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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1938

FROM APRIL 17, 1939 (CONCLUDED), TO AND INCLUDING
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Erratum.—303 U. S. 560, note 3, line 2, "302" should be 303.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

FRANK MURPHY, Attorney General.
ROBERT H. JACKSON, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the Acts of Congress in such cases made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, 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, WILLIAM O. DOUGLAS, 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.

For the District of Columbia, CHARLES EVANS HUGHES, Chief Justice.

April 24, 1939.

(For next previous allotment, February 6, 1939, see 306 U. S. p. iv.)

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(D) Foreign Statutes

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1938.

CHIPPEWA INDIANS OF MINNESOTA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 666. Argued March 30, 1939.—Decided April 17, 1939.

1. The Act of January 14, 1889, pursuant to which the bands of Chippewa Indians in Minnesota ceded their reservations to the United States and the United States undertook to sell land and timber, hold the proceeds in trust, expend income for purposes specified, and ultimately distribute the principal, all for the benefit of the Indians, did not create a conventional trust or abdicate guardianship over the Indians as tribal Indians. P. 3.
2. Congress therefore retained the power to make expenditures from the fund for the benefit of the Indians in ways not contemplated by that Act. P. 5.

88 Ct. Cls. 1, affirmed.

APPEAL from a judgment dismissing a suit brought by the above-named Indians for restoration of trust funds alleged to have been diverted by the United States.

Mr. Donald S. Holmes, with whom *Mr. Webster Ballinger* was on the brief, for appellants.

Mr. Raymond T. Nagle, with whom *Solicitor General Jackson, Acting Assistant Attorney General Collett,* and *Messrs. C. W. Leaphart* and *William R. Sherwood* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims [1] dismissing a suit brought to compel restoration of trust funds alleged to have been diverted by the appellee.

In 1926 Congress granted permission for the bringing of the suit,[2] which was instituted April 13, 1927. In order to permit the claim to be presented in its present form the permissive act was amended in 1934.[3] The appellants then filed an amended petition to which the appellee responded by a general traverse. The right of appeal from the judgment of the Court of Claims is conferred by Joint Resolution of June 22, 1936.[4]

The suit is for the enforcement of equitable claims arising under or growing out of the Act of January 14, 1889.[5] The appellants' theory is that the Act constituted an offer on the part of Congress for an agreement with the bands of Chippewas located in Minnesota, whereby, if these bands would cede the Indian title to their reservations, (which they did), the United States would sell the timber thereon and open the agricultural lands to settlement, and hold the proceeds of the timber and the lands, in trust, to expend the income for purposes specified in the statute, including payment of a portion of such income to the Indians, and to distribute the principal at the expiration of fifty years after allotments had been completed to all the members of the various bands on specified reservations.

[1] 88 Ct. Cls. 1.

[2] Act of May 14, 1926, c. 300; 44 Stat. 555, as amended by Acts of April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979.

[3] Act of June 18, 1934, c. 568, 48 Stat. 979.

[4] c. 714, 49 Stat. 1826.

[5] 25 Stat. 642.

The circumstances leading to the adoption of the Act and its relevant sections appear in earlier decisions of this Court and need not here be repeated.[6]

The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.

In this view the living Chippewas are beneficiaries of the income of the fund during the fifty year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen. It is urged that, as Congress has, from time to time, reimbursed the Treasury for expenditures for the benefit of the Chippewa Indians of Minnesota out of the fund, and has authorized other direct expenditures from the fund for the benefit of the Indians in ways not authorized by the Act, the United States has been guilty of a diversion of trust funds and that the appellants, as the representatives of the remaindermen, are entitled, on plain principles of equity, to demand restoration of the diverted sums to the corpus.

If, as the Court of Claims has found, the Act of 1889, and the cessions made pursuant to it, did not create a technical trust, we are relieved from considering many of the contentions pressed by the appellants in that court and here. We are of opinion that the Court of Claims was right in its decision that no such trust was created.

The original tribal status of the Chippewas is described in *Wilbur* v. *United States,* 281 U. S. 206, 208,

[6] *Wilbur* v. *United States,* 281 U. S. 206, 209, 210; *Chippewa Indians* v. *United States,* 301 U. S. 358, 362.

and *Chippewa Indians* v. *United States,* 301 U. S. 358, 360. It is unnecessary now to restate what was there said on the subject.

It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to its adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.

This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals.[7] Many of these statutes refer to the Chippewas of Minnesota as a tribe.[8] Moreover, an examination of the Act

[7] Aug. 19, 1890, c. 807, 26 Stat. 336, 357. Between 1890 and 1926 Congress appropriated, either from the fund created under the Act of 1889 or from public funds reimbursable therefrom, a total of $5,105,059 for the civilization and support of the Chippewas. (Findings 9, 10, 15.) During the period 1889 to 1934 Congress authorized the expenditure of public funds totaling $5,065,878 for the use and benefit of the Chippewas without any provision for reimbursement. (Finding 20.)

[8] Aug. 1, 1914, c. 222, 38 Stat. 582, 592; May 18, 1916, c. 125, 39 Stat. 134, 135; March 2, 1917, c. 146, 39 Stat. 969, 979; May 25, 1918, c. 86, 40 Stat. 561, 572; June 30, 1919, c. 4, 41 Stat. 3, 14; February 14, 1920, c. 75, 41 Stat. 408, 419; November 19, 1921, c. 133, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat. 7; March 4, 1929, c. 705, 45 Stat. 1562, 1584.

of 1889 discloses that it is not cast in the form of an agreement; and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.

It is not contended that the expenditures made from the fund, or reimbursed from it, were not for the benefit of the Indians or were not such as properly might be made for their education and civilization, the purposes stated in the Act of 1889.

We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of the tribal property for the benefit of its Indian wards.

The judgment of the Court of Claims is

Affirmed.

ELECTRIC STORAGE BATTERY CO. *v.* SHIMADZU ET AL.

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

No. 441. Argued February 28, 1939.—Decided April 17, 1939.

1. Under R. S. § 4886, a patent for an invention made but not patented or published in a foreign country, is good, in a suit for infringement, against an innocent infringing use in this country for which no patent right is claimed and which began before the date of the application but after the actual date of the invention. Pp. 10 *et seq.*
2. R. S. § 4887 contains no provision which precludes proof of facts respecting the actual date of invention in a foreign country to overcome the prior knowledge or use bar of § 4886. P. 12.
3. R. S. § 4923, which provides that if the patentee, at the time of his application, believed himself the original or first inventor, his patent shall not be refused or held void by reason of the invention having been known or used in a foreign country, before his invention or discovery, if it had not been patented or described in

a printed publication, *held* inapplicable where the litigation is between the patentee of a foreign invention, or his assignee, and an alleged infringer who defends only in virtue of prior knowledge or use not covered by patent. P. 13.

4. Repeated amendment of sections of the Patent Laws without alteration of provisions theretofore construed by the courts, implies legislative approval of such constructions. P. 14.
5. The question whether an invention has been abandoned is one of fact. P. 15.
6. R. S. § 4920 makes abandonment an affirmative defense which must be pleaded and proved. P. 16.

   Held in this case that the defense was waived by failure to plead it in the original answer or by amendment, and that the circumstances did not afford an excuse on the ground of surprise.
7. Findings of the District Court to the effect that a foreign inventor limited his application for a foreign patent to one step of his process, and, for motives not inquired into, withheld more essential features for future patenting, are not to be construed in this case as meaning that he concealed the full invention and delayed applications for the purpose of extending unduly the life of his patents. P. 15.
8. Under R. S. § 4886, a valid patent can not issue for an invention in public use in this country for more than two years prior to the filing of the application. P. 17.

   This defense was duly pleaded in this case by denials of negative allegations of the bill and by affirmative allegations, in the answer. P. 17.
9. The ordinary use of a machine or the practice of a process in a factory in the usual course of producing articles for commercial purposes is a public use within the meaning of R. S. § 4886. P. 18.

   So held where the defendant had continuously employed the allegedly infringing machine and process for the production of lead oxide powder used in the manufacture of plates for storage batteries which were sold in quantity, and where the machine, process and the product were well known to the employees in the plant, and no efforts were made to conceal them from anyone who had a legitimate interest in understanding them.
10. Upon finding that two of the patents sustained by the courts below are invalid because of more than two years' public use prior to application, the Court directs that the bill be dismissed as to them; but as to a third patent, not subject to that objection, it

directs that the questions of validity in other respects and of infringement be re-examined by the District Court. Pp. 20, 22.

As to Patent No. 1,584,149, to Shimadzu, Claims 1 and 2, for a method of forming finely divided lead powder, the cause is remanded for further examination in regard to validity and infringement.

Patent No. 1,584,150, to Shimadzu, Claims 1–4, 6, 8–13, for a method or process of manufacturing a powder composed of metallic and oxidized lead; and Patent No. 1,896,020, to Shimadzu, Claims 10 and 11, for an apparatus for the continuous production of lead oxides, *held* invalid.

98 F. 2d 831, reversed.

CERTIORARI, 305 U. S. 591, to review the affirmance of a decree, 17 F. Supp. 42, enjoining alleged infringement of three patents and referring the cause to a Special Master for an accounting.

Mr. Hugh M. Morris, with whom *Messrs. Augustus B. Stoughton* and *Alexander L. Nichols* were on the brief, for petitioner.

Messrs. Edmund B. Whitcomb and *George Whitefield Betts, Jr.,* with whom *Messrs. Joseph W. Henderson* and *George Yamaoka* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The courts below have held valid and infringed certain claims of three patents [1] granted to Genzo Shimadzu, a citizen and resident of Japan. The earliest is for a method of forming a finely divided and, consequently, more chemically reactive, lead powder. The second is for a method or process of manufacturing a fine powder composed of lead suboxide and metallic lead and for the product of

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[1]

Patents.	*Date granted*	*Claims*
1,584,149	5/11/1926	1 and 2
1,584,150	5/11/1926	1–4, 6, 8–13
1,896,020	1/31/1933	10 and 11

the process. The third is for an apparatus for the continuous production of lead oxides in the form of a dry fine powder. Such powder is useful in the manufacture of plates for storage batteries.

