Radford*, 295 U. S. 555.

Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed.

In so far as the judgments below struck from the schedules the 80.31-acre tract and refused to permit amendment to show the character of appellant's interest, they are affirmed. As to the rest of the land in question, they are reversed.

Affirmed in part; reversed in part.

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

COLLINS ET AL. *v.* YOSEMITE PARK & CURRY CO.

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

No. 870. Argued April 27, 28, 1938.—Decided May 31, 1938.

1. The United States, owning land set aside as a national park within the boundaries of a State, may constitutionally accept from the State a cession of jurisdiction over it. The jurisdiction ceded need not be exclusive but may be limited by reservations of powers in the State, such as the power to tax persons and their property on the land included. Pp. 527, 530.

   It is not essential to valid acquisition of jurisdiction by cession from a State that the land involved shall be acquired by the United States for one of the purposes specified in Clause 17, § 8, Art. I, of the Constitution. P. 528.

2. The territory embraced in the Yosemite National Park in California was acquired by the United States under the Treaty of Guadalupe Hidalgo. Part of it, known as Yosemite Valley, was granted to the State, in 1864, for park and recreational pur-

poses, and was regranted to the United States by Act of the state legislature in 1905, at a time when another statute (Cal. Stat. 1891, c. 181) purported to cede to the United States, over land granted to it, jurisdiction for all purposes except the administration of the criminal laws of the State and the service of civil process. The other lands composing the Park have remained in the proprietorship of the United States since the time of the Treaty. By Act of April 15, 1919, California granted exclusive jurisdiction over the Park as a whole, saving certain rights, including the right "to tax persons and corporations, their franchises and property" on the lands included; and this was accepted by the Act of Congress of June 2, 1920. *Held:*

(1) That whatever the status of jurisdiction existing at the time of their enactment, these Acts of cession and acceptance, of 1919 and 1920, are to be taken as declarations of the agreements, reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park. P. 528.

(2) Distinguished from the right to tax, the power to regulate the sale and use of alcoholic beverages was not reserved by the State, and such regulations are not enforceable in the Park. P. 530.

(3) The reservation of the right to tax is to be construed without employing the rule of strict construction applied to grants limiting a state's taxing power. P. 432.

(4) This reservation does not authorize the State to exact, for the sale or importation of alcoholic beverages in the Park, the fees for licenses which are provided by § 5 of the California Alcoholic Beverage Control Act, those provisions being regulatory in character. P. 533.

This is not a case where provisions requiring a license may be treated as separable from regulations applicable to those licensed. Here the regulatory provisions appear in the form of conditions to be satisfied before a license may be granted.

(5) The reservation, however, does authorize the State to tax sales in the Park, under §§ 23 and 24 of the Act cited. P. 534.

3. A corporation operating hotels, camps and stores in the Yosemite National Park, under a contract with the Secretary of the Interior obliging it to pay over to him a portion of its excess profits, imported beer, wine and spirits from places outside of California and retailed them to customers in the Park at prices approved by the Secretary. The California Alcoholic Beverage Control Act

imposes a tax per unit sold upon beer and wine sold "in this State" by an importer, and upon distilled spirits sold "in this State" by a rectifier or wholesaler thereof. It defines the term "in this State" as embracing all territory within the geographical limits of the State. *Held:*

(1) That the company is taxable on its sales. P. 534.

These tax provisions are separable from the licensing and regulatory provisions of the Act.

Although the company does not import beverages into California within the meaning of the Twenty-First Amendment, for the purposes of the Act it is an importer making sales "within this State."

There is nothing in the Act restricting these taxing provisions to sales made by or to persons licensed under the Act.

Although the company is neither a manufacturer nor a rectifier, the tax on its sales of distilled spirits is sustainable under a provision (§ 33) that "in exceptional instances" the state enforcing agency may sell stamps, evidencing payment of tax, "to on- and off-sale distilled spirits licensees and *other persons*."

(2) Objection that collection of the taxes may interfere with an agency of the United States and may be taken in part from the United States, because of its interest in the profits from the contract, is answered by the fact that the United States, by its acceptance of qualified jurisdiction over the Park, has consented to such taxation. P. 536.

4. The Twenty-First Amendment did not confer upon a State the power to regulate the importation of intoxicating liquors into territory over which it has ceded to the United States exclusive jurisdiction. P. 536.

20 F. Supp. 1009, reversed.

APPEAL from a decree of a District Court of three judges, which permanently enjoined the appellants, members of the Board of Equalization of California and the state Attorney General, from enforcing the California Beverage Control Act against the appellee, with respect to sales of intoxicating liquors in the Yosemite National Park.

Mr. Seibert L. Sefton, Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for appellants.

Mr. James S. Moore, Jr., with whom *Messrs. Herman Phleger, Maurice E. Harrison,* and *Gregory A. Harrison* were on the brief, for appellee.

Solicitor General Jackson filed a memorandum on behalf of the United States.

MR. JUSTICE REED delivered the opinion of the Court.

Appellee, the Yosemite Park and Curry Co., brought this suit to enjoin the State Board of Equalization and the State Attorney General from enforcing the "Alcoholic Beverage Control Act" of the State of California,[1] within the limits of Yosemite National Park. Appellee is engaged in operating, within the Park, hotels, camps, and stores, under a contract with the Secretary of the Interior, leasing portions of the Park to appellee for a 20-year term. The contract, expressly intended to implement the Congressional desire to make the Park a resort and playground for the benefit of the public, places upon appellee the duty of furnishing visitors with sundry facilities and accommodations. If it pays dividends in excess of 6% on its investment it must pay to the Secretary of the Interior a sum equal to 25% of the excess during the first ten years, and 22½% of any excess over 6% earned during the second ten years. Appellee sells liquors, beer and wine to Park visitors for prices approved by the Secretary of the Interior. In the ordinary course of business, it imports from places outside of California beer, wine, and distilled spirits, which it stores and sells within the Park.

According to the allegations of appellee's bill, appellants (defendants below) assert that the Alcoholic Beverage Control Act applies within the Park and that appellee is obligated to apply for permits for importation and

[1] Cal. Stat. 1935, c. 330, as amended, Cal. Stat. 1937, c. 681, 758.

sale; that appellee is subject to provisions of the Act prohibiting the issuance of importer's licenses to persons holding on-sale retail licenses, and vice versa; that appellee must pay fees and taxes imposed by the Act or be subject to penalties. Allegation was made that appellants threaten to seize beverages on or being transported to appellee's premises, demand rendition of reports and keeping of accounts, and threaten to institute civil and criminal proceedings against appellee for violation of the Act. On the other hand, appellee's allegations continue, the Secretary of the Interior, under the contract of lease, has approved prices making no allowance for taxes, and has instructed appellee to apply for no license and to pay no tax under the California Act, and that payment of such license fees or taxes will not be allowed as an operating expense under the contract.

Appellee brought this suit to restrain enforcement of the Alcoholic Beverage Control Act within Yosemite Park, on the theory that the Park is within the exclusive jurisdiction of the United States. The suit being one to restrain the enforcement of a state statute as applied to a specific situation, a three-judge court was convened under § 266 of the Judicial Code, 28 U. S. C. § 380. The case was heard below upon motion to dismiss the complaint. The District Court denied this motion. It granted a temporary injunction, 20 F. Supp. 1009, and later granted the final injunction prayed for by the complaint, restraining appellants (a) from entering upon appellee's premises, examining its records, seizing its beverages, or interfering with its importation and sales of beverage within the Park; (b) from interfering with shipments to appellee from outside the State; (c) from instituting any actions based on alleged violations of the Act with respect to the importation, possession, or sale of liquors; (d) from requiring reports thereon; (e) from enforcing the Act as to transactions within the Park.

The District Court, after noting that Yosemite National Park consists of Yosemite Valley and considerable surrounding territory, first discussed what it conceived to be the situation in the Valley.[2] It reviewed the history of the land: The United States acquired it in 1848 under the Treaty of Guadalupe Hidalgo,[3] reserved proprietary rights when California became a State in 1850,[4] and on June 30, 1864, gave the Valley to California in trust for public park and recreational purposes.[5]

The District Court held that exclusive jurisdiction over the land was acquired again by the United States by virtue of the joint operation of three statutes: an 1891 California law ceding to the United States exclusive jurisdiction over such land as might be ceded to it;[6] a 1905 California statute re-ceding the Valley to the United States;[7] and the Act of June 11, 1906,

[2] The discussion applies equally to the Mariposa Big Tree Grove.

[3] 9 Stat. 922.

[4] 9 Stat. 452.

[5] 13 Stat. 325.

[6] "Section 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein." Cal. Stat. 1891, c. 181.

[7] "*An act to recede and regrant unto the United States of America, the 'Yosemite Valley,' and the land embracing the 'Mariposa Big Tree Grove.'*

. . . . . .

"Section 1. The State of California does hereby recede and regrant unto the United States of America, the 'Cleft' or 'Gorge' in the granite peak of the Sierra Nevada mountains, situated in the county of Mariposa, State of California, and the headwaters of the Merced river, and known as the Yosemite Valley, with its branches or spurs, granted unto the State of California in trust for public use, resort and recreation by the act of congress entitled 'An act authorizing a grant to the State of California of the Yosemite Valley and of the land embracing the 'Mariposa Big Tree Grove,' approved June 30th, 1864; and

whereby Congress accepted the regrant and constituted the Valley a part of the Yosemite National Park.[8] It further held, over appellants' objection, that there was no constitutional obstacle to the acquisition by the United States of exclusive jurisdiction over land ceded to it for national park purposes. Jurisdiction over the

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the State of California does hereby relinquish unto the United States of America and resign the trusts created and granted by the said act of congress.

. . . . . .

"Sec. 3. This act shall take effect from and after acceptance by the United States of America of the recessions and regrants herein made, thereby forever releasing the State of California from further cost of maintaining the said premises, the same to be held for all time by the United States of America for public use, resort and recreation, and imposing on the United States of America the cost of maintaining the same as a national park. *Provided, however,* that the recession and regrant hereby made shall not affect vested rights and interests of third persons." Cal. Stat. 1905, c. 60.

[8] "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the recession and regranting unto the United States by the State of California of the cleft or gorge in the granite peak of the Sierra Nevada Mountains, situated in the county of Mariposa, State of California, and the headwaters of the Merced River, and known as the Yosemite Valley, with its branches or spurs, granted unto the State of California in trust for public use, resort, and recreation by the Act of Congress entitled 'An Act authorizing a grant to the State of California of the Yosemite Valley and of the land embracing the Mariposa Big Tree Grove,' approved June thirtieth, eighteen hundred and sixty-four (Thirteenth Statutes, page three hundred and twenty-five), as well as the tracts embracing what is known as the 'Mariposa Big Tree Grove,' likewise granted unto the State of California by the aforesaid Act of Congress, is hereby ratified and accepted, and the tracts of lands embracing the Yosemite Valley and the Mariposa Big Tree Grove, as described in the Act of Congress approved June thirtieth, eighteen hundred and sixty-four, together with that part of fractional sections five and six, township five south, range twenty-two east, Mount Diablo meridian, California, lying south of the South Fork of Merced River and almost wholly between the Mariposa Big Tree Grove and the present south boundary of the Yosemite National Park, be, and the same are hereby,

rest of the Park, it concluded, was in the State until April 15, 1919, when it was offered to the National Government (which had always retained the proprietary interest) in a statute saving to the State, inter alia, "the right to tax persons and corporations, their franchises and property on the lands included in said parks."[9] Ju-

reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States and set apart as reserved forest lands, subject to all the limitations, conditions, and provisions of the Act of Congress approved October first, eighteen hundred and ninety, entitled 'An Act to set apart certain tracts of land in the State of California as forest reservations,' as well as the limitations, conditions, and provisions of the Act of Congress approved February seventh, nineteen hundred and five, entitled 'An Act to exclude from the Yosemite National Park, California, certain lands therein described, and to attach and include the said lands in the Sierra Forest Reserve,' and shall hereafter form a part of the Yosemite National Park." 34 Stat. 831.