The bill was filed by the respondents as patentee and exclusive licensee. The answer denied that Shimadzu was the first inventor; asserted knowledge and use of the invention by the petitioner in the United States more than two years prior to the dates of the applications; and pleaded that earlier patents procured by Shimadzu in Japan avoided the United States patents as the former were for the same inventions and each was granted more than a year prior to the filing of the corresponding application in this country. The case was tried, the District Court found the facts, stated its conclusions, and entered a decree for the respondents,[2] which the Circuit Court of Appeals affirmed.[3] The petitioner sought certiorari alleging that the case presents three questions, one which should be settled by this court and two which were decided below contrary to our adjudications.

The questions are: In an infringement suit by the owner of a patent for an invention, made but not patented or published abroad, to restrain an innocent use, the inception of which antedates the application for patent, may the plaintiff prove that his actual date of invention was earlier than the commencement of the asserted infringing use? Is the delay of the patentee in this case in applying for patent a bar to relief for alleged infringement? Does commercial use of the patented process and apparatus in the alleged infringer's plant for more than two years prior to the application for patent preclude redress?

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[2] 17 F. Supp. 42.

[3] 98 F. 2d 831.

No controversy of fact is involved as the petitioner concedes it must accept the concurrent findings of the courts below.[4] The relevant facts lie within a narrow compass.

The inventions which are the basis of the patents were conceived by Shimadzu and reduced to practise in Japan not later than August 1919. He did not disclose the inventions to anyone in the United States before he applied for United States patents. Application was presented for No. 1,584,149 on January 30, 1922; for No. 1,584,150 on July 14, 1923; and for No. 1,896,020 on April 27, 1926. The inventions were not patented or described in a printed publication in this or any foreign country prior to the filing of the applications. The petitioner, without knowledge of Shimadzu's inventions, began the use of a machine, which involved both the method and the apparatus of the patents, at Philadelphia, Pennsylvania, early in 1921 and attained commercial production in June 1921. Over the objection of the petitioner the respondents were permitted by testimony, and by the introduction of contemporaneous drawings and note books, to carry the date of invention back to August 1919, and the courts below fixed that as the date of invention and reduction to practise in Japan.

First. The petitioner asserts that R. S. 4886, 4887, and 4923,[5] considered together, require one who has made

[4] At the trial the respondents relied, to some extent, upon an adjudication in an interference proceeding between Shimadzu and Hall, an employe of the petitioner who in 1924 applied for a patent for a process of producing finely powdered mixed lead and lead oxide. See *Hall* v. *Shimadzu,* 59 F. 2d 225. The courts below have held that this interference has no bearing upon the present controversy and their holding in this respect involves questions of fact. As the respondents did not cross-petition they may not, in this court, attack the findings in question.

[5] U. S. C. Tit. 35, §§ 31, 32, 72.

an invention abroad to take as his date of invention the date of his application in the United States unless, prior thereto, the invention has been communicated and described to someone in this country, or has been patented abroad. The respondents insist that the sections have no such force. They say that where the alleged infringer is not acting under the supposed protection of a prior patent, but is using an unpatented process or device, the holder of a patent for a foreign invention, like the holder of one for an invention made here, may show novelty by proving that his invention antedated his application and the infringing use.

The solution of the issue requires examination of two of the sections in the light of their development from earlier patent statutes.

R. S. 4886, as it stood when the patents were granted,[6] was:

"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 a patent therefor."

The legislative history of the section may be briefly outlined. The Patent Act of 1790[7] authorized the grant

[6] The section was amended by the Act of May 23, 1930, c. 312, § 1, 46 Stat. 376, to authorize the patenting of inventions of certain plants.

[7] Act of April 10, 1790, § 1, 1 Stat. 109.

of a patent to "any person or persons" who made an invention "not before known or used." The succeeding Act of 1793 [8] confined the privilege to "a citizen or citizens of the United States," but the Act of 1800 [9] conferred it on any alien who, at the time of his application, had resided for two years within the United States. By the Act of 1836 [10] it was provided that a patent might be obtained by "any person or persons." The Act of 1870,[11] which was carried into the Revised Statutes, added the words "in this country" as they appear in the first bracket in the foregoing quotation. The Act of 1897 [12] added the three other bracketed clauses.

The requirement of the Act of 1790 was that the discovery be "not before known or used." The Act of 1793 amended this to read "not known or used before the application." The Act of 1800 altered the provision so that the petitioner had to swear that his invention had not "been known or used either in this or any foreign country." The Act of 1836 changed the knowledge and use clause to read "not known or used by others before his or their discovery or invention thereof."

These successive alterations throw into relief the fact that the section makes the criterion of novelty the same whether the invention was conceived abroad or in this country. The test is whether the invention was "known or used by others in this country, before his invention or discovery thereof . . ." The elements which preclude patentability are a patent, or a description in a printed publication in this or any foreign country, which antedates the invention or discovery of the applicant.

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[8] Act of Feb. 21, 1793, § 1, 1 Stat. 318.

[9] Act of April 17, 1800, § 1, 2 Stat. 37.

[10] Act of July 4, 1836, § 6, 5 Stat. 117, 119.

[11] Act of July 8, 1870, c. 230, § 24, 16 Stat. 198, 201.

[12] Act of March 3, 1897, c. 391, § 1, 29 Stat. 692.

None of the statutes has ever embodied as an element the place of invention or discovery, but the change effected by the Act of 1836, and carried forward in all succeeding statutes, is the fixation of the actual date of the inventive act as the date prior to which the invention must have been known or used to justify denial of a patent for want of novelty. The omission of any limitation as to the place of invention or discovery precludes a ruling imposing such a limitation, especially so since the Act of 1870 expressly limited the area of prior knowledge or use to this country.

The provisions of R. S. 4886 which affect the question are not modified by R. S. 4887, the purpose of which is to permit the filing of applications for the same invention in foreign countries and in the United States. It derives from § 25 of the Act of 1870.[13]

The second paragraph of the section, which was added by the Act of 1903 [14] to comply with reciprocal agreements with foreign countries, gives the same force and effect to the filing of an application in a foreign country as it would have if filed here on the date on which the application for patent was first filed in the foreign country, provided that the domestic application is filed within twelve months of the foreign filing date. The last sentence of the paragraph expressly preserves the bars of more than two years' prior patenting, description in a printed publication before the filing of application in this country, and public use, more than two years before such filing. But the section does not contain any provision which precludes proof of facts respecting the actual date of invention in a foreign country to overcome the prior knowledge or use bar of § 4886.

The petitioner also relies upon R. S. 4923, which provides that if the patentee, at the time of his application,

[13] § 25, 16 Stat. 201.

[14] Act of March 3, 1903, § 1, c. 1019, 32 Stat. 1226.

believed himself the original or first inventor, his patent shall not be refused or held void by reason of the invention having been known or used in a foreign country, before his invention or discovery, if it had not been patented or described in a printed publication. The effect of this section is that in an interference between two applicants for United States patent, or in an infringement suit where the alleged infringer relies upon a United States patent, the application and patent for the domestic invention shall have priority despite earlier foreign knowledge and use not evidenced by a prior patent or a description in a printed publication.

The section, on its face, is without application where the litigation is between the patentee of a foreign invention, or his assignee, and an alleged infringer who defends only in virtue of prior knowledge or use not covered by a patent.

While this court has never been called upon to decide the precise question presented, the lower federal courts have refused to extend § 4923 to such a case. They have held that § 4886 does not limit the plaintiff to the date of application in this country but that he may prove the invention was in fact made at an earlier date, as could the owner of an invention made in the United States.[15]

There is force in the petitioner's argument that the distinction seems illogical. Thus, if a diligent domestic inventor applies, in good faith believing himself to be the first inventor, § 4923 assures him a patent and gives it priority, despite prior foreign use, even though that use is evidenced by a patent applied for after the invention made in this country. The foreign applicant or patentee

[15] *Hanifen* v. *E. H. Godshalk Co.*, 78 F. 811; *Welsbach Light Co.* v. *American Incandescent Lamp Co.*, 98 F. 613; *Badische Anilin & Soda Fabrik* v. *Klipstein & Co.*, 125 F. 543; *Claude Neon Lights, Inc.* v. *Rainbow Light, Inc.*, 47 F. 2d 345.

cannot carry the date of his invention back of the date of application in this country, as the holder of a later patent for an invention made here would be permitted to do in order to establish priority. On the other hand, a domestic inventor who is willing to dedicate his invention to the public may be held as an infringer by reason of the later patenting of an invention abroad which antedates the invention and use in this country; and so is put in a worse position *vis à vis* a foreign inventor who subsequently secures a patent, and succeeds in establishing an earlier date of invention, than he would occupy if he had promoted his own interest by procuring a patent.

We have no way of knowing whether the discrimination results from inadvertence or from some undisclosed legislative policy, but, in order to redress the disadvantage under which one in the petitioner's situation suffers, we should have to read into the law words which plainly are missing.[16] We cannot thus rewrite the statute.[17] Moreover §§ 4886 and 4887 have repeatedly been amended and other portions of the patent act have been revised and amended from time to time since the decisions pointing out that § 4886 did not prevent the foreign inventor from carrying back his date of invention beyond the date of his application. Congress has not seen fit to amend the statute in this respect and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts.[18]

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[16] The petitioner would have us insert in § 4886, for the third time, the words "in this country" which Congress has twice inserted in the section by amendment. The petitioner's argument requires us to read the section as if the phrase "in this country" appeared between the words "discovery thereof" and the words "and not patented."

[17] *Dewey* v. *United States,* 178 U. S. 510.

[18] *Sessions* v. *Romadka,* 145 U. S. 29, 41–42; *Manhattan Properties, Inc.* v. *Irving Trust Co.,* 291 U. S. 320, 336; *United States* v. *Elgin, J. & E. Ry. Co.,* 298 U. S. 492, 500; *Missouri* v. *Ross,* 299 U. S. 72, 75.

We are of opinion that the courts below were right in not limiting Shimadzu's date of invention to the date of his application but allowing him to show an earlier actual date.

Second. A patent is not validly issued if the invention "is proved to have been abandoned." [19] Abandonment may be evidenced by the express and voluntary declaration of the inventor; [20] it may be inferred from negligence or unexplained delay in making application for patent; [21] it may be declared as a consequence of the inventor's concealing his invention and delaying application for patent in an endeavor to extend the term of the patent protection beyond the period fixed by the statute.[22] In any case, the question whether the invention has been abandoned is one of fact.[23]

Referring to a Japanese patent applied for November 27, 1920, and issued May 10, 1922, the District Court found: "We are not concerned with the motives which prompted him . . . to confine it [the Japanese patent] to the single step of mechanical removal of the dust from the drum, and to withhold the really essential steps of the invention for later patenting. It is sufficient to say that he had the right to do this if he chose." Taken in connection with the court's finding that Shimadzu's inventions were conceived and reduced to practise in August 1919 this finding is said to convict him of intentional and inexcusable concealment. In the light of the record we are unable so to hold.

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[19] R. S. 4886, *supra.*

[20] *Kendall* v. *Winsor,* 21 How. 322, 329; *U. S. Rifle & Cartridge Co.* v. *Whitney Arms Co.,* 118 U. S. 22, 25.

[21] *Consolidated Fruit-Jar Co.* v. *Wright,* 94 U. S. 92, 96; *U. S. Rifle & Cartridge Co.* v. *Whitney Arms Co., supra,* p. 25.

[22] *Kendall* v. *Winsor, supra,* p. 328; *Macbeth-Evans Glass Co.* v. *General Electric Co.,* 246 F. 695; *Bliss Co.* v. *Southern Can Co.,* 251 F. 903; *Victor Talking Machine Co.* v. *Starr Piano Co.,* 281 F. 60.

[23] *Pennock* v. *Dialogue,* 2 Pet. 1, 16.

R. S. 4920 [24] makes abandonment an affirmative defense which must be pleaded and proved.[25] Admittedly the defense was not pleaded and the respondents assert, without contradiction, that it was not relied upon in brief or argument in the courts below. The petitioner explains its failure so to plead by saying that, when it filed its answer, it believed that certain of the Japanese patents issued to Shimadzu covered the identical inventions described in the patents in suit and invalidated the latter because application was not made in this country within one year of the grant of the foreign patents as required by R. S. 4887. The claim is that the refusal to sustain this defense and the assignment of August 1919 as the date of invention, took petitioner by surprise; and that the question of Shimadzu's concealment of his invention from 1919 until he made his applications in the United States did not emerge until the District Court's decision was rendered.

We think this is not a sufficient excuse for not pleading the defense. Alternative and inconsistent defenses may be pleaded.[26] Certainly if the petitioner was surprised it could at least have requested an opportunity to amend its answer. If the defense had been pleaded originally or by amendment the respondents would have had an opportunity to meet it by proof and this they appear not to have been afforded. We have a finding which seems not to have been addressed to this issue; and no findings as to the circumstances which led to the delay in filing applications. In the circumstances we think we are not justified in assigning to the findings below the force of a finding that Shimadzu, with intent, concealed

[24] U. S. C. Tit. 35, § 69.

[25] *Crown Cork Co.* v. *Gutmann Co.*, 304 U. S. 159, 165. Compare *Mumm* v. *Decker & Sons*, 301 U. S. 168, 171.

[26] *Jones* v. *Sewall*, 13 Fed. Cas. 1017, 1028; *Specialty Brass Co.* v. *Sette*, 22 F. 2d 964, 966; *Walsh* v. *Wahle Co.*, 25 F. 2d 350, 351.

his invention and delayed making applications for the purpose of unduly extending the life of his patents,—a defense not pleaded.

Third. If a valid patent is to issue, the invention must not have been in public use in this country for more than two years prior to the filing of the application.[27] Such public use is an affirmative defense to be pleaded and proved.[28] The respondents insist that it was not pleaded in this case and that the findings respecting the defense, on which the petitioner relies, are unsupported by the evidence. We cannot agree with either position.

Although not required so to do, the respondents in their bill pleaded with respect to each of the patents that the invention had not been in public use for more than two years before application filed. The petitioner denied the allegation as to each patent and, in addition, alleged that it was successfully making and selling the product of the invention in its plant long before it ever learned of Shimadzu's existence or his inventions, and further asserted that "the claims of said letters patent are invalid and void because the subject matter thereof was, prior to the alleged invention thereof by Shimadzu, and for more than two years prior to his application dates, known to and used by the defendant at Philadelphia, Pennsylvania, . . ." Upon the trial, employes of the petitioner described an early apparatus and process used in 1918 and 1919 and abandoned in the latter year when experiments began towards employment of the apparatus and process the petitioner now uses. They testified to the increasing perfection of the apparatus and process during the early months of 1921, and that commercial production was accomplished sometime between

[27] R. S. 4886, *supra.*

[28] R. S. 4920, *supra; Klein* v. *Seattle,* 63 F. 702; *Hookless Fastener Co.* v. *Rogers Co.,* 26 F. 2d 264.

April and June of that year. Former employes of the petitioner were called by the respondents and described this apparatus and process as used and practised in the petitioner's plant in Philadelphia subsequent to the date of Shimadzu's applications, but the evidence indicates that, after its perfection in 1921, the same apparatus has been used, and the same process practised, from that date to the present. This is the apparatus and process which the courts below have held to infringe. The District Court found "commercial production by the Hardinge mill with its forced air draft undoubtedly involved the use of the plaintiff's patent, and June, 1921, may be fixed as the date when that began." The respondents insist that this does not amount to a finding of prior public use, distinguishing between the court's phrase "commercial production" and the designation "public use" found in the statute. We think the position is untenable.

The finding of the District Court appears under a heading in its opinion entitled "Alleged Prior Public Use." As originally promulgated the finding fixed January 1921 as the date of commercial production. The respondents sought a rehearing and asked that the finding as to commercial production in January 1921 be revised. A rehearing was granted and the District Judge filed a memorandum amending his opinion. In this he said: "As to the second statement of fact, it may be said at once that it was never intended by the Court to make a finding of a prior public use (in the statutory sense of that term) by the defendant in January 1921." After discussing the use of the apparatus in the early months of 1921, the court said: "It is therefore plain that there is no evidence of anything beyond an experimental use by the defendant earlier than about the middle of the year 1921. It is entirely possible that the word 'January' in

the second statement of fact referred to above is a mere typographical error and that what the Court had in mind was, 'June.' However that may be and in order to avoid any possible misunderstanding as to the scope of the finding, I will amend it to read 'Commercial production by the Hardinge mill with its forced air draft undoubtedly involved the use of the plaintiff's patent, and June, 1921, may be fixed as the date when that began.' "

Both parties appealed to the Circuit Court of Appeals. That the respondents understood the force and effect of the finding as to prior use is evident from their assignments, one of which is that the District Court erred "in finding and adjudging that commercial production by the Hardinge mill with its forced draft involving the use of plaintiff's patent began in June 1921."

It remains to determine whether the commercial use found is, in contemplation of law, a public use within the meaning of R. S. 4886. We hold that it is.

The earlier Acts provided that the bar should consist in public use or sale "with the applicant's consent or allowance prior to the application." [29] The Act of 1839 [30] altered the clause to read "no patent shall be held to be invalid" except upon proof that "such . . . prior use has been for more than two years prior to such application for a patent." This court construed the later Act, which has been carried forward into the revised statutes, as rendering prior public use a bar whether the use was with or without the consent of the patentee.[31]

Decisions turning on prior public use have been numerous both in this court and in other federal courts; and the definition of such use, formulated when the statute made only use by consent a bar, has been adopted in

[29] Act of July 4, 1836, § 7, 5 Stat. 117, 119.

[30] Act of March 3, 1839, § 7, 5 Stat. 353, 354.

[31] *Andrews* v. *Hovey,* 123 U. S. 267; on rehearing, 124 U. S. 694.

instances where the use was without consent or knowledge of the applicant for patent.[32]

A mere experimental use is not the public use defined by the Act,[33] but a single use for profit, not purposely hidden, is such.[34] The ordinary use of a machine or the practise of a process in a factory in the usual course of producing articles for commercial purposes is a public use.[35]

In the present case the evidence is that the petitioner, since June 1921, has continuously employed the alleged infringing machine and process for the production of lead oxide powder used in the manufacture of plates for storage batteries which have been sold in quantity. There is no finding, and we think none would have been justified, to the effect that the machine, process, and product were not well known to the employes in the plant, or that efforts were made to conceal them from anyone who had a legitimate interest in understanding them.[36] This use, begun more than two years before Shimadzu applied for patents 1,584,150 and 1,896,020, invalidated the claims in suit.

Fourth. The defense of prior public use is not made out against patent 1,584,149, for which application was

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[32] *Detroit Lubricator Co.* v. *Lunkenheimer,* 30 F. 190; *United States Electric Lighting Co.* v. *Edison Lamp Co.,* 51 F. 24, 28; *Front Rank Steel Furnace Co.* v. *Wrought Iron Range Co.,* 63 F. 995, 998; *A. Schrader's Sons, Inc.* v. *Wein Sales Corp.,* 9 F. 2d 306, 308; *Twyman* v. *Radiant Glass Co.,* 56 F. 2d 119; *In re Martin,* 74 F. 2d 951; *Paraffine Co.* v. *Everlast, Inc.,* 84 F. 2d 335; *Becker* v. *Electric Service Supplies Co.,* 98 F. 2d 366.

[33] *Elizabeth* v. *Pavement Co.,* 97 U. S. 120, 134.

[34] *Consolidated Fruit-Jar Co.* v. *Wright, supra,* 94; *Egbert* v. *Lippmann,* 104 U. S. 333, 336.

[35] *Manning* v. *Cape Ann Isinglass Co.,* 108 U. S. 462, 465; *Twyman* v. *Radiant Glass Co., supra; Paraffine Co.* v. *Everlast, supra,* pp. 338, 339.

[36] Compare *Hall* v. *Macneale,* 107 U. S. 90, 96–97.

filed January 30, 1922. The defendant's commercial production commenced about six months earlier. The District Court held the patent valid and infringed. Its claims cover merely a process for the production of a finely divided chemically reactive lead powder by introducing relatively large masses of lead into a rotatable vessel, rotating the vessel at a relatively low speed, forming the powder by attrition resulting from the rubbing of the masses against each other, and blowing the powder from the vessel by a current of air. The process and apparatus covered by the other two patents in issue involve use and control of an air current and use and control of temperature within the receptacle for the oxidation of the lead. With respect to 1,584,149 the trial court said:

"Whether or not '149 is for the same process as U. S. patent '150 is immaterial, so far as the question of validity of either is concerned. There is no double patenting involved. The two patents issued on the same day. They both expired on the same day. There can be no extension of the monopoly and one is not prior art against the other.