[9] "*An Act to cede to the United States exclusive jurisdiction over Yosemite national park, Sequoia national park, and General Grant national park in the State of California.*

. . . . . .

"Section 1. Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Yosemite national park,' 'Sequoia national park,' and 'General Grant national park' respectively; saving, however, to the State of California the right to serve civil or criminal process within the limits of the aforesaid parks in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said state outside of said parks; and saving further, to the said state the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in which said parks are situate; *provided, however,* that jurisdiction shall not vest until the United States through the proper officer notifies the State of California that they assume police jurisdiction over said parks." Cal. Stat. 1919, c. 51.

risdiction of the Park was assumed by the United States by Act of June 2, 1920, which referred to the state act, including its reservation of a power to tax.[10] The District Court held this reservation inapplicable, on the ground that the Alcoholic Beverage Act is chiefly regulatory in nature rather than a revenue measure. Concluding that the United States had exclusive jurisdiction over the land in question, the District Court enjoined the enforcement of the state Act.

From this final decree of injunction, a direct appeal to this Court was taken under §§ 238 and 266 of the Judicial Code. Several questions were argued on the appeal. At this point, reference may be confined to appellants' contention that the United States has no

[10] 41 Stat. 731, 16 U. S. C. § 57.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the act of the Legislature of the State of California (approved April 15, 1919), ceding to the United States exclusive jurisdiction over the territory embraced and included within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State of California the right to serve civil or criminal process within the limits of the aforesaid parks or either of them in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State outside of said parks; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in which said parks are situated. All the laws applicable to places under sole and exclusive jurisdiction of the United States shall have force and effect in said parks or either of them. All fugitives from justice taking refuge in said parks, or either of them, shall be subject to the same laws as refugees from justice found in the State of California."

power under the Constitution to exercise exclusive jurisdiction over land ceded to it by a State for national park purposes. Pursuant to the Act of August 24, 1937, the Court certified to the Attorney General that in this cause was drawn in question the constitutionality of the Acts of June 11, 1906, 34 Stat. 831, and June 2, 1920, 41 Stat. 731, accepting exclusive jurisdiction over the areas which embrace the Yosemite National Park. The United States, regarding appellee's argument as adequate, determined that it was not necessary to intervene.

Exclusive jurisdiction. By the Act of March 3, 1905, see note 7, California ceded and granted the United States title to the "Cleft" or "Gorge," known as Yosemite Valley and the Mariposa Big Tree Grove. As the Act of March 31, 1891, was then in force, see note 6, exclusive jurisdiction, with the exception of right to administer criminal laws and serve civil process, passed to the United States, on its acceptance, unless the United States was without constitutional power to exercise it. By the Act of June 11, 1906, see note 8, the Congress accepted the cession and made the lands conveyed a part of the Yosemite National Park. The other lands composing the Park had been in the proprietorship of the national government since cession by Mexico. Exclusive jurisdiction of them passed from the United States to California by the admittance of that State to the Union. Except for certain rights expressly reserved, exclusive jurisdiction of these lands was granted to the United States by the Act of April 15, 1919, see note 9, and accepted by the Congress on June 2, 1920, see note 10. As this Act granted exclusive jurisdiction over all "territory which is now or may hereafter be . . . included in . . . Yosemite National Park," the language of the cession and acceptance is apt to determine exclusive jurisdiction, with the explicit reservations, of the Gorge also.

Whatever the existing status of jurisdiction at the time of their enactment, the Acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements, reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park. As jurisdiction over the Gorge was created by one set of statutes and that over the rest of the Park by different legislation, this adjustment was desirable. The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, coöperatively adjust problems flowing from our dual system of government.[11] Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification.[12] It is a matter of arrangement. These arrangements the courts will recognize and respect.

The State urges the constitutional inability of the National Government to accept exclusive jurisdiction of any land for purposes other than those specified in Clause 17, § 8, Article I of the Constitution.[13] This clause has not been strictly construed. This Court at this term has given full consideration to the constitutional power of

[11] Cf. *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 541; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co., ante,* pp. 92, 104.

[12] *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 146; *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186, 203; *Fort Leavenworth R. Co.* v. *Lowe, supra; Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 651.

[13] "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 United States to acquire land under Clause 17 without taking exclusive jurisdiction.[14] In that case, it was said: "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." The clause is not the sole authority for the acquisition of jurisdiction. There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17.[15] And it has been held that such a cession may be qualified.[16] It has never been necessary, heretofore, for this Court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. It was raised but not decided in *Arlington Hotel* v. *Fant,* 278 U. S. 439, 454. It was assumed without discussion in *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. 2d 644.[17]

On account of the regulatory phases of the Alcoholic Beverage Control Act of California, it is necessary to determine that question here. The United States has large bodies of public lands. These properties are used for

[14] *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 148.

[15] *Fort Leavenworth R. Co.* v. *Lowe, supra; Chicago, R. I. & P. Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439; *United States* v. *Unzeuta,* 281 U. S. 138; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647; *Standard Oil Co.* v. *California,* 291 U. S. 242; *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. 2d 644.

[16] *Fort Leavenworth R. Co.* v. *Lowe, supra.*

[17] Cf. *Rainier Nat. Park Co.* v. *Martin,* 18 F. Supp. 481.

forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17. In *Silas Mason Co.* v. *Tax Commission of Washington*, 302 U. S. 186, we upheld in accordance with the arrangements of the State and National Governments the right of the United States to acquire private property for use in "the reclamation of arid and semiarid lands" and to hold its purchases subject to state jurisdiction. In other instances, it may be deemed important or desirable by the National Government and the State Government in which the particular property is located that exclusive jurisdiction be vested in the United States by cession or consent. No question is raised as to the authority to acquire land or provide for national parks. As the National Government may, "by virtue of its sovereignty" acquire lands within the borders of states by eminent domain and without their consent,[18] the respective sovereignties should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States. The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e. g., right to tax, by the Act of April 15, 1919. As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the Act under consideration are unenforceable in the Park.

Interpretation of Reservations. The lower court, in interpreting the language of the Acts of grant and acceptance was of the opinion that the saving of "the right to tax persons and corporations, their franchises and property" was not sufficiently broad to justify the collec-

[18] *James* v. *Dravo Contracting Co.*, *supra*, 147; *Kohl* v. *United States*, 91 U. S. 367, 371, 372.

tion of fees for licenses under § 5 and sales under §§ 23 and 24 of the Alcoholic Beverage Control Act.[19] The retention of the right to charge license fees for fishing

[19] "Sec. 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor.

1. Beer manufacturer's license	$750. 00 per year
2. Wine manufacturer's license (to be computed only on the gallonage manufactured) five thousand gallons or less	20. 00 per year
Over five thousand gallons to twenty thousand gallons per year	40. 00 per year
Over twenty thousand to one hundred thousand gallons per year	75. 00 per year
Over one hundred thousand to two hundred thousand gallons per year	100. 00 per year
Over two hundred thousand gallons to one million gallons a year	150. 00 per year
For each million gallons or fraction thereof over a million gallons an additional	100. 00 per year
3. Distilled spirits manufacturer's license	250. 00 per year
4. Still license	10. 00 per year per still
5. Rectifier's license	250. 00 per year
6. Brandy manufacturer's license	150. 00 per year
7. Distilled spirits importer's license	no fee
8. Wine importer's license	no fee
9. Beer importer's license	no fee
10. Public warehouse license	10. 00 per year
11. Wine bottling or packaging license	10. 00 per year
12. Beer bottling or packaging license	500. 00 per year
13. Distilled spirits wholesaler's license	250. 00 per year
14. Beer and wine wholesaler's license	50. 00 per year
15. Broker's license	250. 00 per year
16. Retail package off-sale beer and wine license	10. 00 per year
17. Retail package off-sale distilled spirits license for the first $10,000 retail sales per year	100. 00 per year
For each $1,000 retail sales or fraction thereof over $10,000 per year	10. 00 per year
18. Industrial alcohol dealer's license	50. 00 per year
19. On-sale beer license	25. 00 per year
20. On-sale beer and wine license	75. 00 per year
21. On-sale beer and wine license for trains (per train)	15. 00 per year
22. On-sale beer and wine license for boats (per boat)	50. 00 per year
23. On-sale distilled spirits license	As set by the board
24. Distilled spirits manufacturer's agents license	250. 00 per year"

"Sec. 23. An excise tax is hereby imposed upon all beer and wine sold in this State by a manufacturer or importer, except as otherwise in this act provided, at the following rates:

"(a) On all beer, sixty-two cents for every barrel containing thirty-one gallons, and at a proportionate rate for any other quantity;

"(b) On all natural dry wines one cent per wine gallon and at a proportionate rate for any other quantity; (c) on all other still wines two cents per wine gallon and at a proportionate rate for any other

was considered an indication of abandonment of the right to enforce any other license fees; and finally, the regulatory character of the California enactment was deemed to mark it as non-enforceable under the reservation of the right to tax.

As the respective acts of State and Nation were in the nature of a mutual declaration of rights, this is not an occasion for strict construction of a grant by a State limiting its taxing power. Without employing that rule, we are of the opinion that this language is sufficiently broad to cover excises on sales,[20] but not the license fees

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quantity; (d) on champagne, sparkling wine, except sparkling hard cider, whether naturally or artificially carbonated one and one-half cents per half pint or fraction thereof, three cents per pint or fraction thereof greater than one-half pint, six cents per quart or fraction thereof greater than one pint; (e) on sparkling hard cider two cents per wine gallon and at a proportionate rate for any other quantity." Statutes 1937, ch. 758; operative July 1, 1937.

"Sec. 24. An excise tax is hereby imposed upon all distilled spirits sold in this State by rectifiers or wholesalers thereof, at the following rates:

"On all distilled spirits of proof strength or less, two cents on each bottle containing two ounces or fraction thereof; five cents on each bottle containing eight ounces or fraction thereof greater than two ounces; ten cents on each bottle containing one pint or fraction thereof greater than a half-pint; sixteen cents on each bottle containing one-fifth gallon or fraction thereof greater than one pint; twenty cents on each bottle containing one quart or fraction thereof greater than one-fifth gallon; forty cents on each bottle containing one-half gallon or fraction thereof, greater than one quart; eighty cents on each bottle containing one gallon or fraction thereof greater than one-half gallon, and at a proportionate rate for any quantity.

"All distilled spirits in excess of proof strength shall be taxed at double the above rate." Statutes 1937, ch. 758; operative July 1, 1937.

[20] *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45, 49; *Rainier Nat. Park Co.* v. *Martin*, 18 F. Supp. 481, 486, affirmed, 302 U. S. 661, on the authority of the *Walker* case.

In this view we need not consider appellants' argument that the Constitution of California forbids the release of the taxing power.

provided for by this Act. The fact that the "right to fix and collect license fees for fishing in said parks" was reserved, is not decisive. It may well be that the negotiators of the agreement considered such licenses regulatory in nature and therefore requiring express exception from the agreement for exclusive jurisdiction, in addition to the tax exception.

(a) Licenses. As the State of California has in the area of the Yosemite National Park only the jurisdiction saved under the cession and acceptance acts of 1919 and 1920, it does not have the power to regulate the liquor traffic in the Park. Except as to this reserved jurisdiction, California "put that area beyond the field of operation of her laws." [21] While the State has, under its reservation, the right to use means to force collection of the taxes saved,[22] it seems clear that the licenses required by § 5 go beyond aids to the collection of taxes and are truly regulatory in character. This is not a case where provisions requiring a license may be treated as separable from regulations applicable to those licensed.[23] Here the regulatory provisions appear in the form of conditions to be satisfied before a license may be granted.[24] The pro-

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[21] *Standard Oil Co.* v. *California,* 291 U. S. 242.

[22] *Rainier National Park* v. *Martin,* 18 F. Supp. 481, 488.

[23] Cf. *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n,* 303 U. S. 419.