"The fact that '149 does not disclose the oxidizing function of the air or refer to the highly important element of the process having to do with the temperature control necessary to its successful operation might throw doubt upon its validity in view of the prior art. This is, of course, upon the assumption that it is not for the same invention as '150. The whole matter however is rather academic since '149 is coincident in duration with '150, and the defendant's process infringes the somewhat more precise, if not narrower, claims of '150.

"This patent is therefore held valid and infringed."

The holding was assigned as error in the Circuit Court of Appeals and is specified as error in the petition for certiorari.

In view of our decision as to 1,584,150 and of the basis of the decision below respecting 1,584,149, we think the petitioner is entitled to a reëxamination of the questions of the validity and infringement of the latter.

The decree of the Circuit Court of Appeals must be reversed and the cause remanded to the District Court with directions to dismiss the bill as to Nos. 1,584,150 and 1,896,020, and to proceed, in the light of the dismissal as to those patents, to determine whether 1,584,149 is valid and infringed.

Reversed.

KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* STRECKER.

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

No. 330. Argued February 10, 13, 1939.—Decided April 17, 1939.

1. Section 1 of the Act of October 16, 1918, as amended, provides that aliens of described classes, including "aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States . . .", shall be excluded from admission to the United States. Section 2 provides that "any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any of the classes of aliens enumerated" in Section 1, shall, upon warrant of the Secretary of Labor, be taken into custody and deported, in the manner provided by law.

   Held that an alien who after entry becomes a member of such an organization is not deportable on that ground if at the time of his arrest his membership has ceased. P. 30.

2. The legislative history of the statute supports this conclusion. P. 30.

3. This reading of the statute makes it unnecessary in this case to pass upon the adequacy of the evidence before the Secretary con-

cerning the purposes and aims of the Communist Party or the propriety of the court's taking judicial notice thereof. P. 33.

4. The record in this case does not justify reversal of a holding of the court below that the evidence before the Secretary of Labor was insufficient to support his finding that the respondent alien believes in and teaches the overthrow, by force and violence, of the Government of the United States. P. 34.
5. When no issue of citizenship is raised, an administrative order for deportation of an alien made after fair hearing, based on findings supported by evidence and without error of law, is conclusive; if any of these elements was lacking it is void. The matter can not be tried *de novo* in *habeas corpus*. P. 34.

95 F. 2d 976; 96 *id.* 1020, affirmed, with modification.

CERTIORARI, 305 U. S. 587, to review the reversal of a judgment dismissing a writ of *habeas corpus*.

Solicitor General Jackson, with whom *Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Matthew F. McGuire, Benjamin M. Parker,* and *W. Marvin Smith* were on the brief, for petitioner.

Messrs. Whitney North Seymour and *C. Alpheus Stanfield,* with whom *Messrs. Herbert T. Wechsler* and *Carol King* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Martin Dies,* urging reversal; and by *Mr. Joseph R. Brodsky* on behalf of the Communist Party of the United States, urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondent is an alien who entered the United States in 1912 and has since resided here. In 1933 he applied for naturalization to a United States District Court in Arkansas. He made certain admissions to a District Director of Naturalization as a result of which

naturalization was withheld and his case was referred to the Department of Labor.

November 25, 1933, the Second Assistant Secretary of Labor issued a warrant for the respondent's apprehension, in which it was recited that he was in the United States in violation of law in that (1) he believes in, advises, advocates or teaches the overthrow, by force or violence, of the Government of the United States; (2) he is a member of, or affiliated with, an organization, association, society, or group that believes in, advises, advocates or teaches the overthrow, by force or violence, of the Government of the United States; (3) he is a member of, or affiliated with, an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for these purposes written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government of the United States; and (4) after his entry into the United States he has been found *to have become* a member of one of the classes of aliens enumerated in § 1 of the Act of October 16, 1918, as amended by the Act of June 5, 1920, to wit: an alien who is a member of, or affiliated with, an organization, association, society or group that believes in, advises or teaches the overthrow, by force and violence, of the Government of the United States.

The respondent was apprehended and was given hearings before an Immigration Inspector, at which he was represented by counsel and testified in his own behalf. The Government offered in evidence transcripts of his examination by the Naturalization Bureau, of an interview with him by an Immigration Inspector, and his membership book in the Communist Party of the U. S. A., issued November 15, 1932, with stamps affixed showing payment of dues to the end of February, 1933. The rules

of the party, set forth in the book, provided that failure to pay dues for three months automatically results in the loss of membership, and it is admitted there is no evidence respondent continued to be a member after March 1, 1933.

The book contained printed matter stating the purposes and objects of the party. The Government also offered a copy of a magazine called "The Communist," dated April 1934, and read into the record excerpts from articles appearing therein. The respondent admitted that he joined the Communist Party in November 1932, asserted that his membership terminated prior to March 1, 1933, and had never been renewed, and professed ignorance of the magazine called "The Communist" and its contents. In some respects his testimony as to his beliefs and actions was contradictory of his statements on prior examinations, and testimony was elicited from him in an effort to show that his denial of present affiliation with the Communist Party might not be made in good faith; but there was no sufficient evidence to sustain that conclusion. After a review of the record by the Board of Review of the Department of Labor, a warrant of deportation was issued by the Assistant Secretary which recites an affirmative finding as to each of the counts in the warrant of arrest and orders the respondent's deportation.[1]

The respondent petitioned a federal district court in Arkansas for a writ of *habeas corpus* to deliver him from the custody of the Immigration Inspector. The writ was denied. Thereafter he filed the petition in the instant case in the District Court for Louisiana. In this peti-

[1] The delay in this case is due to the fact that respondent was born an Austrian subject but was refused reëntry into that country on the ground that the place of his birth is now in Poland. Protracted negotiations on the part of the Department were required to obtain the consent of the government of Poland to his return to that country.

tion he alleged that he had not been accorded a fair hearing; that the Department of Labor had not correctly construed the immigration laws applicable to his case; that the findings were without support in the evidence; that he had been denied due process of law, and that he is not a citizen of Poland, to which the warrant directed his remission. The District Court dismissed the writ. The respondent appealed to the Circuit Court of Appeals assigning error to the District Court's action in denying each of his contentions. That court found that the hearings had been fair, but held that each of the findings recited in the warrant was without support in the evidence. The court was of opinion the evidence failed to show that the respondent is now a member of the Communist Party or that he or that party, in 1933, taught, advocated, or incited the overthrow of the Government by force and violence, and that the record was bare of evidence to countervail his denial that he had ever taught or believed in the unlawful destruction or overthrow of the Government by force. The court held that the Acts of 1918 and 1920 were passed to meet a situation caused by crises in Russia in 1918 and 1919; [2] that the major changes in policy and conduct of the Soviet Socialist Republics which had taken place between 1918 and 1933 rebutted the implications arising from membership in the Communist Party at the time the Acts were adopted; that mere membership in that party in 1933 is not a statutory ground for deportation. The order of the District Court was reversed and the cause was remanded for further proceedings not inconsistent with the opinion.[3]

The Government moved for a rehearing, pressing specially the contention that the overwhelming weight of

[2] That this view is erroneous is shown by the history of the legislation referred to *infra*, p. 30. Compare, House Report 504, 66th Cong., 2nd Sess., p. 7; Senate Report 648, 66th Cong., 2nd Sess., p. 4.

[3] 95 F. 2d 976.

authority is to the effect that membership in the Communist Party is sufficient to warrant deportation. The petition was entertained, the judgment was amended to provide: "Reversed, with directions to try the issues *de novo* as suggested in Ex Parte Fierstein, 41 Fed. (2d) p. 54"; and a rehearing was denied.[4] Judge Sibley dissented on the ground that on the basis of the respondent's membership book which refers to the Third Communist Internationale, the court could take judicial notice of the objectives and programs of the Communist Party and the Third Internationale.

The United States petitioned for certiorari, asserting that the single question presented is "whether the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States." In its specification of errors to be urged the Government enumerated (1) the holding that an alien who became a member of the party in 1932 is not, by reason of that fact, subject to deportation; (2) the holding that the evidence before the Secretary of Labor concerning the principles of the party was insufficient to sustain the order; (3) the remand for a trial *de novo* in the District Court, and (4) the failure to affirm the judgment of the District Court. As reason for the granting of the writ the Government urged a conflict of decision on the question whether membership by an alien in the Communist Party of America subjects him to deportation. By reason of the allegation of conflict and the action of the Circuit Court of Appeals in ordering a trial *de novo* in the District Court, we granted the writ.

The Government does not attempt to support the warrant of deportation on the second and third grounds therein specified, namely, that the respondent "is a mem-

[4] 96 F. 2d 1020.

ber of or affiliated with" an organization described in the Act. The only evidence of record is that his membership ceased months before the issue of the warrant for his arrest. The contention is that respondent is deportable because, after entry, he became a member of a class of aliens described in § 1 of the Act, to wit, a member of the Communist Party, an organization membership in which is made a cause of deportation because the organization believes in, advocates, and teaches the overthrow of the Government of the United States by force and violence. This contention presents the question whether the Act renders former membership in such an organization, which has ceased, a ground of deportation. Respondent insists that the statute makes only present membership in an organization described in the Act such ground.

Section 1 of the Act of October 16, 1918, as amended in 1920,[5] has to do with the exclusion of alien immigrants and specifies five classes, members of which may not be admitted to the United States. One of these classes—subsection (c)—includes "aliens who believe in, advise, advocate, or teach, or who *are* members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States. . . ."

Section 2 of the Act of 1918,[6] which was not altered by the Act of 1920, deals with deportation. It provides that "any alien who, *at any time* after entering the United States, is found to have been at the time of entry, or *to have become thereafter,* a member of any of the classes of aliens enumerated" in § 1, shall, upon war-

[5] Act of Oct. 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008; U. S. C. Tit. 8, § 137 (a) to (e).

[6] 40 Stat. 1012; U. S. C. Tit. 8, § 137 (g).

rant of the Secretary of Labor, be taken into custody and deported, in the manner provided by law.