[24] Art. XX, § 22, of the California Constitution provides that the State Board of Equalization "shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

The Alcoholic Beverage Control Act, Cal. Stat. 1935, c. 330, as amended Stat. 1937, c. 681, c. 758, contains, inter alia, provisions that no person may perform acts authorized by a license, unless licensed (§ 3); that an importer's license may be issued only to the holder of a manufacturer's, rectifier's, or wholesaler's license, § 6 (d); that appli-

visions requiring licenses for the importation or sale of alcoholic beverages in the Park are invalid.

(b) Excise Taxes. A different conclusion obtains, however, with respect to the excise tax provisions of the Alcoholic Beverage Control Act, laying a tax, at a specified rate per unit sold, on beer, wine, and distilled spirits sold "in this State." The Park Company, seeking to bring the excise provisions of the Act within the principle stated above with respect to the license fee provisions, contends that, notwithstanding the separability clause,[25] the taxing features cannot be separated from the regulatory features, and that "the Act does not even purport to tax persons not subject to licensing requirements." Thus the argument is made that § 23 imposes an excise tax on beer and wine sold by an importer, and applies not to the Company, which sells beverages direct to consumers, but only to importers licensed under the Act, and restricted by their license to sales to retail licensees.

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cation of a required type be filed for a license (§ 10); that no on-sale distilled spirits license shall be issued to any applicant who is not a citizen of the United States (§ 12); that no distilled spirits license may be issued to any person or agent of any person who manufactures distilled spirits within or without the State (§ 20½); that retail licenses may not be granted for premises in certain locations (§§ 13–17); that no retail on-sale or off-sale licensee shall purchase alcoholic beverages for resale from any person except a person holding a beer, or wine, manufacturer's, a rectifier's or a wholesaler's license issued under this act (§ 6.6).

[25] "Sec. 70. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portion of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional."

Neither party cites any pertinent state court decision. There is nothing in the statute itself compelling the conclusion that the excise tax and regulatory provisions are inseparable, or requiring the Court to overturn the presumptively correct determination of the administrative officers that the sales within the Park are subject to the excise tax. Section 23 provides that an excise tax is imposed upon beer and wine sold "in this State by [an] . . . importer." Reference to provisions of the Act defining the terms used in this section [26] makes it plain that although appellee Company does not import beverages into California within the meaning of the Twenty-First Amendment, it is an importer for purposes of the Act, and, as such, is subject to the tax. The Act is restricted to sales "in this State," but that term embraces all territory within the geographical limits of the State.[27] There is nothing in the Act restricting this taxing provision to sales made by or to persons licensed under the Act. Sec. 23 clearly applies to beer and wine sold by appellee Company in the Park, and it applies to such sales regardless of the applicability *vel non* of the regulatory or licensing provisions of the Act.

Section 24 imposes an excise tax upon all distilled spirits "sold in this State by rectifiers or wholesalers." Appellee Company does not come within the statutory

[26] Sec. 2 (k): " 'Importer' means any consignee of alcoholic beverages brought into this State from without this State when such alcoholic beverages are for delivery or use within this State, . . ." Sec. 2 (w): " 'Within this State' means all territory within the boundaries of this State." Sec. 2 (wl): " 'Without the State' means all territory without the boundaries of the State."

[27] See *supra,* note 26. See boundary of State of California as defined in Cal. Const., Art. XXI, § 1.

Compare *Rainier Nat. Park Co.* v. *Martin,* 18 F. Supp. 481, 486 (W. D. Wash.), affirmed 302 U. S. 661.

definition of either of these groups,[28] but § 24 must be read in conjunction with § 33. Sec. 33 provides that the "tax imposed by § 24 of this act upon the sale of distilled spirits shall be collected from rectifiers and wholesalers of distilled spirits and payment of the tax shall be evidenced by stamps issued by the board to such rectifiers and wholesalers," and continues with the provision that "in exceptional instances the board may sell such stamps to on- and off-sale distilled spirits licensees and *other persons.*" (Italics added.) In view of the atypical circumstances of the present case, we cannot consider erroneous an interpretation by the board that stamps, to be affixed to the liquor containers, might be issued and sold to appellee Company. These provisions, like § 23, are independent of any licensing or regulatory provisions of the Act, and may be enforced independently, as a purely tax or revenue measure.

The objection that collection of the taxes may not only interfere with an agency of the United States but may be actually partly collected from the National Government because of its interest in the profits under the contract is fully answered by the fact that the United States, by its acceptance of qualified jurisdiction, has consented to such a tax.[29]

XXI Amendment. The State makes the point that § 2 of the XXI Amendment [30] gives it the right to regulate

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[28] Sec. 2 (j) " 'Rectifier' means every person who colors, flavors, or otherwise processes distilled spirits by distillation, blending, percolating or other processes."

(s) " 'Wholesaler' means and includes every person other than a manufacturer or rectifier who is engaged in business as a jobber or wholesale merchant, dealing in alcoholic beverages."

[29] *Rainier Nat. Park Co.* v. *Martin,* 302 U. S. 661; cf. *Baltimore Nat. Bank* v. *State Tax Comm'n,* 297 U. S. 209.

[30] "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

the importation of intoxicating liquors. Reliance for enforcement is placed upon §§ 49 and 49.2 of the Alcoholic Beverage Control Act.[31] The argument for this claim is bottomed upon our decision in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, where we held that a statute imposing a $500 license fee for importing and a $750 license fee for brewing beer did not violate

[31] "Sec. 49. Alcoholic beverages shall be brought into this State from without this State for delivery or use within the State only when such alcoholic beverages are consigned to a licensed importer and only when consigned to the premises of such licensed importer or to the premises of a public warehouse licensed under this act. Alcoholic beverages which are consigned to a destination within this State shall be presumed to be for delivery or use within this State. Alcoholic beverages imported into this State contrary to the provisions hereof shall be seized by the board. Every person violating the provisions of this section shall be guilty of a misdemeanor." Statutes 1937, ch. 758; operative July 1, 1937.

"Sec. 49.2. Common or private carriers transporting alcoholic beverages into this State from without the State for delivery or use within this State must obtain the receipt of the licensed importer, distilled spirits manufacturer or distilled spirits manufacturer's agent for the alcoholic beverages so transported and delivered and, if the consignee refuses to give such receipt and show his license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverages. Where the consignee is not a licensed importer, distilled spirits manufacturer or distilled spirits manufacturer's agent or where the consignee refuses to give his receipt and show his license the carrier shall immediately notify the board at Sacramento giving full details as to the character of shipment, point of origin, destination and address of the consignor and consignee, and within ten days such alcoholic beverages shall be delivered to the board and shall be forfeited to the State of California. If any alcoholic beverages seized under the preceding section or forfeited under this section are sold by or under the direction of the board the common carrier's unpaid freight and storage charges accruing on the shipments of such alcoholic beverages shall be satisfied out of the proceeds of any sale made by the State after deducting the cost of such sale and any excise taxes accruing thereon. Every person violating the provisions of this section shall be guilty of a misdemeanor." Statutes 1937, ch. 758; operative July 1, 1937.

the commerce clause or the equal protection clause, because the words of the XXI Amendment "are apt to confer upon the State the power to forbid all importations" and "the State may adopt a lesser degree of regulation than total prohibition" (pp. 62, 63).[32] The lower court was of the opinion that though the Amendment may have increased "the state's power to deal with the problem . . . , it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment.[33] There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.[34]

Conclusion. The bill of complaint states that the defendants, the state officials, "assert that said Alcoholic Beverage Control Act of the State of California applies to complainant's operations within said Yosemite National Park; . . . that it is obligated to pay the fees and taxes imposed by said Act and is subject to the penalties thereof for the possession and sale of said beverages without compliance with the provisions of said Act." In the prayer of the bill, the complainant prays for an injunction restraining the defendants "from enforcing in any manner within the limits of Yosemite National Park, or in respect of transactions within said Park, the Alcoholic Beverage Control Act of the State of California."

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[32] The conclusions have been reiterated in *Mahoney* v. *Joseph Triner Corp., ante,* p. 401.

[33] *Standard Oil Co.* v. *California,* 291 U. S. 242.

[34] Compare *Western Union Telegraph Co.* v. *Chiles,* 214 U. S. 274; *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. 2d 644.

The final decree forbids entering upon the premises of complainant; seizing, impeding or interfering with any shipments to complainant in Yosemite National Park; from instituting any actions or proceedings in any court of law or equity for violations or alleged violations of said Alcoholic Beverage Control Act in respect of the importation, possession or sale in the Park; from requiring or demanding reports on the importation, possession or sale of said beverages; from enforcing in any manner within the limits of Yosemite National Park, or in respect of transactions within said Park, the Alcoholic Beverage Control Act of the State of California.

From the pleadings and decree it is clear that until now the controversy has turned not upon special provisions of the Act in question but upon its applicability as a whole. As in our judgment, as heretofore pointed out, the tax provisions are enforceable and the regulatory provisions unenforceable, it is necessary to reverse the decree and remand the cause to the District Court for a determination by the Court in accordance with this opinion of the applicability of such sections of the Act as the State may threaten to enforce.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the decree below should be reversed because as stated by counsel for appellants, "The acts of cession and acceptance reserved to the State the right to levy upon and collect from the appellee company the type of tax imposed by the Alcoholic Beverage Control Act." Also, that discussion should be confined to that point.

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

DECISIONS PER CURIAM, ETC., FROM APRIL 12, 1938, THROUGH MAY 31, 1938.*

No. 887. 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 April 25, 1938. *Per Curiam:* The motion of the appellees to affirm is granted and the judgment is affirmed. *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,* Solicitor General of New York, for appellees.

No. 965. TENNESSEE ELECTRIC POWER CO. *v.* ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS. Appeal from the District Court of the United States for the District of Columbia. Decided April 25, 1938. *Per Curiam:* The motion of the appellee to affirm is granted and the decree of the District Court is affirmed. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485. *Mr. Spencer Gordon* for appellant. *Acting Solicitor General Bell* for appellees. Reported below: 22 F. Supp. 639.

No. —, original. EX PARTE VICTOR J. EVANS. April 25, 1938. The motion for leave to file petition for writ of habeas corpus is denied.

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* Mr. Justice Cardozo was absent from the bench, on account of illness, during the period covered by this volume.

For decisions on applications for certiorari, see *post,* pp. 552, 558; for rehearing, *post,* p. 586.

No. 511. NEW NEGRO ALLIANCE ET AL. *v.* SANITARY GROCERY CO. April 25, 1938. It is ordered that the opinion in this cause be amended (1) by striking out the last three sentences in the first full paragraph on page 5 and substituting therefor the following: "The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous.";

(2) By striking out of the second full paragraph on page 6 the first and second sentences and so much of the third sentence as reads: "In the first place" and starting a new sentence with a capital "T";

(3) By striking out the words "In the second place" in the fourth sentence in the second full paragraph on page 6 and beginning the sentence with a capital "T."

Opinion reported as amended, 303 U. S. 552.

Nos. 715 and 716. WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. April 25, 1938. In view of the Act of August 24, 1937 (50 Stat. 751), the Court hereby certifies to the Attorney General of the United States that the constitutionality of § 75 of the Bankruptcy Act, as amended by the Act of August 28, 1935 (49 Stat. 942), is drawn in question in this cause. *Messrs. Samuel E. Cook, Wm. Lemke, Elmer McClain,* and *Ray M. Foreman* for petitioner. *Messrs. Louis M. Mantynband, Stanley K. Henshaw,* and *Virgie D. Parish* for respondent. Reported below: 91 F. 2d 894.

No. 978. AMERICAN NATIONAL BANK *v.* AMES ET AL. April 25, 1938. It is ordered that execution pursuant to the judgment of the Supreme Court of Appeals of Virginia entered in this cause be, and the same is hereby, stayed pending action upon the petition for writ of certiorari. *Messrs. George P. Barse, Tazewell Taylor,* and *L. E. Birdzell* for petitioner. *Messrs. Wm. G. Maupin* and *James E. Heath* for respondent. Reported below: 169 Va. 711; 194 S. E. 784.