Relying on the phrases italicized in the quotation, the Government insists that the section embraces an alien who, after entry, has become a member of an organization, membership in which, at the time of his entry, would have warranted his exclusion, although he has ceased to be a member at the time of his arrest. We hold that the Act does not provide for the deportation of such an alien. This conclusion rests not alone upon the language, but, as well, upon the context and the history of the legislation.

The phrase "at any time" qualifies the verb "found." Thus, if at any time the Secretary finds that at entry the alien was a member, or has thereafter become and is a member, he may be deported. The natural meaning is that, as the alien was excludable for present membership, he is deportable for present membership subsequently acquired. The Government's construction, which collocates the phrase "at any time" with the phrase "or to have become thereafter" is unnatural and strained. If Congress meant that past membership, of no matter how short duration or how far in the past, was to be a cause of present deportation the purpose could have been clearly stated. The section does not bear this import.

By the first section of the Act, as amended in 1920, aliens are to be excluded who *are* members of a described organization. The section does not require the exclusion of those who have been in the past, but are no longer, members. When the Congress came to provide for deportation, instead of again enumerating and defining the various classes of aliens who might be deported, it provided that if at any time it should be found that an alien had been admitted and, at the time of admission, was a member of any of the proscribed classes, or had thereafter become such, he should be deported. It is not to be

supposed that past membership, which does not bar admission, was intended to be a cause of deportation. And the fact that naturalization is denied to an alien only on the ground that he "*is* a member of or affiliated with any organization entertaining" disbelief in or opposition to organized government, and not for past membership or affiliation,[7] lends added force to this view.

In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization. In the absence of such expression we conclude that it is the *present membership,* or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation. Since the statute deals not only with membership in an organization of the described class, but with affiliation therewith and, as well, with belief and teaching, it enables the Secretary of Labor, as trier of the facts, fully to investigate and to find the true relation, belief and activity of the alien under investigation.

The legislative history of the statute supports this conclusion. By Act of March 3, 1903,[8] Congress directed the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, . . ." [9] and also of any "person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbe-

[7] Act of June 29, 1906, c. 3592, § 7, 34 Stat. 596, 598.

[8] 32 Stat. 1213.

[9] § 2, 32 Stat. 1214.

lief in or opposition to all organized government . . . "[10] The only section authorizing deportation of such persons is directed to an alien found to have entered in violation of the Act, if proceeded against within three years after entry.[11] These provisions were reënacted without alteration in the Act of February 20, 1907.[12]

The first legislation authorizing deportation of persons who had entered lawfully is H. R. 6060, enacted by the 63rd Congress but vetoed by President Wilson January 28, 1915.[13] This bill required deportation of "any alien who *within five years after entry* shall be found advocating or teaching" the defined doctrines. It also altered existing law in respect of deportation of those who had entered illegally to provide that "*at any time within five years after entry,* any alien who *at the time of entry* was a member of one or more of the classes excluded by law" should be deported.

A bill, in substance the same, was introduced in the 64th Congress and enacted February 5, 1917, over Presidential veto.[14] While this measure was in course of passage, the Chairman of the House Committee in charge of it moved, on behalf of the Committee, to amend § 19 by inserting the phrase "at any time" so that the section should provide for deportation of "any alien who *at any time after entry* shall be found advocating or teaching" forcible overthrow of the government. The Act, as adopted, was in this form. The purpose of the amendment was to make plain that no time limit was fixed for deportation of aliens found advocating the doctrine.[15]

[10] § 38, 32 Stat. 1221.

[11] § 21, 32 Stat. 1218.

[12] 34 Stat. 898, §§ 21 and 38, pp. 905, 908.

[13] House Document No. 1527, 63rd Cong., 3rd Sess.

[14] 39 Stat. 874.

[15] See 53 Cong. Rec. Part. 5, p. 5165, 64th Cong., 1st Sess.; Sen Rep. 352, p. 14, 64th Cong., 1st Sess. to accompany H. R. 10384.

The Act of 1917 was amended by that of October 16, 1918, here under consideration, which, by its title, purported to apply to "aliens who *are* members of the anarchistic and similar classes. . . ."

Section 1 enlarged one of the classes of excludable aliens by the addition of the words "aliens who *are* members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States. . . ." Section 2 modified the earlier Act in respect of deportation, both in form and substance. The provision for deportation of those who, at the time of entry, were members of one of the proscribed classes was retained, but the five year period of limitation within which deportation might be had was eliminated.[16] The provision for deportation of aliens of anarchistic and similar classes was expanded by including as causes of *deportation* all the causes *of exclusion* enumerated in § 1 which were themselves much broader than those included in the 1917 Act. Thus, although there was no provision in the Act of 1917 for deportation of aliens who did not personally advocate the proscribed doctrine, but were members of an organization which did, the Act of 1918 embodied such a provision. This alteration, and the elimination of the five year time limitation, were the important changes, relevant to the question under examination, which the Act of 1918 effected in the earlier legislation. These modifications lend no support to the contention that § 2 of the Act of 1918 was intended to make quondam membership a ground of deportation.

Nor is there anything in the formal alteration worked by the Act of 1918 which leads to a different conclusion. Section 19 of the Act of 1917 dealt in distinct clauses with the various classes of aliens who might be deported, speci-

[16] House Rep. 645, 65th Cong., 2nd Sess.

fying in one clause an alien "who at the time of entry was a member of the classes excluded by law" and, in another clause, an alien "who, at any time after entry, shall be found advocating or teaching" the obnoxious doctrines. Section 2 of the Act of 1918 combined the clauses dealing with the two groups in a single sentence, with a somewhat different locution. We think this consolidation was not intended to alter the substantive law as it theretofore stood.

The only decisions which support the Government's position are those in the Second Circuit.[17] We cannot approve their reasoning or result. It is claimed that the administrative construction has always accorded with the Government's contention in the present case. We cannot find that there has been such a uniform construction as requires an interpretation of the Act in accordance with that view. The administrative construction seems to have been in favor of the respondent's view until after the decision in the *Yokinen* case,[18] and the construction seems to have been changed in deference to the decision in that case.[19]

Our reading of the statute makes it unnecessary to pass upon the conflicting contentions of the parties concerning the adequacy of the evidence before the Secretary concerning the purposes and aims of the Communist Party or the propriety of the court's taking judicial notice thereof.

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[17] *United States ex rel. Yokinen* v. *Commissioner of Immigration,* 57 F. 2d 707; *United States ex rel. Mannisto* v. *Reimer,* 77 F. 2d 1021.

[18] House Rep. 504, p. 9, 66th Cong., 2nd Sess. Hearings Communist and Anarchistic Deportation Cases, H. R. 66th Cong., 2nd Sess. Subcommittee of Committee on Immigration and Naturalization, April 21, 24, 1920, p. 17.

[19] See letter of Secretary of Labor embodied in Senate Rep. 769, 75th Cong., 1st Sess.

The Solicitor General suggests that the evidence is sufficient to sustain the warrant of deportation on the first ground therein stated, namely, that the respondent believes in and teaches the overthrow, by force and violence, of the Government of the United States. It is said that the error of the Circuit Court of Appeals in reversing the District Court is, in this aspect, so plain that we should notice it, although the petition does not present the question. We have the power to do this in the case of plain error,[20] but we exercise it only in clear cases and in exceptional circumstances.

We do not know on what grounds the District Judge's action rested since he wrote no opinion. The Circuit Court of Appeals held the evidence insufficient to support the Secretary's finding. We think that the record does not justify a reversal of the holding of the court below upon this point.

The Circuit Court of Appeals remanded the cause to the District Court for a trial *de novo*. In this we think there was error. The proceeding for deportation is administrative.[21] If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings.[22] If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside.[23] A district court cannot upon *habeas corpus,* proceed *de novo,* for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. Only in the event an alleged alien asserts his United States

[20] *Mahler* v. *Eby,* 264 U. S. 32, 45.

[21] *Pearson* v. *Williams,* 202 U. S. 281; *Zakonaite* v. *Wolf,* 226 U. S. 272.

[22] *Zakonaite* v. *Wolf, supra; Tisi* v. *Tod,* 264 U. S. 131, 133.

[23] *Vajtauer* v. *Commissioner,* 273 U. S. 103, 106; *Gegiow* v. *Uhl,* 239 U. S. 3.

citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial *de novo* of that issue in the district court.[24] The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary.[25]

It follows from what has been said that, as the Secretary erred in the construction of the statute, the writ must be granted and the respondent discharged from custody.

The judgment of the Circuit Court of Appeals is accordingly modified and the cause is remanded to the District Court with instructions to proceed in conformity with this opinion.

Affirmed with modification.

MR. JUSTICE McREYNOLDS, dissenting:

MR. JUSTICE BUTLER and I cannot acquiesce in the disposition of this cause or in the supporting opinion just announced. It seems worthwhile briefly to indicate our views.

More than five years have passed since the alien respondent was arrested and ordered to show why he should not be deported. The record of the following proceedings before the Labor Department and in the courts, printed on eighty-four pages, is before us. It is not very difficult to understand. Without question we have power finally to dispose of the cause upon the merits notwithstanding

[24] *United States* v. *Sing Tuck,* 194 U. S. 161, 167; *Bilokumsky* v. *Tod,* 263 U. S. 149, 152, 153.

[25] *Ng Fung Ho* v. *White,* 259 U. S. 276; compare *Tod* v. *Waldman,* 266 U. S. 113, 119.

any omissions or defects found in the petition for certiorari. In the circumstances, we think that course should be taken. The District Court upon another view of the record can ascertain nothing not open to us.

If this alien is guiltless of the charge against him he should be liberated without more ado; if guilty, the public should be relieved of his presence now. That he is an undesirable is made manifest.

The construction of the statute adopted by the Court seems both unwarranted and unfortunate. If by the simple process of resigning or getting expelled from a proscribed organization an alien may thereby instantly purge himself after months or years of mischievous activities, hoped-for protection against such conduct will disappear. Escape from the consequences of deliberate violations of our hospitality should not become quite so facile.[1]

Seven years ago, the Court of Appeals, Second Circuit, construed the statute under consideration in *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707–708. There the alien had been expelled from the Communist Party before his arrest, and for that reason he unsuccessfully claimed exemption. The following excerpts from the court's opinion, with force and directness, express our view concerning the true meaning of the enactment—

"It is true that he was not a member of the Communist Party when arrested. He had recently been expelled because of his attitude toward negroes, but that did not remove him from the reach of the statute. We have nothing to do with shaping the policy of the law

[1] Strecker, born in Poland in 1888, was admitted to the United States in 1912.

He joined the Communist Party November, 1932, but paid no dues subsequent to February, 1933. He claims that under the Party rules failure to pay for four weeks causes membership to cease. Warrant for his arrest issued in November, 1933.

towards aliens who come here and join a proscribed society. Congress has provided that 'any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section' shall be deported. 8 USCA § 137 (g). This alien concededly did become after entry a member of 'one of the classes * * * enumerated' and from that time became deportable. We are urged to ameliorate the supposed harshness of the statute by reading into it words that Congress saw fit to leave out and interpret it to apply not to aliens who become members, but only to those who become and continue to the time of their arrest to be members, of one of the enumerated classes. If the words used in the statute were equivocal or the intention of Congress for any reason uncertain, there might be room for such a construction as that for which the appellant now contends. Perhaps the sufficient answer is that had Congress intended membership at the time of arrest to be the criterion it would have said so. It has the power to determine what acts of an alien shall terminate his right to remain here. *Skeffington* v. *Katzeff et al.* (C. C. A.) 277 F. 129. What it did do was to make the act of becoming a member a deportable offense without regard to continuance of membership and it did that in language so plain that any attempt to read in any other meaning is no less than an attempt to circumvent the law itself.

"Since the appellant admittedly had, after entry, become a member of a proscribed organization, the undisputed evidence required the order from which this appeal was taken. All proof upon which he was held to be affiliated with the Communist Party was unnecessary, and while we do not mean to intimate that any evidence on that phase of the case was unfairly received and considered, in any event it did him no harm."

A petition for certiorari asking this Court to review the judgment of the Circuit Court of Appeals was refused October 10, 1932 (287 U. S. 607). It stressed the point that—"A fair and proper construction of the statute requires that it be confined in its operation to aliens who are members of or affiliated with a proscribed organization at the issuance of the warrant of arrest."

The unusual importance of the question was not difficult to appreciate.

In the presence of clear and positive expression of Congressional intent to the contrary we do not feel at liberty to conclude that an alien who after entry has shown his contempt for our laws by deliberately associating himself with a proscribed organization must be allowed to remain if he resigned or was debarred a day, a month or a year before his arrest. An experienced court years ago declared that would be "no less than an attempt to circumvent the law itself."

MULFORD ET AL. *v.* SMITH ET AL.

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

No. 505. Argued March 8, 1939.—Decided April 17, 1939.

1. Producers of tobacco, challenging the constitutionality of provisions of the Agricultural Adjustment Act of 1938, sought to enjoin warehousemen from deducting penalties under the Act from the sales price of tobacco to be sold on behalf of the plaintiffs, in excess of their respective quotas. *Held:*

(1) The suit is within § 24 (8) Jud. Code, which confers jurisdiction upon District Courts "of all suits and proceedings arising under any law regulating commerce," irrespective of citizenship of parties or amount in controversy. P. 46.

(2) The suit is not forbidden by R. S. 3224, which applies only to restraint of assessment or collection of a tax. P. 46.

(3) Upon the averments of the bill the case is of equitable cognizance, for want of adequate legal remedy. P. 46.

2. Title III of the Agricultural Adjustment Act of 1938, reciting, *inter alia,* the importance to the Nation of the marketing of tobacco; that tobacco is sold on a national market,—almost wholly in interstate and foreign commerce; and that without federal assistance tobacco farmers are unable to bring about orderly marketing, with the consequence that excessive supplies are produced and dumped on the market, bringing burdens and obstructions to interstate and foreign commerce,—directs that when in any year, on November 15th, the Secretary of Agriculture finds that the total supply of tobacco, as of July 1st, exceeded the reserve supply level which is defined in the Act, he shall proclaim the total supply and a national marketing quota shall be in effect throughout the marketing year which commences the following July 1st, but not if more than one-third of the producers of the crop of the preceding year, at a referendum held by the Secretary, oppose the imposition of such quota. The quota for any year is to be first apportioned among the States, largely on the basis of past production, and each state allotment is to be apportioned among the farms largely on the basis of past production and marketing. Each farmer is to be notified of his marketing quota, and if tobacco in excess of the quota for any farm on which it was produced is marketed through a warehouseman, the latter must pay to the Secretary a penalty equal to fifty per cent. of the market price of the excess and may deduct an amount equivalent to the penalty from the price paid the producer. *Held:*

(1) The statute does not purport to control production, but regulates commerce in tobacco through marketing. P. 47.

(2) Where marketing conditions are such that regulation as to sales in interstate and foreign commerce can not be effective unless extended to sales in intrastate commerce also, such extension of regulation is constitutional. P. 47.

(3) In order to foster, protect and conserve interstate commerce, or to prevent the flow of that commerce from working harm to the people, the amount of a given commodity which may be transported in it may be limited. P. 48.

(4) The motive of Congress in asserting the power is irrelevant to the validity of the legislation. P. 48.

(5) The provisions under review do not amount to unconstitutional delegation of the legislative power to the Secretary of Agriculture. P. 48.

Definite standards are laid down in the Act to govern the Secretary, in fixing the quota and in its allotment amongst the States and farms. He is directed to adjust allotments so as to allow for specified factors which have abnormally affected the production of the State or the farm in question in test years. Congress has indicated in detail the considerations to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors.

3. In its application to the marketing year 1938, the above mentioned Act provided that the national marketing quota should be proclaimed within 15 days from February 16, 1938, the date of the Act's approval. Subsequent steps were so far delayed that producers of flue-cured tobacco in Georgia and Florida, who had begun preparations in the preceding December for their 1938 crops, and at great expense had brought them to harvest, curing and grading, were not notified of their quotas, which were below the quantities produced, until a few days before the markets opened.

Held, that in being subjected to the statutory penalty on the excess, they were not deprived of property without due process, through retroactive operation of the statute. Pp. 49, 51.

The statute operated, not on production, but prospectively on marketing, the activity regulated. It did not prevent any producer from holding over the excess of tobacco produced, or from processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

24 F. Supp. 919, affirmed.

APPEAL from a decree of a three-judge District Court which dismissed the bill in a suit brought by tobacco farmers to enjoin warehousemen from deducting, and remitting to the Secretary of Agriculture, the penalties inflicted by the Agricultural Adjustment Act of 1938 on tobacco sold for the plaintiffs in excess of the quotas assigned to their respective farms. The suit was begun in the Superior Court of Georgia. The defendants removed the case to the federal court. The United States intervened, under the Act of August 24, 1937.

Mr. A. J. Little, with whom *Messrs. C. A. Avriett* and *L. E. Heath* were on the brief, for appellants.

Solicitor General Jackson and *Mr. Robert K. McConnaughey,* with whom *Assistant Attorney General Arnold,* and *Messrs. Hugh B. Cox, Robert L. Stern, John S. L. Yost, Mastin G. White, Robert H. Shields,* and *W. Carroll Hunter* were on the brief, for the United States (intervening defendant), appellee.

Mr. Omer W. Franklin for Smith et al., appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellants, producers of flue-cured tobacco, assert that the Agricultural Adjustment Act of 1938,[1] is unconstitutional as it affects their 1938 crop.

The portions of the statute involved are those included in Title III, providing marketing quotas for flue-cured tobacco.[2] The Act directs that when the supply is found to exceed the level defined in the Act as the "reserve supply level" a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the ensuing marketing year to maintain the supply at the reserve supply level. The quota is to be apportioned to the farms on which tobacco is grown. Penalties are to be paid by tobacco auction warehousemen for marketing tobacco from a farm in excess of its quota.

[1] 52 Stat. 31, as amended March 26, 1938, 52 Stat. 120, April 7, 1938, 52 Stat. 202, May 31, 1938, 52 Stat. 586, and June 20, 1938, 52 Stat. 775; U. S. C. Supp. IV, Title 7, §§ 1281, *et seq.*

[2] Title III, Subtitle B, Marketing Quotas, Part I, marketing quotas—tobacco, §§ 311–314, inclusive. See also § 301, Definitions. §§ 361–375, inclusive, administrative provisions; §§ 388 and 389 relating to personnel.

Section 311 is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing, with the consequence that abnormally excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supply burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products; and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster and obtain an orderly flow of tobacco in interstate and foreign commerce.

There is no provision for continuous regulation of tobacco marketing, but, by § 312 (a), regulation becomes effective in any year only if, on November 15th, the Secretary finds that the total supply of tobacco as of July 1st exceeded the reserve supply level which is defined in the Act.[3] If he so finds, he shall, by December 1st, proclaim the total supply and a national marketing quota shall be in effect throughout the marketing year which commences the following July 1st. The quota is to be the amount which the Secretary finds will make available during the ensuing marketing year a supply of tobacco equal to the

[3] The total supply, the carry-over for a marketing year, the reserve supply level, the normal supply, a normal year's domestic consumption, and a normal year's exports, are defined in § 301.

reserve supply level. As it was not passed until after November 15, 1937, the Act provided, with respect to the marketing year beginning July 1, 1938, for which the quotas involved in this case were in effect, that the determination and proclamation of the national marketing quota should be made within fifteen days after the statute's approval.[4]

Within thirty days after proclamation, the Secretary is to conduct a referendum of the producers of the crop of the preceding year to ascertain whether they favor or oppose the imposition of a quota. If more than one-third oppose, the Secretary is to proclaim the result before January 1st and the quota is not to be effective.[5]

By § 313 (a) it is directed that the quota is to be first apportioned among the states based on the total quantity of tobacco produced in each state during the five years immediately preceding the year in question, plus the normal production of any acreage diverted under any agricultural adjustment and conservation program in any of the years. The basic determination is to be adjusted to correct state allotments, giving due consideration to seed bed or other plant diseases, production trends, or abnormal producing conditions which affected production in the several states during the five-year period, and to make required provision for allotments to small farms. A limit is set below which the quota of any state may not be reduced.

The Act provides for the apportionment of the state allotment amongst the farms which produced tobacco in the current year or have produced previously in one or more of the four preceding years. Apportionment to

[4] § 312 (d).