No. 960. ARIZONA PUBLISHING CO. *v.* O'NEIL ET AL., MEMBERS OF AND CONSTITUTING THE STATE TAX COMMISSION OF ARIZONA. Appeal from the District Court of the United States for the District of Arizona. Decided May 2, 1938. *Per Curiam:* The judgment is affirmed. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250; *Associated Press* v. *Labor Board,* 301 U. S. 103, 133; *Giragi* v. *Moore,* 301 U. S. 670. *Messrs. Elisha Hanson* and *John Mason Ross* for appellant. *Mr. Allan K. Perry* for appellees. Reported below: 22 F. Supp. 117.

No. —, original. EX PARTE ELZA G. WYATT. May 2, 1938. The motion for leave to file petition for writ of habeas corpus is denied.

No. 18, original. EX PARTE TINKOFF. May 2, 1938. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of certiorari also granted. *Paysoff Tinkoff, pro se.*

No. 891. PHILADELPHIA *v.* UNION TRACTION CO. May 2, 1938. The application for writ of certiorari to the

Circuit Court of Appeals for the Third Circuit is dismissed as premature. *Craig* v. *United States,* 298 U. S. 637; *Continental Oil Co.* v. *United States,* 299 U. S. 510. *Mr. G. Coe Farrier* for petitioner. *Messrs. Francis Shunk Brown* and *Joseph Gilfillan* for respondent.

No. 9, original. NEBRASKA *v.* WYOMING ET AL. May 2, 1938. After argument on the motion of the United States for leave to intervene and on the objections of the several States thereto, it was ordered that a proposed form of order be prepared by counsel and submitted for the consideration of the Court.

No. 215. TAX COMMISSION *v.* WILBUR ET AL., CO-TRUSTEES. Certiorari, 302 U. S. 668, to the Court of Appeals of Cuyahoga County, Ohio. Argued January 6, 1938. Decided May 16, 1938. *Per Curiam:* The writ of certiorari is dismissed as it appears upon argument that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it. *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303, 304; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 33; *Lynch* v. *New York,* 293 U. S. 52, 54, 55. *Messrs. A. F. O'Neil,* First Assistant Attorney General of Ohio, and *Will P. Stephenson,* with whom *Messrs. Herbert S. Duffy,* Attorney General of Ohio, and *W. H. Middleton, Jr.* were on the brief, for petitioner. *Mr. Edwin H. Chaney,* with whom *Messrs. Harold T. Clark, Atlee Pomerene,* and *Howard L. Barkdull* were on the brief, for respondents. By leave of Court, *Mr. Mortimer M. Kassell* filed a brief on behalf of the Tax Commission of the State of New York, as *amicus curiae,* in support of the petitioner.

No. —. NORTHERN PACIFIC R. CO. ET AL. *v.* UNITED STATES ET AL.; and

No. —. SCHMIDT ET AL. *v.* UNITED STATES ET AL. May 16, 1938. The applications, presented to the Chief Justice and referred by him to the Court, are denied.

No. —, original. EX PARTE CLARENCE M. BRUMMITT; and

No. —, original. EX PARTE JOSEPH J. MCCARTHY. May 16, 1938. Applications denied.

No. 9, original. NEBRASKA *v.* WYOMING ET AL. Argued May 2, 1938. Decided May 16, 1938. The United States having moved for leave to intervene herein, and the States of Nebraska, Wyoming, and Colorado having filed their objections to the granting of such motion, and the Court having heard argument by counsel upon the motion and objections;

It is now here ordered and adjudged as follows:

1. The motion of the United States for leave to intervene as a party herein is granted;

2. The United States shall have leave to file a petition of intervention within thirty days, with leave to the States of Nebraska, Wyoming, and Colorado within thirty days thereafter to file their answers thereto;

3. The record and testimony already received and exhibits filed shall stand as against the United States as the record of evidence in the cause to this date; but the United States shall be permitted to introduce such evidence as it may deem necessary to correct and supplement such testimony and exhibits;

4. This order shall be without prejudice to the determination on final decree of any of the substantive questions of law or fact advanced or to be advanced by any of the parties herein;

5. The States of Nebraska, Wyoming, and Colorado agree, and it is hereby ordered that, the United States may amend its petition at any time hereafter during the proceedings herein;

6. The orders heretofore entered with respect to reference to the Special Master are hereby extended to include the issues raised or to be raised by the intervention of the United States.

No. 1, original. GEORGIA *v.* TENNESSEE COPPER CO. ET AL. May 16, 1938. Decree entered vacating all orders and decrees which have heretofore been entered in this cause against The Ducktown Sulphur, Copper & Iron Company, Ltd., and Tennessee Copper Company excepting insofar as they relate to the taxation of costs, and the cause dismissed. A rule is ordered to issue returnable on May 26, next, requiring the Ducktown Chemical & Iron Company to show cause why it should not pay costs charged against the defendant Ducktown Sulphur, Copper & Iron Company, Ltd. *Mr. M. J. Yeomans,* Attorney General of Georgia, for complainant. *Mr. R. M. McConnell* for Tennessee Copper Co.

No. 357. GENERAL TALKING PICTURES CORP. *v.* WESTERN ELECTRIC CO. ET AL. May 16, 1938. It is ordered that the opinion in this cause be amended by striking from the last sentence of the opinion the word "original" and by inserting in its place the word "continuation," and by striking therefrom the words "the continuation applications" and inserting in their place the word "they." As amended, the sentence reads as follows: "In the absence

of intervening adverse rights for more than two years prior to the continuation applications, they were in time." Reported as amended, *ante*, p. 175.

No. 943. CONWAY *v.* ALLEN, JUDGE, ET AL. May 16, 1938. On suggestion of a diminution of the record the motion for a writ of certiorari to the Supreme Court of the State of Washington is denied. The petition for rehearing is also denied. *Tom Conway, pro se.* No appearance for respondent.

No. 21, original. EX PARTE NATIONAL LABOR RELATIONS BOARD ET AL. May 16, 1938. Motion for leave to file petition for writs of prohibition and mandamus submitted by *Mr. Solicitor General Jackson* for the petitioners. The motion for leave to file the petition is granted and a rule is ordered to issue directed to the Honorable Joseph Buffington, the Honorable J. Warren Davis, the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other judges and officers of the Circuit Court of Appeals for the Third Circuit, to show cause why the relief should not be granted as prayed. Said rule shall be returnable on Monday, May 23, at twelve o'clock, when the parties will be heard upon the question of the jurisdiction of the Circuit Court of Appeals to make the order complained of. *Solicitor General Jackson* and *Mr. Robert B. Watts* for petitioners. *Messrs. Luther Day, Thomas F. Patton, Joseph W. Henderson, Thomas F. Veach* and *Mortimor S. Gordon* for the Republic Steel Corporation.

No. 980. MCALVAY ET AL. *v.* STOCKWELL ET AL. Appeal from the Supreme Court of California. Decided May 23, 1938. *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. Joseph L. Lewinson* for appellants. *Mr. Nathan Newby* for appellees. Reported below: 10 Cal. 2d 748; 74 P. 2d 504.

No. 996. HUGHES *v.* WISCONSIN TAX COMMISSION ET AL. Appeal from the Supreme Court of Wisconsin. Decided May 23, 1938. *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) *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 344; *Whitney* v. *California,* 274 U. S. 357, 360; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Morris* v. *Alabama,* 302 U. S. 642. (2) *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279–281; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313. *Mr. S. W. Jensch* for appellant. *Mr. Joseph E. Messerschmidt* for appellees. Reported below: 227 Wis. 403; 278 N. W. 403.

No. 997. DROMEY, ADMINISTRATOR *v.* WISCONSIN TAX COMMISSION ET AL. Appeal from the Supreme Court of Wisconsin. Decided May 23, 1938. *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) *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 344; *Whitney* v. *California,* 274 U. S. 357, 360; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; *Morris* v. *Alabama,* 302 U. S. 642; (2) *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 279–281; *New York ex rel. Cohn* v. *Graves,* 300

U. S. 308, 313; *Mitchell* v. *United States,* 21 Wall. 350, 353. *Mr. S. W. Jensch* for appellant. *Mr. Joseph E. Messerschmidt* for respondents. Reported below: 227 Wis. 400; 278 N. W. 400.

No. 1010. BERMAN *v.* ILLINOIS BELL TELEPHONE CO. ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. May 23, 1938. *Per Curiam:* The motion to affirm is granted. *Mr. Meyer Abrams* for appellant. *Messrs. Kenneth F. Burgess, Leslie N. Jones,* and *W. Clyde Jones* for appellees.

No. —, original. EX PARTE DENNIS J. MCCARTHY. May 23, 1938. Application denied.

No. 16, original. MISSOURI *v.* IOWA. May 23, 1938. Samuel Williston, Esq., of Cambridge, Massachusetts, appointed Special Master in this cause.

No. 993. CHAMPLIN REFINING CO. *v.* RYAN, SECRETARY OF STATE. Appeal from the Supreme Court of Kansas. Decided May 31, 1938. *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). The petition for writ of certiorari is denied. *Mr. Horace G. McKeever* for appellant. No appearance for respondent. Reported below: 147 Kan. 160; 75 P. 2d 245.

No. 1004. MUTUAL BENEFIT, HEALTH & ACCIDENT ASSN. *v.* BOWMAN. On petition for writ of certiorari to

the Circuit Court of Appeals for the Eighth Circuit. Decided May 31, 1938. *Per Curiam:* The petition for writ of certiorari is granted limited to the question of the right of respondent to recover under the law of New Mexico. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the Circuit Court of Appeals for determination of the question presented. *Erie Railroad Co.* v. *Tompkins, ante,* p. 64; *New York Life Ins. Co.* v. *Jackson, ante,* p. 261; *Rosenthal* v. *New York Life Ins. Co., ante,* p. 263. *Messrs. John S. Leahy, Philip E. Horan,* and *William C. Michaels* for petitioner. No appearance for respondent. Reported below: 96 F. 2d 7.

No. 1045. MOSHER *v.* AMERICAN SURETY CO. ET AL. Appeal from the Superior Court of Maricopa County, Arizona. Decided May 31, 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 a writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. John W. Ray* for appellants. *Mr. Fred Blair Townsend* for appellees. Reported below: 48 Ariz. 552.

No. 948. NED ET AL. *v.* ROBINSON. Appeal from the Supreme Court of Oklahoma. Decided May 31, 1938. *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, 938). The petition for writ of certiorari is denied. *Mr. H. A. Ledbetter* for appellants. No appearance for appellee. Reported below: 181 Okla. 507; 74 P. 2d 1156.

No. 1030. OIL SHARES INCORPORATED *v.* COMMERCIAL TRUST CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. Decided May 31, 1938. *Per Curiam:* The petition for writ of certiorari is granted, the decree of the Circuit Court of Appeals is reversed, and the decree of the District Court dismissing the complaint as to the respondent, Commercial Trust Company of New Jersey, is vacated. The cause is remanded to the District Court with instructions to set forth its findings of fact and conclusions of law in accordance with Equity Rule 70½. *Mr. William M. Chadbourne* for petitioner. *Messrs. Thomas G. Haight* and *Albert C. Wall* for respondents. Reported below: 94 F. 2d 751.

No. —, original. EX PARTE MERRITT B. SCHUYLER. May 31, 1938. Application denied.

No. 1, original. GEORGIA *v.* TENNESSEE COPPER CO. ET AL. May 31, 1938. The return to the rule to show cause is received and ordered to be filed with leave to file a supplemental return on or before October 3, next.

No. 11, original. TEXAS *v.* NEW MEXICO. May 31, 1938. Motion for leave to file petition and brief on behalf of Belen-Ladera Acequia, as *amicus curiae,* denied.

No. —, original. EX PARTE FOWLER, ADMINISTRATOR, ET AL. May 31, 1938. The motion for leave to file petition for writ of mandamus is denied. Reported below: 95 F. 2d 627.

No. 313. LONE STAR GAS CO. *v.* TEXAS ET AL. May 31, 1938. It is ordered that the opinion in this cause be amended by striking the word "interstate" from the ninth

line on page four thereof and substituting the word "intrastate" therefor, so that the sentence will read: "The fair value of its intrastate property was thus claimed to be $38,350,882.32 and the net amount available at the Commission's rate for return on intrastate deliveries of gas as less than four per cent." Reported as amended, *ante,* p. 224.

No. 72. CROWN CORK & SEAL CO. *v.* FERDINAND GUTMANN CO. May 31, 1938. The motion to amend the judgment is denied. *Messrs. Thomas G. Haight* and *John J. Darby* for petitioner. *Mr. Wm. E. Warland* for respondent. Reported below: 86 F. 2d 698. See *ante,* p. 159.

DECISIONS GRANTING CERTIORARI, FROM APRIL 12, 1938, THROUGH MAY 31, 1938.

No. 437. HINDERLIDER, STATE ENGINEER, ET AL. *v.* LA PLATA RIVER & CHERRY CREEK DITCH CO. See *ante,* p. 92.

No. 877. STAHMANN ET AL. *v.* VIDAL, COLLECTOR OF INTERNAL REVENUE. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted, limited to the question whether the petitioners were the proper parties to maintain the suit. *Mr. Thornton Hardie* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 93 F. 2d 902.

No. 905. DAVIS *v.* DAVIS. April 25, 1938. Petition for writ of certiorari to the Court of Appeals for the

District of Columbia granted. *Mr. Joseph T. Sherier* for petitioner. *Mr. Crandall Mackey* for respondent. Reported below: 96 F. 2d 512.

No. 915. FEDERAL POWER COMMISSION *v.* METROPOLITAN EDISON CO. ET AL. April 28, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Solicitor General Jackson* and *Mr. Oswald Ryan* for petitioner. *Messrs. Walter Biddle Saul, C. Edward Paxson, Edward F. Huber,* and *Geo. J. Banigan* for respondents. Reported below: 94 F. 2d 943.

No. 18, original. EX PARTE PAYSOFF TINKOFF. May 2, 1938. The motion for leave to proceed *in forma pauperis* is granted. The motion for leave to file petition for writ of certiorari is also granted. *Paysoff Tinkoff, pro se.*

No. 904. WAIALUA AGRICULTURAL CO. *v.* CHRISTIAN ET AL.; and

No. 909. CHRISTIAN *v.* WAIALUA AGRICULTURAL CO. May 2, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Herman Phleger, Maurice E. Harrison,* and *J. Garner Anthony* for the Waialua Agricultural Co. *Messrs. M. C. Sloss* and *Charles M. Hite* for Eliza R. P. Christian et al. Reported below: 93 F. 2d 603; 94 *id.* 806.

No. 869. NEW YORK LIFE INS. CO. *v.* JACKSON ET AL. See *ante,* p. 261.

No. 924. ROSENTHAL *v.* NEW YORK LIFE INS. CO. See *ante*, p. 263.

No. 912. DAVIDSON *v.* COMMISSIONER OF INTERNAL REVENUE. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. J. A. C. Kennedy* and *Ralph E. Svoboda* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 94 F. 2d 300.

No. 920. STOLL *v.* GOTTLIEB. May 16, 1938. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Messrs. A. W. Froehde* and *Russell F. Locke* for petitioner. *Mr. David J. Shipman* for respondent. Reported below: 368 Ill. 88; 12 N. E. 2d 881.

No. 934. UNITED STATES *v.* CONTINENTAL NATIONAL BANK & TRUST CO., TRUSTEE, ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* for the United States. *Mr. Herbert Pope* for respondents. Reported below: 94 F. 2d 81.

No. 941. STEELMAN, TRUSTEE, *v.* ALL CONTINENT CORP. ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Wm. Elmer Brown, Jr.* for petitioner. *Mr. Clarence L. Cole* for respondents. Reported below: 96 F. 2d 20.

No. 916. CONSOLIDATED EDISON CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 957. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. *v.* SAME. May 16, 1938. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Wm. L. Ransom* for petitioners in No. 916. *Messrs. Isaac Lobe Straus* and *Claude A. Hope* for petitioners in No. 957. *Solicitor General Jackson,* and *Messrs. Robert L. Stern, Charles Fahy,* and *Laurence A. Knapp* for the National Labor Relations Board et al. Reported below: 95 F. 2d 390.

No. 921. NEBLETT ET AL. *v.* CARPENTER, INSURANCE COMMISSIONER, ET AL. May 16, 1938. Petition for writ of certiorari to the Supreme Court of California granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Messrs. William H. Neblett* and *R. Dean Warner* for petitioners. *Mr. U. S. Webb,* Attorney General of California, and *Miss Hester Webb* for the Insurance Commissioner. *Messrs. T. B. Cosgrove* and *John N. Cramer* for Carroll C. Day et al. Reported below: 10 Cal. 2d 307; 74 P. 2d 761.

No. 938. HUDSON ET AL. *v.* MOONIER. See *ante,* p. 397.

No. 945. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, *v.* LOWREY, COMMITTEE. May 23, 1938. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. James T. Brady, Edward E. Odom,* and *Y. D. Mathes* for petitioner. *Mr. Louis J. Altkrug* for respondent.

No. 966. TEXAS CONSOLIDATED THEATRES, INC., *v.* PITTMAN. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Jos. W. Bailey, Jr.* for petitioner. No appearance for respondent. Reported below: 93 F. 2d 21; 94 *id.* 203.

No. 1004. MUTUAL BENEFIT, HEALTH & ACCIDENT ASSN. *v.* BOWMAN. May 31, 1938. See *ante,* p. 549.

No. 1030. OIL SHARES INC. *v.* COMMERCIAL TRUST CO. ET AL. See *ante,* p. 551.

Nos. 396 and 1053. KELLOGG CO. *v.* NATIONAL BISCUIT CO. May 31, 1938. See *post,* p. 586.

No. 674. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 675. ABERDEEN MOTOR SUPPLY CO. *v.* SAME; and

No. 676. F. E. ROWE SALES CO. *v.* SAME. May 31, 1938. See *post,* p. 587.

No. 984. SHIELDS ET AL. *v.* UTAH IDAHO CENTRAL RAILROAD CO. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Jackson* and *Mr. Daniel W. Knowlton* for petitioners. *Messrs. J. H. DeVine* and *J. A. Howell* for respondent. Reported below: 95 F. 2d 911.

No. 1008. COLORADO NATIONAL BANK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals

for the Tenth Circuit granted. *Messrs. Morrison Shafroth, W. W. Grant,* and *Henry W. Toll* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Carlton Fox* and *S. Dee Hanson* for respondent. Reported below: 95 F. 2d 160.

No. 1042. LYETH *v.* HOEY, COLLECTOR OF INTERNAL REVENUE. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. J. M. Richardson Lyeth, Will R. Gregg,* and *Allin H. Pierce* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 96 F. 2d 141.

No. 1043. SCHER *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. A. L. Greenspun* for petitioner. *Solicitor General Jackson, Hugh A. Fisher, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 95 F. 2d 64.

No. 1048. HARRIS ET AL. *v.* AVERY BRUNDAGE CO. ET AL. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Benjamin F. J. Odell* for petitioners. *Mr. Sigmund W. David* for respondents. Reported below: 95 F. 2d 373.

No. 1016. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD *v.* BOLIN ET AL. May 31, 1938. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, granted. *Messrs. John T. Harding, D. A. Murphy,* and *Rainey T. Wells* for petitioner. *Mr. Ray Weightman* for respondents. Reported below: 112 S. W. 2d 582.

DECISIONS DENYING CERTIORARI, FROM APRIL 12, 1938, THROUGH MAY 31, 1938.

No. 927. STOKES ET AL. *v.* UNITED STATES. April 25, 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, for the reason that the Court, upon examination of the papers herein submitted, finds that the application for writ of certiorari was not made within the time provided by law. *Mr. James Frank Kemp* for petitioners. No appearance for the United States. Reported below: 93 F. 2d 744.

Nos. 928 and 929. RIFFEE *v.* MARION STEAM SHOVEL CO.;

No. 930. WILLIAM BRAMMER ET AL. *v.* ALLOY CAST STEEL CO. ET AL.;

No. 931. SHERMAN BRAMMER *v.* SAME; and

No. 932. NOGGLE, EXECUTRIX, *v.* SAME. April 25, 1938. Petitions for writs of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Paul D. Smith* and *Thomas H. Sutherland* for petitioners. No appearance for respondents. Reported below: 133 Ohio St. 109, 117, 118; 11 N. E. 2d 1022; 12 N. E. 2d 295.

No. 943. CONWAY *v.* ALLEN, JUDGE, ET AL. April 25, 1938. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Tom Conway, pro se.* No appearance for respondent.

No. 944. SISCHO *v.* ADERHOLD, WARDEN. April 25, 1938. Petition for writ of certiorari to the Circuit Court

of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Wesley Leroy Sischo, pro se.* No appearance for respondent. Reported below: 93 F. 2d 1015.

No. 949. LINDSEY ET AL. *v.* WASHINGTON. April 25, 1938. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *E. R. Lindsey, pro se.* No appearance for respondent. Reported below: 94 Wash. Dec. No. 3, p. 93; 77 P. 2d 596.

No. 829. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* KINGS COUNTY DEVELOPMENT CO. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Acting Solicitor General Bell* for petitioner. *Mr. Bradford M. Melvin* for respondent. Reported below: 93 F. 2d 33.

No. 848. GORNEY ET AL. *v.* TRUSTEES OF MILWAUKEE COUNTY ORPHANS BOARD. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George C. Brown* for petitioners. *Mr. Albert B. Houghton* for respondents. Reported below: 93 F. 2d 107.

No. 850. ITALIA FLOTTE RIUNITE COSULICH ET AL. *v.* KATZ ET AL. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioners. *Mr. Forrest E. Single* for respondents. Reported below: 93 F. 2d 1007.

No. 858. HIGHWAY ENGINEERING & CONSTRUCTION Co. *v.* HILLSBOROUGH COUNTY. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Peter O. Knight, C. Fred Thompson, George C. Bedell* and *John Bell* for petitioner. *Mr. W. F. Himes* for respondent. Reported below: 94 F. 2d 419.

No. 859. SHEEHAN, ADMINISTRATRIX, *v.* NEW YORK, N. H. & H. R. Co. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. O'Neill* for petitioner. *Mr. Edward R. Brumley* for respondent. Reported below: 93 F. 2d 442.

No. 861. FRANKLIN LIFE INS. Co. *v.* STAATS. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jerome F. Barnard* for petitioner. *Mr. A. B. Cole* for respondent. Reported below: 94 F. 2d 481.

No. 863. ATCHISON, T. & S. F. RY. Co. *v.* TAYLOR. April 25, 1938. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. Charles H. Woods* for petitioner. *Messrs. Walter H. Newton* and *Mortimer H. Boutelle* for respondent. Reported below: 292 Ill. App. 457; 11 N. E. 2d 610.

No. 865. MOTOR WHEEL CORP. *v.* RUBSAM CORP. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Carroll R. Taber* and *James G. Martin* for petitioner. *Mr. Justin R. Whiting* for respondent. Reported below: 92 F. 2d 129.

No. 866. ILLINOIS EX REL. HAKANSON *v.* PALMER, DIRECTOR. April 25, 1938. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Dean Lake Traxler* for petitioner. *Mr. Otto Kerner* for respondent. Reported below: 367 Ill. 513; 11 N. E. 2d 931.

No. 878. MOLLY-ES DOLL OUTFITTERS ET AL. *v.* GRUELLE. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Harry Langsam, Leon Sacks,* and *Peter P. Zion* for petitioners. *Messrs. Edward G. Curtis* and *Daniel L. Morris* for respondent. Reported below: 94 F. 2d 172.

No. 879. COHEN *v.* SWIFT & Co. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Greenberry Simmons* and *M. K. Hobbs* for petitioner. *Messrs. Henry Veeder* and *Albert H. Veeder* for respondent. Reported below: 95 F. 2d 131.

No. 880. MERSHON ET AL. *v.* SPRAGUE SPECIALTIES CO. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Drury W. Cooper* and *C. Blake Townsend* for petitioners. *Mr. Vernon M. Dorsey* for respondent. Reported below: 92 F. 2d 313.