[5] § 312 (c). With respect to 1938 quotas, the proclamation of the result of the referendum was to be made within forty-five days after approval of the Act. § 312 (d).

these farms is to be made on the basis of past marketing, after due allowance for drought, flood, hail, and other abnormal weather conditions, plant bed and other diseases, land, labor, and equipment available for the production of tobacco, crop-rotation practices, and soil and other physical factors affecting production. A limit is fixed below which the adjustment may not reduce the production of a given farm. Allotment to new tobacco farms is to be made on a slightly different basis.[6]

Apportionment of the quota amongst individual farms is to be by local committees of farmers according to standards prescribed in the Act, amplified by regulations and instructions issued by the Secretary. Each farmer is to be notified of his marketing quota and the quotas of individual farms are to be kept available for public inspection in the county or district where the farm is located. If the farmer is dissatisfied with his allotment he may have his quota reviewed by a local review committee, and, if dissatisfied with the determination of that committee, he may obtain judicial review.

Section 314 provides that if tobacco in excess of the quota for the farm on which the tobacco is produced is marketed through a warehouseman, the latter must pay to the Secretary a penalty equal to fifty per cent. of the market price of the excess, and may deduct an amount equivalent to the penalty from the price paid the producer.[7]

[6] §§ 313 (b) and 313 (c).

[7] If the tobacco is marketed directly to a person outside the United States, the producer is required to pay the penalty. If the tobacco is sold by the grower directly to a purchaser without intervention by the warehouseman or other agent, the buyer is required to pay the penalty, but may deduct an equivalent amount from the purchase price. §§ 314, 372, 373. The penalty is to be three cents per pound if that rate is higher than 50% of the market price. § 314.

Section 376 gives the United States a civil action for the recovery of unpaid penalties.[8]

A few days before the 1938 auction sales were to take place, the appellants, who produce flue-cured tobacco in southern Georgia and northern Florida, filed a bill in equity in a Georgia state court against local warehousemen to restrain them from deducting penalties under the Act from the sales price of tobacco to be sold at their auction warehouses on behalf of appellants. The bill alleged that the Act is unconstitutional; that it illegally commands the defendants to deduct penalties, pay them over to the Secretary, who must cover them into the treasury of the United States; that, if the defendants should make the required payments, the amounts paid by them would aggregate so large a sum that they would be unable to satisfy judgments in actions brought to recover the illegal payments. The court granted a preliminary injunction and ordered the defendant warehousemen to pay the amounts of the penalties into the registry of the court. The cause was removed to the United States District Court for the Middle District of Georgia. The District Court continued the injunction, modified the order to require the payments to be made into its registry, the auction sales were held, and payments into the court were made. The United States was permitted to intervene as a defendant.[9] The warehousemen and the United States filed answers. The cause was set down before a court

[8] The Secretary may make regulations necessary for identifying tobacco subject to quotas, § 375; and requiring the keeping of records and the making of reports. The Act imposes upon handlers other than producers a fine of $500 upon conviction of failure to make any report or keep any record, or for making any false report or record. § 373 (a) and (b).

[9] Act of August 24, 1937, c. 754, § 1, 50 Stat. 751; U. S. C. Supp. III, Tit. 28, § 401.

consisting of three judges,[10] which heard it on a stipulation of facts and entered a decree dismissing the bill.[11]

Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under subsection (1)[12] of § 24 of the Judicial Code, the case falls within subsection (8)[13] which confers jurisdiction upon District Courts "of all suits and proceedings arising under any law regulating commerce." Maintenance of the bill for injunction is not forbidden by R. S. 3224,[14] which applies only to a suit to restrain assessment or collection of a tax. Under the averments of the bill the defendant warehousemen would be wrongdoers if they deducted and paid over the prescribed penalties, but no action at law would be adequate to redress the damage thus inflicted. It appears that the total of the penalties involved in this suit is some $374,000. The allegation that the warehousemen would be unable to respond in actions for sums aggregating this amount has, therefore, reasonable basis. Before any such action could be initiated the penal sum would have been paid to the Secretary of Agriculture and by him to the Treasurer of the United States and covered into the general funds of the Treasury. No action could be maintained against the warehousemen or either of these officials for disposing of the penal sums in accordance with the terms of the Act unless prior notice not to do so had been served upon each of them. In the light of the fact that the appellants received notice of their quotas only a few days before the

[10] *Ibid*, U. S. C. Supp. III, Tit. 28, § 380 (a).

[11] 24 F. Supp. 919.

[12] U. S. C. Tit. 28, § 41 (1).

[13] U. S. C. Tit. 28, § 41 (8).

[14] U. S. C. Tit. 26, § 1543.

actual marketing season opened, the maintenance of actions based upon collection of the penalties would have been a practical impossibility. We are of opinion, therefore, that a case is stated for the interposition of a court of equity.

The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that, as applied to appellants' 1938 crop, the Act takes their property without due process of law.

First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse.[15] The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent. of the tobacco so sold is purchased by extra-state purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales.[16] This

[15] *Currin* v. *Wallace,* 306 U. S. 1; compare *Townsend* v. *Yeomans,* 301 U. S. 441.

[16] *The Minnesota Rate Cases,* 230 U. S. 352; *The Shreveport Case,* 234 U. S. 342; *Currin* v. *Wallace, supra.*

court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce.[17] Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce,[18] and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.[19]

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution.

Second. The appellants urge that the standard for allotting farm quotas is so uncertain, vague, and indefinite that it amounts to a delegation of legislative power to an executive officer and thus violates the Constitutional requirement that laws shall be enacted by the Congress.

What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota and, second, in its allotment amongst states and farms. He is directed to adjust the allot-

[17] *Currin* v. *Wallace, supra;* and see *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 198. Compare *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50.

[18] *Champion* v. *Ames,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Hoke* v. *United States,* 227 U. S. 308; *Brooks* v. *United States,* 267 U. S. 432; *Gooch* v. *United States,* 297 U. S. 124.

[19] Story, Commentaries on the Constitution (4th Ed.), §§ 965, 1079, 1081, 1089.

ments so as to allow for specified factors which have abnormally affected the production of the state or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer. In this aspect the Act is valid within the decisions of this court respecting delegation to administrative officers.[20]

Third. In support of their contention that the Act, as applied to the crop year 1938, deprives them of their property without due process of law in violation of the Fifth Amendment, the appellants rely on the following undisputed facts.

Tobacco growers in southern Georgia and northern Florida began to arrange for the planting of their 1938 crop in December, 1937, when it was necessary for them to prepare beds for the planting of the seeds. Thereafter it was necessary to cultivate the seed beds, sow and water the seed, cover the beds with cloth, and otherwise care for the plants until they were large enough to be transplanted. At the date of approval of the Act each of the plaintiffs had planted his seed beds and, about the middle of March, began transplanting into the fields, which were prepared and fertilized at large expense. The plants were thereafter cultivated and sprayed, and harvesting began during June and continued during July, followed by the curing and grading of the tobacco.

[20] *United States* v. *Grimaud,* 220 U. S. 506; *Avent* v. *United States,* 266 U. S. 127; *Hampton & Co.* v. *United States,* 276 U. S. 394; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Currin* v. *Wallace, supra.*

All of these activities involved labor and expense. The production of flue-cured tobacco requires, at prevailing price levels, a cash outlay of between thirty and forty dollars per acre for fertilizer, plant bed covering, twine, poison, etc. The use of animals and permanent and semi-permanent equipment demands an average expenditure, over a period of years, ranging from twenty to thirty dollars an acre. The labor expended per acre is between three hundred and four hundred man-hours. The total cost per pound varies from ten cents to twenty cents.

The marketing season for flue-cured tobacco in Georgia and Florida commences about August 1st of each year. Each of the appellants was notified of the quota of his farm shortly before the opening of the auction markets. Prior to the receipt of notice each of them had largely, if not wholly, completed planting, cultivating, harvesting, curing and grading his tobacco. Until receipt of notice none knew, or could have known, the exact amount of his quota, although, at the time of filing the bill, each had concluded from available information that he would probably market tobacco in excess of any quota for his farm.

The Act was approved February 16, 1938. The Secretary proclaimed a quota for flue-cured tobacco on February 18th and, on the same date, issued instructions for holding a referendum on March 12th. March 25th the Secretary proclaimed the result of the referendum which was favorable to the imposition of a national marketing quota. In June he issued regulations governing the fixing of farm quotas within the states. July 22nd he determined the apportionment as between states and issued regulations relative to the records to be kept by warehousemen and others. Shortly before the markets opened each appellant received notice of the allotment to his farm.

On the basis of these facts it is argued that the statute operated retroactively and therefore amounted to a taking of appellants' property without due process. The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

The decree is

Affirmed.

MR. JUSTICE BUTLER, dissenting.

Plaintiffs are farmers in Georgia and on their farms raise tobacco. They sell it in the market year when produced because, in their circumstances, they are unable to process and make it fit to be held for sale in a later year. The sales are at auction markets, through defendants who are Georgia warehousemen, to purchasers intending to take the tobacco outside the State. The Secretary of Agriculture, assuming to be empowered by the Agricultural Adjustment Act of 1938, undertook to prescribe the amount of flue-cured tobacco to be raised in 1938 in the United States, in each State, and on each farm. He failed to let plaintiffs know the quotas respectively assigned to them until after their crops had matured and were ready for marketing. Each raised more than the assigned quota.

The Act declares that, if more than the amount fixed for a farm is marketed, the warehouseman shall pay to

the Secretary a penalty equal to one-half the price of the excess, but it authorizes him to retain that amount from the farmer raising and bringing it to market for sale. If, without resort to a warehouseman, the farmer sells directly to one in this country, the purchaser is required to pay the penalty but is authorized to take the amount from the purchase price. If the farmer sells directly to one outside the United States he is required to pay the penalty to the Secretary. Thus, in any event, the penalty is effectively laid upon the farmer. Enforcement of the Act will compulsorily take from plaintiffs an amount of money equal to one-half of the market value of all tobacco raised and sold by them in excess of the prescribed quotas.

In *United States* v. *Butler*, 297 U. S. 1, we held the federal government without power to control farm production. We condemned the statutory plan there sought to be enforced as repugnant to the Tenth Amendment. That scheme was devised and put in effect under the guise of exertion of power to tax. We held it to be in excess of the powers delegated to the federal government; found the tax, the appropriation of the money raised, and the directions for its disbursement, to be but the means to an unconstitutional end; showed that the Constitution confers no power to regulate production and that therefore legislation for that purpose is forbidden; emphasized the principle established by earlier decisions that a prohibited end may not be attained under pretext of exertion of powers which are granted; and finally we declared that, if Congress may use its power to tax and to spend compulsorily to regulate subjects within the reserved power of the States, that power "would become the instrument for total subversion of the governmental powers reserved to the individual States."