No. 883. COUNTY OF WESTCHESTER *v.* MONTROSE CONTRACTING CO. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William A. Davidson* and *Francis*

J. Morgan for petitioner. *Messrs. Howard G. Wilson* and *Frederick W. Newton* for respondent. Reported below: 94 F. 2d 580.

No. 884. MALONE *v.* UNITED STATES. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Weaver* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, William H. Boyd,* and *A. M. Sellers* for the United States. Reported below: 94 F. 2d 281.

No. 885. EQUITABLE LIFE INS. CO. *v.* GERMANTOWN TRUST CO., TRUSTEE. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Phineas M. Henry* for petitioner. *Mr. J. Rich Guckes* for respondent. Reported below: 94 F. 2d 898.

No. 886. WIESE *v.* COMMISSIONER OF INTERNAL REVENUE. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. Kennedy McCook* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 93 F. 2d 921.

No. 874. FORT WORTH ET AL. *v.* LONE STAR GAS CO. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. E. Rouer* for petitioners. *Messrs. Roy C. Coffee, Marshall Newcomb,* and *Ogden K. Shannon* for respondent. Reported below: 93 F. 2d 584.

No. 881. WARKENTIN *v.* SCHLOTFELDT, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. Schwartz* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 93 F. 2d 42.

No. 889. FLORENCE ET AL. *v.* CRUMMER. April 25. 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William Lipscomb, Charles L. Black,* and *Ireland Graves* for petitioners. *Messrs. Dexter Hamilton* and *Blatchford Downing* for respondent. Reported below: 93 F. 2d 542.

No. 893. R. J. REYNOLDS TOBACCO CO. *v.* ROBERTSON, COLLECTOR OF INTERNAL REVENUE. April 25, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander H. Sands* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 22 F. Supp. 187; 94 F. 2d 167.

No. 910. ARMSTRONG ET AL. *v.* VIRGINIA IRON, COAL & COKE CO. April 25, 1938. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. William H. Werth* for petitioners. *Mr. Lewis A. Nuckols* for respondent. Reported below: 169 Va. 306; 193 S. E. 919.

Nos. 917 and 918. BERGSON *v.* FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE. April 25, 1938. Petitions for

writs of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Walter B. Gibbons* for petitioner. *Mr. Joseph First* for respondent. Reported below: 328 Pa. 547, 548; 196 A. 28, 30.

No. 923. Cox *v.* McElligott, Fire Commissioner. April 25, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. W. H. K. Davey* for petitioner. *Mr. Paxton Blair* for respondent. Reported below: 276 N. Y. 604; 12 N. E. 2d 598.

No. 19, original. Ex parte Basil H. Pollitt. May 2, 1938. The motion for leave to file petition for writ of certiorari is granted. Motion for leave to proceed further *in forma pauperis* and petition for writ of certiorari denied. *Basil H. Pollitt, pro se.*

No. 1003. Hicks *v.* Indiana. May 2, 1938. On petition for writ of certiorari to the Supreme Court of Indiana. Motion for stay denied. Motion for leave to proceed further *in forma pauperis* and petition for writ of certiorari denied. *Mr. Stephens L. Blakely* for petitioner. No appearance for respondent. Reported below: 213 Ind. —; 11 N. E. 2d 171.

No. 971. McDonald *v.* United States. May 2, 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. *Mr. Claude L. Dawson* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 893.

No. 981. SIMPSON *v.* MASSACHUSETTS. May 2, 1938. Petition for writ of certiorari to the Superior Court, County of Middlesex, Massachusetts, and motion for leave to proceed further *in forma pauperis* denied. *Edward P. Simpson, pro se. Messrs. Paul A. Dever* and *James J. Ronan* for respondent. Reported below: 13 N. E. 2d 939.

No. 985. SPRUILL *v.* DORSEY. May 2, 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 respondent.

No. 891. PHILADELPHIA *v.* UNION TRACTION CO. See *ante,* p. 543.

No. 969. BARTOLINI *v.* MASSACHUSETTS. May 2, 1938. Petition for writ of certiorari to the Superior Court, County of Norfolk, Massachusetts, denied. *Mr. George B. Lourie* for petitioner. *Messrs. Paul A. Dever* and *James J. Ronan* for respondent. Reported below: 13 N. E. 2d 382.

No. 890. INTERNATIONAL MERCANTILE MARINE CO. *v.* LOWE, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMM'N, ET AL. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ray Rood Allen* for petitioner. No appearance for respondents. Reported below: 93 F. 2d 663.

No. 894. ODOM ET AL. *v.* NEW YORK LIFE INS. Co.; and No. 895. ODOM ET AL. *v.* SAME. May 2, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John R. L. Smith* for petitioners. *Messrs. Louis H. Cooke* and *Shepard Bryan* for respondent. Reported below: 93 F. 2d 641.

No. 897. NEW YORK LIFE INS. Co. *v.* GOLIGHTLY, ADMINISTRATOR, ET AL. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Louis H. Cooke* and *Earl King* for petitioner. *Mr. Abe D. Waldauer* for respondents. Reported below: 94 F. 2d 316.

No. 898. FOX & LONDON, INC. *v.* PENNSYLVANIA RAILROAD Co. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernie Adamson* for petitioner. *Mr. Martin Conboy* for respondent. Reported below: 93 F. 2d 669.

No. 900. GULF REFINING Co. ET AL. *v.* NORTON, DEPUTY COMMISSIONER, ET AL. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank H. Myers* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Henry A. Julicher* for respondents. Reported below: 94 F. 2d 380.

No. 903. TAMPA INTEROCEAN STEAMSHIP Co. *v.* JORGENSEN. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George H. Terriberry, Jos. M. Rault,* and *Walter*

Carroll for petitioner. *Mr. W. J. Waguespack* for respondent. Reported below: 93 F. 2d 927.

No. 906. PEOPLES LIFE INS. CO. *v.* WHITESIDE, ADMINISTRATRIX, ET AL. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Lipscomb* for petitioner. *Mr. Ogden K. Shannon* for respondents. Reported below: 94 F. 2d 409.

No. 922. PACIFIC-ATLANTIC STEAMSHIP CO. ET AL. *v.* WEYERHAEUSER TIMBER CO. ET AL. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Cletus Keating, William H. McGrann,* and *Richard Sullivan* for petitioners. *Messrs. T. Catesby Jones, D. Roger Englar, James W. Ryan, J. M. Richardson Lyeth, Chauncey I. Clark,* and *Burton H. White* for respondents. Reported below: 94 F. 2d 834.

No. 967. WIL-LOW CAFETERIAS, INC., ET AL. *v.* 650 MADISON AVENUE CORP. May 2, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William M. Chadbourne, Samuel C. Duberstein,* and *Samuel Miller* for petitioners. *Messrs. William D. Mitchell, Rollin Browne,* and *Henry L. Glenn* for respondent. Reported below: 95 F. 2d 306.

No. 943. CONWAY *v.* ALLEN, JUDGE, ET AL. See *ante,* p. 547.

No. 958. BLUMGART ET AL. *v.* ST. LOUIS-SAN FRANCISCO RY. CO. May 16, 1938. Petition for writ of certiorari to

the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE BRANDEIS took no part in the consideration or decision of this application. *Mr. Frank E. Karelsen, Jr.* for petitioners. *Messrs. Alexander P. Stewart* and *Joseph W. Jamison* for respondent. Reported below: 94 F. 2d 712.

No. 961. PENNSYLVANIA PUBLIC UTILITY COMM'N *v.* UNION TRACTION CO. ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Joseph Ominsky* and *Charles J. Margiotti* for petitioner. *Messrs. Francis Shunk Brown* and *Joseph Gilfillan* for respondent.

No. 899. SHAMA *v.* UNITED STATES. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry C. Shull* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 1.

No. 901. BANKERS MORTGAGE CO. ET AL. *v.* MOTTER, COLLECTOR OF INTERNAL REVENUE. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Thomas M. Lillard* and *Otis S. Allen* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 93 F. 2d 778.

No. 908. BONET, TREASURER, *v.* BOWIE ET AL., TRUSTEES. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. *Mr. Earle T. Fiddler* for respondents. Reported below: 93 F. 2d 323.

No. 911. HARGER *v.* OKLAHOMA GAS & ELECTRIC CO. May 16, 1938. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Allen McReynolds* for petitioner. *Messrs. Joseph M. Hill* and *Henry L. Fitzhugh* for respondent. Reported below: 195 Ark. 107; 111 S. W. 2d 485.

No. 913. DAVIDSON *v.* COMMISSIONER OF INTERNAL REVENUE. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy* and *Ralph E. Svoboda* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 94 F. 2d 303.

No. 925. GILMORE, GUARDIAN, *v.* UNITED STATES. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. L. E. Gwinn* for petitioner. *Solicitor General Jackson* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury* and *W. Marvin Smith* for the United States. Reported below: 93 F. 2d 774.

No. 935. SMITH *v.* METROPOLITAN LIFE INS. CO. ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioner. No appearance for respondents. Reported below: 94 F. 2d 277.

No. 936. NATIONAL CARBON CO. *v.* WESTERN SHADE CLOTH CO. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Thomas G. Haight* and *George A. Chritton* for petitioner. *Messrs. William H. Davis* and *Albert J. Fihe* for respondent. Reported below: 93 F. 2d 94.

No. 939. PULITZER PUBLISHING CO. *v.* CURRENT NEWS FEATURES, INC. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John Raeburn Green* for petitioner. *Mr. Guy Mason* for respondent. Reported below: 94 F. 2d 682.

No. 950. CENTURY INDEMNITY CO. *v.* STANDARD CAHILL CO. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney Krause* for petitioner. *Mr. James Marshall* for respondent. Reported below: 93 F. 2d 1000.

No. 951. UNION CENTRAL LIFE INS. CO. ET AL. *v.* BANK OF COMMERCE & TRUST CO. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gerald FitzGerald* for petitioners. *Mr. Julian C. Wilson* for respondent. Reported below: 94 F. 2d 922.

No. 955. FORT WORTH *v.* McCAMEY ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. E. Rouer* for petitioner. *Messrs. Clay Cooke* and *H. C. Ray* for respondents. Reported below: 93 F. 2d 964.

No. 959. CONNECTICUT RAILWAY & LIGHTING CO. *v.* CONNECTICUT CO. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George W. Martin* for petitioner. *Messrs. James Garfield* and *Hermon J. Wells* for respondent. Reported below: 95 F. 2d 311.

No. 914. CRESCENT WHARF & WAREHOUSE CO. ET AL. *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph D. Peeler* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Mr. Henry A. Julicher* for the Deputy Commissioner, and *Mr. Arch E. Ekdale* for Alfred E. Hunter, respondents. Reported below: 93 F. 2d 761.

No. 926. MILLHISER ET AL. *v.* CHASE NATIONAL BANK, TRUSTEE. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. E. Randolph Williams, Henry W. Anderson,* and *Wirt P. Marks, Jr.* for petitioners. *Messrs. John S. Eggleston* and *Arthur A. Gammell* for respondent. Reported below: 93 F. 2d 695.

No. 933. BENTLEY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 16, 1938. Petition for writ of

certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John W. Ford* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 93 F. 2d 998.

No. 940. INDUSTRIAL TRUST CO. ET AL. *v.* BRODERICK, COLLECTOR OF INTERNAL REVENUE. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Ira Lloyd Letts* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *L. W. Post* for respondent. Reported below: 94 F. 2d 927.

No. 942. DAVILLA *v.* BRUNSWICK-BALKE-COLLENDER CO. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses H. Heonig* for petitioner. *Mr. Charles S. Rosenschein* for respondent. Reported below: 94 F. 2d 567.

No. 952. BRITTAIN *v.* LOUISVILLE & NASHVILLE R. Co. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Horace B. Wilkinson* for petitioner. *Messrs. Charles H. Eyster* and *White E. Gibson* for respondent. Reported below: 93 F. 2d 159.

No. 953. GEORGE E. WARREN CORP. *v.* UNITED STATES. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Geo. W. Dalzell* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Edward H. Horton* for the United States. Reported below: 94 F. 2d 597.

No. 956. HARTFORD TRANSPORTATION CO. *v.* LEE TRANSIT CORP. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles W. Hagen* for petitioner. *Mr. Robert S. Hume* for respondent. Reported below: 95 F. 2d 1008.

No. 962. OLIVER-SHERWOOD CO. ET AL. *v.* PATTERSON BALLAGH CORP. ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A. W. Boyken* and *Benjamin F. Bledsoe* for petitioners. *Messrs. Ford W. Harris, Frederick S. Lyon* and *Leonard S. Lyon* for respondents. Reported below: 95 F. 2d 70.

No. 968. AMERICAN LECITHIN CO. *v.* J. C. FERGUSON MFG. WORKS, INC. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Edward G. Curtis* and *Daniel L. Morris* for petitioner. *Messrs. Russell Wiles* and *George A. Chritton* for respondent. Reported below: 94 F. 2d 729.

No. 977. STOODY CO. *v.* MILLS-ALLOYS, INC. ET AL. May 16, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Fred H. Miller, Charles C. Montgomery,* and *William Stanley* for petitioner. *Mr. John Flam* for respondents. Reported below: 94 F. 2d 413.

No. 980. MCALVAY ET AL. *v.* STOCKWELL ET AL. May 23, 1938. See *ante,* p. 547.

No. 1018. EX PARTE TINKOFF. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals

for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Paysoff Tinkoff, pro se.* Reported below: 95 F. 2d 651.

No. 1020. CLARK *v.* CALIFORNIA. May 23, 1938. Petition for writ of certiorari to the District Court of Appeal, 3rd Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Frank Clark, pro se.* Reported below: 24 Cal. App. 2d 302; 74 P. 2d 1070.

No. 1031. DOLL *v.* JOHNSTON, WARDEN. May 23 1938. 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. *Edward Doll, pro se.* Reported below: 95 F. 2d 838.

No. 946. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS *v.* COPSEY, GUARDIAN. May 23, 1938. Petition for writ of certiorari to the Supreme Court of California denied for the want of a final judgment. *Messrs. James T. Brady, Edward E. Odom, Y. D. Mathes,* and *James B. Burns* for petitioner. *Mr. Allan C. Rowe* for respondent. Reported below: 10 Cal. 2d 748; 76 P. 2d 691.

No. 973. HOLYOKE WATER POWER CO. *v.* AMERICAN WRITING PAPER CO. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Messrs. Bentley W. Warren, Samuel Williston, Nathan P. Avery, James M. Healy,* and *Donald C. Starr* for petitioner. *Messrs. Claude R. Branch, Charles P. Curtis, Jr.,* and *Rus-*

sell L. Davenport for respondent. Reported below: 94 F. 2d 931.

No. 979. GLOBE INDEMNITY CO. *v.* UNITED STATES. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE STONE took no part in the consideration or decision of this application. *Messrs. F. Morse Hubbard* and *Barham R. Gary* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *James E. Murphy* for the United States. Reported below: 94 F. 2d 576.

No. 990. E. I. DUPONT DE NEMOURS & CO. *v.* WAXED PRODUCTS CO. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. J. Harry Covington* and *Harry D. Nims* for petitioner. *Messrs. Thomas D. Thacher, Ellis W. Leavenworth,* and *L. A. Janney* for respondent. Reported below: 85 F. 2d 75.

No. 1009. NORTHERN PACIFIC RY. CO. *v.* TWOHY BROTHERS CO. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE BUTLER took no part in the consideration or decision of this application. *Mr. Charles A. Hart* for petitioner. *Messrs. De Lancey C. Smith* and *W. Lair Thompson* for respondent. Reported below: 95 F. 2d 220.

No. 907. CARLISLE LUMBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. May 23, 1938. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles H. Paul, George Donworth,* and *Charles T. Donworth* for petitioner. *Solicitor General Jackson,* and *Messrs. Robert L. Stern, Charles Fahy, Richard B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 94 F. 2d 138.

No. 954. BRADSHAW *v.* EASTUS, U. S. ATTORNEY, ET AL. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. B. Harrell* and *L. E. Martlew* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, William H. Boyd, M. Leo Looney, Jr.,* and *Earl C. Crouther* for respondents. Reported below: 94 F. 2d 788.

No. 963. UNITED STATES ET AL. *v.* SILVER LINE, LTD. ET AL. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Jackson* for petitioners. *Messrs. Ira S. Lillick* and *Joseph J. Geary* for respondents. Reported below: 94 F. 2d 754.

No. 964. EPPLEY HOTELS CO. *v.* LINCOLN ET AL. May 23, 1938. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. William J. Hotz* for petitioner. *Mr. Frederick H. Wagener* for respondents. Reported below: 133 Neb. 550; 276 N. W. 196.

No. 970. REMINGTON RAND, INC., *v.* NATIONAL LABOR RELATIONS BOARD. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George H. Bond, George H.*

Cohen, and *Tracy H. Ferguson* for petitioner. *Solicitor General Jackson,* and *Messrs. Robert L. Stern, Charles Fahy, Richard B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 94 F. 2d 862.

No. 972. ARN ET AL. *v.* DUNNETT ET AL. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. T. P. Gore* and *Finis E. Riddle* for petitioners. *Mr. Wesley E. Disney* for respondents. Reported below: 93 F. 2d 634.

No. 974. CONSUMERS CONSTRUCTION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 94 F. 2d 731.

No. 978. AMERICAN NATIONAL BANK *v.* AMES ET AL. May 23, 1938. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. George P. Barse, Tazewell Taylor,* and *L. E. Birdzell* for petitioner. *Messrs. Wm. G. Maupin* and *James E. Heath* for respondents. Reported below: 169 Va. 711; 194 S. E. 784.

No. 988. ALAMO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 989. ALEXANDER *v.* SAME. May 23, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Ash* for petitioners. *Solicitor General Jackson, Assistant Attorney*

General Morris, and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 95 F. 2d 622, 624.

No. 992. CONWAY ROAD ESTATES CO. *v.* FIRST NATIONAL BANK. May 12, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. L. London* for petitioner. *Mr. Hyman G. Stein* for respondent. Reported below: 94 F. 2d 736.

No. 998. WHITE ET AL. *v.* WOOD. May 23, 1938. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Abraham Chasanow* for petitioners. *Mr. Henry I. Quinn* for respondent. Reported below: 97 F. 2d 646.

No. 999. CAROLINA POWER & LIGHT CO. *v.* SOUTH CAROLINA PUBLIC SERVICE AUTHORITY ET AL.;

No. 1000. SOUTH CAROLINA POWER CO. *v.* SOUTH CAROLINA PUBLIC SERVICE AUTHORITY; and

No. 1001. SOUTH CAROLINA ELECTRIC & GAS CO. *v.* SOUTH CAROLINA PUBLIC SERVICE AUTHORITY ET AL. May 23, 1938. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Arthur R. Young, Wm. M. Rogers, Raymond T. Jackson,* and *W. C. McLain* for petitioners. *Messrs. R. M. Jefferies* and *W. J. McLeod, Jr.* for the Public Service Authority and its Board of Directors. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Paul A. Freund, Robert E. Sher,* and *Enoch E. Ellison* for federal officers Harold L. Ickes and Harry L. Hopkins. Reported below: 94 F. 2d 520.

No. 1012. CHICAGO *v.* JOSEPH, RECEIVER. May 23, 1938. Petition for writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. *Messrs. Barnet Hodes, Joseph F. Grossman,* and *J. Herzl Segal* for petitioner. *Messrs. Emmett J. McCarthy, George P. Barse, Robert R. Hanley,* and *Robert F. Carey* entered an appearance for respondent. Reported below: 95 F. 2d 444.

No. 872. BLACK DIAMOND STEAMSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. May 23, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioner. *Solicitor General Jackson, Robert L. Stern, Charles Fahy, Richard B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 94 F. 2d 875.

No. 993. CHAMPLIN REFINING CO. *v.* RYAN, SECRETARY OF STATE OF KANSAS. See *ante,* p. 549.

No. 1045. MOSHER *v.* AMERICAN SURETY CO. ET AL. May 31, 1938. See *ante,* p. 550.

No. 948. NED ET AL. *v.* ROBINSON. May 31, 1938. See *ante,* p. 550.

No. 22, original. EX PARTE HARRY M. BLAIR. May 31, 1938. The motion to defer consideration is denied. The motion for leave to file petition for writ of certiorari is granted and the petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. George Pfeil* for petitioner. Reported below: 95 F. 2d 995.

No. 1021. BLAIR ET AL. *v.* MCCLINTIC, JUDGE. May 31, 1938. The motion to defer consideration is denied and the petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Mr. George Pfeil* for petitioners. *Messrs. T. R. White* and *Thomas Hart* for respondent. Reported below: 95 F. 2d 995.

No. 1049. FOWLER, ADMINISTRATOR, ET AL. *v.* SEYMOUR, TRUSTEE. May 31, 1938. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is denied. *Mr. Calvin S. Mauk* for petitioners. *Mr. Thomas S. Tobin* for respondent. Reported below: 95 F. 2d 627.

No. 18, original. EX PARTE TINKOFF. May 31, 1938. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is denied. *Paysoff Tinkoff, pro se.*

No. 1051. SUHAY ET AL. *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph H. Brady* for petitioners. No appearance for the United State. Reported below: 95 F. 2d 890.

No. 1062. CARNEVALE *v.* NEW YORK. May 31, 1938. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Michael Carnevale, pro se. Mr. Henry Epstein* for respondent. Reported below: 277 N. Y. 667; 14 N. E. 2d 211; 252 App. Div. 835.

No. 1067. SANDLOFER *v.* NEW YORK CITY. May 31, 1938. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Abraham Sandlofer, pro se.* No appearance for respondent.

No. 1064. LONERGAN *v.* UNITED STATES. May 31, 1938. 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. Pierce Lonergan* for petitioner. No appearance for the United States. Reported below: 95 F. 2d 642.

No. 986. MCCAUGHN, DIRECTOR OF WHARVES, *v.* PHILADELPHIA PIERS, INC., ET AL. May 31, 1938. Petition for writ of certiorari to the Supreme Court of Pennsylvania is denied for the want of a final judgment. *Messrs. G. Coe Farrier* and *J. Harry LaBrum* for petitioner. *Messrs. Wm. A. Schnader, J. R. Guckes,* and *Windsor F. Cousins* for respondents. Reported below: 329 Pa. 147; 196 A. 861.

No. 937. MUTUAL BENEFIT HEALTH & ACCIDENT ASSN. *v.* MOYER. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Philip E. Horan* for petitioner. *Mr. George B. Grigsby* for respondent. Reported below: 94 F. 2d 906.

Nos. 982 and 983. AMERICAN WOOLEN CO. *v.* UNITED STATES. May 31, 1938. Petition for writs of certiorari to the Court of Claims is denied. *Messrs. Melville F. Weston* and *John W. Townsend* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr.*

Sewall Key for the United States. Reported below: 85 Ct. Cls. 101; 18 F. Supp. 783.

No. 987. PACIFIC STEAMSHIP LINES, LTD. *v.* MACK. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Keith R. Ferguson* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 95.

No. 994. MACKEY *v.* LITTLE ROCK ET AL. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Sam T. Poe* and *Tom Poe* for petitioner. *Messrs. Horace Chamberlin* and *George B. Rose* for respondents. Reported below: 94 F. 2d 546.

No. 995. LIVERMORE *v.* MILLER, COLLECTOR OF INTERNAL REVENUE. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph D. Farish* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Paul R. Russell* for respondent. Reported below: 94 F. 2d 111.

No. 1002. PILLSBURY FLOUR MILLS CO. *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Clark Hempstead* for petitioner. *Solicitor General Jackson,* and *Messrs. Charles D. Lawrence* and *John R. Benny* for the United States. Reported below: 25 C. C. P. A. (Customs) 351.

No. 1005. MURRAY ET AL. *v.* NEW YORK CITY ET AL. May 31, 1938. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. A. Gordon Murray* and *Albert G. Avery* for petitioners. *Mr. Paxton Blair* for respondents. Reported below: 278 N. Y. 475; 15 N. E. 2d 69; 252 App. Div. 853; 300 N. Y. S. 431.

No. 1006. WHITE *v.* YOUNGBLOOD. May 31, 1938. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Richard E. Westbrooke* for petitioner. *Corinne L. Rice* for respondent. Reported below: 367 Ill. 632; 12 N. E. 2d 650.

No. 1007. UNITED STATES EX REL. SCHMIDT ET AL. *v.* MILES, U. S. MARSHAL. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. G. Cavett* for petitioners. *Solicitor General Jackson,* and *Messrs. Hugh A. Fisher, William W. Barron,* and *W. Marvin Smith* for respondent. Reported below: 97 F. 2d 881.

No. 1013. LITTLEJOHN *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. A. M. Fitzgerald, Geo. B. Gillespie,* and *Edmund Burke* for petitioner. *Solicitor General Jackson,* and *Messrs. Hugh A. Fisher* and *W. Marvin Smith* for the United States. Reported below: 96 F. 2d 368.

No. 1024. MEYERS *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Sixth Circuit denied. *Mr. Arthur H. Ratner* for petitioner. *Solicitor General Jackson,* and *Messrs. Hugh A. Fisher, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 433.

No. 1034. CLARKE *v.* MARTIN, TRUSTEE. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter H. Eckert* for petitioner. *Mr. Livingston E. Osborne* for respondent. Reported below: 95 F. 2d 26.

No. 1041. UNITED STATES EX REL. REIBECK ET AL. *v.* KELLY, U. S. MARSHAL, ET AL. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Heller* for petitioners. *Solicitor General Jackson* and *Mr. Hugh A. Fisher* for the respondents. Reported below: 95 F. 2d 1022.

No. 1022. MOREHEAD ET AL. *v.* CENTRAL TRUST CO., EXECUTOR. May 31, 1938. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. George S. Hawke* for petitioners. *Mr. Wm. J. Rielly* for respondent. Reported below: 54 Ohio App. 9.

No. 1014. FIRST NATIONAL BANK & TRUST CO. *v.* UHL, RECEIVER. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benn M. Corwin* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 1013.

No. 1054. BREEN ET AL. *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David V. Cahill* for petitioners. No appearance for the United States. Reported below: 96 F. 2d 782.

No. 1055. CALLAGHAN ET AL. *v.* BROOKLYN TRUST CO. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Emanuel Celler* and *Thomas Cradock Hughes* for petitioners. *Mr. Ralph W. Crolly* for respondent. Reported below: 96 F. 2d 161.

No. 1015. JOHNSON *v.* IGLEHEART BROTHERS, INC. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert Stump* for petitioner. *Messrs. George S. Herr, Lester E. Waterbury,* and *Oscar McPeak* for respondent. Reported below: 95 F. 2d 4.

No. 1058. CENTRAL EXECUTIVE COUNCIL OF REMINGTON RAND EMPLOYEES' ASSNS. *v.* NATIONAL LABOR RELATIONS BOARD. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles H. Houston* and *Leon A. Ransom* for petitioner. No appearance for respondent. Reported below: 94 F. 2d 862.

No. 1011. GOLDSTONE *v.* PAYNE. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals

for the Second Circuit denied. *Mr. Benjamin Schenker* for petitioner. *Mr. Neil P. Cullom* for respondent. Reported below: 94 F. 2d 855.

No. 1061. MELLON *v.* UNITED STATES. May 31, 1938. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wm. Matthews* for petitioner. No appearance for the United States. Reported below: 96 F. 2d 462.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 12, 1938, THROUGH MAY 31, 1938.

No. 814. VALLI ET AL. *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the First Circuit. May 31, 1938. Dismissed on motion of counsel for the petitioners. *Mr. Essex S. Abbott* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron,* and *W. Marvin Smith* for the United States. Reported below: 94 F. 2d 687.

PETITIONS FOR REHEARING GRANTED, FROM APRIL 12, 1938, THROUGH MAY 31, 1938.

Nos. 396 and 1053. KELLOGG CO. *v.* NATIONAL BISCUIT COMPANY. May 31, 1938. The motion for leave to file a second petition for rehearing is granted. The second petition for rehearing is granted. The order denying a writ of certiorari is vacated and the petition for writ of certiorari seeking review of the judgment of the Circuit Court of Appeals entered on April 12, 1937, is granted. The petition for writ of certiorari seeking review of the order recalling and clarifying the mandate of the Circuit Court of Appeals is also granted. Further proceedings in the United States District Court for the District of Dela-

ware are stayed pending action of the Court upon the writs of certiorari hereby granted. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. *Messrs. W. H. Crichton-Clarke, Edward S. Rogers, Robert T. McCracken,* and *Thomas D. Thacher* for petitioner in No. 396. *Messrs. Thomas D. Thacher* and *W. H. Crichton-Clarke* for petitioner in No. 1053. *Messrs. Thomas G. Haight, David A. Reed, Drury W. Cooper,* and *Charles A. Vilas* for respondent. Reported below: 91 F. 2d 150. See 302 U. S. 654, 733, 777.

No. 674. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 675. ABERDEEN MOTOR SUPPLY CO. *v.* SAME; and

No. 676. F. E. ROWE SALES CO. *v.* SAME. May 31, 1938. The motion for leave to file a second petition for rehearing is granted. The second petition for rehearing is granted. The order denying certiorari is vacated and the petition for writs of certiorari is granted. *Messrs. Thomas G. Haight, George L. Wilkinson, John H. Bruninga,* and *John H. Sutherland* for petitioners. *Messrs. A. C. Denison, F. O. Richey,* and *Wm. C. McCoy* for respondents. Reported below: 92 F. 2d 330. See 303 U. S. 639, 667.

No. 357. GENERAL TALKING PICTURES CORP. *v.* WESTERN ELECTRIC CO. May 31, 1938. The petition for rehearing is granted upon the first two questions presented in the petition for writ of certiorari and the cause is assigned for argument on Monday, October 10, 1938. The motion to stay the mandate pending rehearing and determination by the Court is granted. *Messrs. Samuel E. Darby, Jr.* and *Ephraim Berliner* for petitioner. *Messrs. Merrell E. Clark* and *Henry R. Ashton* for respondents. Reported below: 91 F. 2d 922. See *ante,* p. 175.

PETITIONS FOR REHEARING DENIED, FROM APRIL 12, 1938, THROUGH MAY 31, 1938.*

No. 435. NEW YORK RAPID TRANSIT CORP. *v.* NEW YORK CITY; and

No. 436. BROOKLYN AND QUEENS TRANSIT CORPORATION *v.* NEW YORK CITY. April 25, 1938. 303 U. S. 573.

No. 563. UNITED STATES *v.* HENDLER, TRANSFEREE. April 25, 1938. 303 U. S. 564.

No. 455. DEITRICK, RECEIVER, ET AL. *v.* STANDARD SECURITY & CASUALTY CO. May 2, 1938. 303 U. S. 471.

No. 844. ROBERT JACOB, INC., *v.* GUNNARSON, ADMINISTRATRIX. May 2, 1938.

No. 856. QUICK ACTION IGNITION CO. *v.* BRIGGS & STRATTON CORP. May 2, 1938. 303 U. S. 661.

No. 943. CONWAY *v.* ALLEN, JUDGE. See *ante*, p. 547.

No. 304. KELLEY ET AL. *v.* ATLANTIC CITY ET AL. May 16, 1938. Motion for leave to file a second petition for rehearing is granted, and petition denied. 302 U. S. 722.

No. 831. BONET, TREASURER, *v.* QUILES. May 16, 1938. 303 U. S. 662.

No. 832. BONET, TREASURER, *v.* VALIENTE & CO. May 16, 1938. 303 U. S. 662.

No. 846. STANDARD MARINE INS. CO. *v.* WESTCHESTER FIRE INS. CO. May 16, 1938. 303 U. S. 661.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 858. HIGHWAY ENGINEERING & CONSTRUCTION CO. *v.* HILLSBOROUGH COUNTY. May 16, 1938.

No. 889. FLORENCE ET AL. *v.* CRUMMER. May 16, 1938.

No. 298. UNITED STATES EX REL. SOCIETE DE CONDENSATION ET D'APPLICATIONS MECANIQUES *v.* COE, COMMISSIONER OF PATENTS. May 23, 1938. Motion for leave to file second petition for rehearing granted, and petition denied. 302 U. S. 721, 776.

No. 240. LYNCH *v.* KEMP. May 23, 1938. Motion for leave to file petition for rehearing granted, and petition denied. 302 U. S. 685, 775.

No. 757. UNITED STATES *v.* BEKINS ET AL., TRUSTEES, ET AL. May 23, 1938.

No. 772. LINDSAY-STRATHMORE IRRIGATION DISTRICT *v.* BEKINS ET AL., TRUSTEES, ET AL. May 23, 1938.

No. 760. ARKANSAS FUEL OIL CO. *v.* LOUISIANA EX REL. MUSLOW. May 23, 1938.

No. 874. FORT WORTH ET AL. *v.* LONE STAR GAS CO. May 23, 1938.

No. 886. WIESE *v.* COMMISSIONER OF INTERNAL REVENUE. May 23, 1938.

No. 893. R. J. REYNOLDS TOBACCO CO. *v.* ROBERTSON, COLLECTOR OF INTERNAL REVENUE. May 23, 1938.

No. 581. MORGAN ET AL. *v.* UNITED STATES ET AL. See *ante*, p. 1.

No. 11, original (October Term, 1934). NEW JERSEY *v.* DELAWARE. May 31, 1938. The motion for leave to file petition for rehearing is granted, and petition denied. 291 U. S. 361; 295 U. S. 694.

No. 313. LONE STAR GAS CO. *v.* TEXAS ET AL. May 31, 1938.

No. 671. SCHULTZ *v.* LIVE STOCK NATIONAL BANK, ADMINISTRATOR. May 31, 1938. 302 U. S. 766.

No. 936. NATIONAL CARBON CO. *v.* WESTERN SHADE CLOTH CO. May 31, 1938.

No. 970. REMINGTON RAND, INC., *v.* UNITED STATES. May 31, 1938.

No. 985. SPRUILL *v.* DORSEY. May 31, 1938.

No. 988. ALAMO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. May 31, 1938.

No. 989. ALEXANDER *v.* COMMISSIONER OF INTERNAL REVENUE. May 31, 1938.

No. 882. ALLEN, COLLECTOR OF INTERNAL REVENUE, *v.* REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA. May 31, 1938.

AMENDMENT OF RULES OF COURT.

ORDER OF MAY 31, 1938.

It is ordered that paragraph 5(b) of Rule 38 of the Rules of this Court be amended so as to read as follows:

"(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

AMENDMENT OF CRIMINAL RULES.

ORDER OF MAY 31, 1938.

It is ordered that paragraph (3) of Rule II of the Rules of Practice and Procedure in Criminal Cases be, and the same is hereby, amended to read as follows:

"(3) Except in capital cases a motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment. In capital cases the motion may be made at any time before execution of the judgment."

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1935, 1936, AND 1937

	ORIGINAL			APPELLATE			TOTALS		
Terms	1935	1936	1937	1935	1936	1937	1935	1936	1937
Total cases on dockets	16	13	22	1,076	1,039	1,069	1,092	1,052	1,091
Cases disposed of during terms	4	1	9	986	941	1, 004	990	942	1, 013
Cases remaining on dockets	12	12	13	90	98	65	102	110	78

	TERMS		
	1935	1936	1937
Distribution of cases disposed of during terms:			
Original cases	4	1	9
Appellate cases on merits	269	270	286
Petitions for certiorari	717	671	718
Cases remaining on dockets:			
Original cases	12	12	13
Appellate cases on merits	56	53	34
Petitions for certiorari	34	45	31

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I. **Miscellaneous.**

1. *Rules of Construction.* Constitutional questions not decided unless necessary on record. *Arkansas Co.* v. *Louisiana*, 197.

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