After failure of that measure, Congress, assuming power under the commerce clause, enacted the provisions authorizing the quotas and penalties the validity of which is questioned in this case. Plaintiffs contend that the Act is a plan to control agricultural production and therefore beyond the powers delegated to Congress. The Court impliedly concedes that such a plan would be beyond congressional power, but says that the provisions do not purport to control production, set no limit upon the acreage which may be planted or produced and impose no penalty upon planting and production in excess of marketing quota. Mere inspection of the statute and Secretary's regulations unmistakably discloses purpose to raise price by lessening production. Whatever may be its declared policy or appearance, the enactment operates to control quantity raised by each farmer. It is wholly fallacious to say that the penalty is not imposed upon production. The farmer raises tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco. The Act is therefore invalid. *United States* v. *Butler,* 297 U. S. 1. *Hammer* v. *Dagenhart,* 247 U. S. 251. See *Brooks* v. *United States,* 267 U. S. 432, 438; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 350. Cf. *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362, *et seq.*

Assuming that, under *Currin* v. *Wallace,* 306 U. S. 1, plaintiffs' sales in interstate commerce at defendants' auction markets are to be deemed subject to federal power under the commerce clause, the Court now rules that, within suggested limits so vague as to be unascertainable, the exercise of power under that clause, "the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce."

That ruling is contrary alike to reason and precedent. To support it, the Court merely cites the following cases:

The Lottery Case, (*Champion* v. *Ames*) 188 U. S. 321, held that an Act of Congress prohibiting transportation of lottery tickets in interstate commerce is not inconsistent with any limitation or restriction imposed upon exercise of the powers granted to Congress. After demonstrating the illicit character of lottery tickets, the Court said (p. 357): "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . . [p. 358] It is a kind of traffic which no one can be entitled to pursue as of right."

Hipolite Egg Co. v. *United States,* 220 U. S. 45, held within federal power the provisions of the Food and Drug Act forbidding transportation in interstate commerce of food "debased by adulteration" and authorizing articles so transported to be seized as contraband.

Hoke v. *United States,* 227 U. S. 308, sustained congressional prohibition of interstate transportation of women for immoral purposes.

Brooks v. *United States,* 267 U. S. 432, upheld a statute of the United States making it a crime to transport a stolen automobile in interstate commerce.

Gooch v. *United States,* 297 U. S. 124, construed an Act of Congress making it a crime to transport a kidnapped person in interstate commerce.

Plainly these cases give no support to the view that Congress has power generally to prohibit or limit, as it may choose, transportation in interstate commerce of corn, cotton, rice, tobacco, or wheat. Our decisions establish the contrary:

Wilson v. *New,* 243 U. S. 332, upheld an Act regulating hours of service of employees of interstate carriers

by rail. The Court, following the teaching of earlier decisions, said (p. 346): "The extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation. The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, drygoods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities."

Hammer v. *Dagenhart,* 247 U. S. 251, held repugnant to the commerce clause and to the Tenth Amendment an Act prohibiting transportation in interstate commerce of articles made at factories in which child labor was employed. The Court said (p. 269): "In other words, the power [granted by the commerce clause] is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that the adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . . [p. 276] In our view the necessary effect of this act is, by means of a prohibition

against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

Heretofore, in cases involving the power of Congress to forbid or condition transportation in interstate commerce, this Court has been careful to determine whether, in view of the nature and character of the subject, the measure could be sustained as an appropriate regulation of commerce.* If Congress had the absolute power now attributed to it by the decision just announced, the opinions in these cases were unnecessary and utterly beside the mark.

For reasons above suggested, I am of opinion:

The penalty is laid on the farmer to prevent production in excess of his quota. It is therefore invalid.

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*_Lottery Case_, 188 U. S. 321, 355 _et seq._ _United States_ v. _Delaware & Hudson Co._, 213 U. S. 366, 415. _Hipolite Egg Co._ v. _United States_, 220 U. S. 45, 57–58. _Hoke_ v. _United States_, 227 U. S. 308, 321–323. _Seven Cases_ v. _United States_, 239 U. S. 510, 514. _Caminetti_ v. _United States_, 242 U. S. 470, 491–492. _Hammer_ v. _Dagenhart_, 247 U. S. 251, 270 _et seq._ _Brooks_ v. _United States_, 267 U. S. 432, 436–438. See _Wilson_ v. _New_, 243 U. S. 332, 346. Cf. _Clark Distilling Co._ v. _Western Md. Ry. Co._, 242 U. S. 311, 325. _United States_ v. _Hill_, 248 U. S. 420. _Kentucky Whip & Collar Co._ v. _Illinois Central R. Co._, 299 U. S. 334, 346 _et seq._

If the penalty is imposed for marketing in interstate commerce, it is a regulation not authorized by the commerce clause.

To impose penalties for marketing in excess of quotas not disclosed before planting and cultivation is to deprive plaintiffs of their liberty and property without due process of law.

The judgment of the district court should be reversed.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

UNITED STATES TRUST CO., EXECUTOR, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 453. Argued March 3, 1939.—Decided April 17, 1939.

1. An estate tax is not a tax upon the property of which an estate is composed, but is an excise upon the transfer of or shifting in relationships to property at death. P. 60.
2. The proceeds of a War Risk Insurance policy payable to a deceased veteran's widow were properly included in his gross estate for the purpose of computing the federal estate tax. Revenue Act of 1926, § 302 (g), as amended. P. 60.
3. Section 22 of the World War Veterans' Act, 1924, providing that such insurance "shall be exempt from all taxation," does not prevent. P. 59.
4. No provision of the Government's contract with an insured veteran is impaired in violation of the Fifth Amendment by the inclusion in his gross estate of proceeds of a War Risk Insurance policy for the purpose of computing the federal estate tax. P. 60.

98 F. 2d 734, affirmed.

CERTIORARI, 305 U. S. 591, to review the affirmance of a decision of the Board of Tax Appeals sustaining a determination of a deficiency in federal estate tax.

Mr. Wilder Goodwin for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Edward J. Ennis,* and *Helen R. Carloss* were on the brief, for respondent.

Mr. Justice Black delivered the opinion of the Court.

The sole question is whether proceeds of a War Risk Insurance policy payable to a deceased veteran's widow were properly included in his gross estate under a federal estate tax.

The federal estate tax in question [1] included in a decedent's gross estate the amount in excess of forty thousand dollars received by "beneficiaries [other than his estate] as insurance under policies taken out by the decedent upon his own life." This veteran's total life insurance for beneficiaries other than his estate exceeded at death the statutory exemption of forty thousand dollars, if his War Risk Insurance policy payable to his widow in the sum of ten thousand dollars is included. The Commissioner assessed an estate tax measured by this excess. As decedent's executor, petitioner claimed that proceeds of the War Risk Insurance policy could not be included in the estate because of § 22 of the World War Veterans' Act, 1924, providing that such "insurance . . . shall be exempt from all taxation." [2] The Board of Tax Appeals upheld the determination of the Commissioner, and the Circuit Court of Appeals affirmed.[3]

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[1] § 302 (g) Revenue Act of 1926, as amended.

[2] 43 Stat. 607, 613.

[3] 98 F. 2d 734. State courts have differed as to whether proceeds of War Risk Insurance are subject to death duties imposed by the States. See, for example, *In re Estate of Harris,* 179 Minn. 450; 229 N. W. 781; *Tax Commission* v. *Rife,* 119 Oh. St. 83; 162 N. E.

Congress has manifested a consistent policy in the Revenue Acts from 1918 to 1934, when the veteran died, by impositions of estate taxes upon transfers at death of proceeds of all life insurance (not payable to an insured's estate) in excess of forty thousand dollars. This has been in harmony with a general plan of graduating income and inheritance taxes to accord with the respective sizes of incomes and estates.[4] And the Treasury Regulations have stated that "The statute provides for the inclusion in the gross estate of . . . All insurance [not for the benefit of an estate] . . . to the extent that it exceeds . . . forty thousand dollars . . . The term 'insurance' refers to life insurance of every description, . . ." [5]

But petitioner invokes the provision of the World War Veterans' Act, 1924, that insurance thereunder "shall be exempt from all taxation." An amendment to that Act of August 12, 1935 [6] provides that "Payments of benefits due or to become due . . . shall be exempt from taxation . . ." However, this amendment served only to clarify the original provision for exemption, without more.[7] Unless resort is had to enlargement by implication, this exemption means only that the proceeds or benefits of a War Risk policy are exempt from taxation.

390; *Wanzel's Estate*, 295 Pa. 419; 145 A. 512; *Watkins* v. *Hall*, 107 W. Va. 202; 147 S. E. 876 (holding these proceeds not subject to such excises); and *Matter of Sabin*, 224 App. Div. 702; 228 N. Y. S. 890; *Matter of Dean*, 131 Misc. 125; 225 N. Y. S. 543 (contra). In view of this fact and the importance of an authoritative interpretation of the federal statutes involved, we granted certiorari, 305 U. S. 591.

[4] See, 44 Stat. 9, 21, 22; 48 Stat. 680, 684, 754.

[5] Treasury Regulation No. 70 (1929 Edition), Articles 25 and 27; Treasury Regulation No. 80, (1934 Edition), Articles 25 and 27.

[6] 49 Stat. 607, 609.

[7] *Lawrence* v. *Shaw*, 300 U. S. 245, 249.

Exemptions from taxation do not rest upon implication.[8]

An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death.[9] The tax here is no less an estate tax because the proceeds of the policy were paid by the Government directly to the beneficiary; the taxing power was nevertheless exercised upon "the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." [10] In an analogous situation, federal bonds exempt by statute from all taxation have been held subject to a federal inheritance tax.[11] And state inheritance taxes can be measured by the value of federal bonds exempted by statute from state taxation in any form.[12] Similarly, the statutory immunity of War Risk Insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured.

Petitioner makes the further point that the inclusion of proceeds of the War Risk policy for purposes of an estate tax amounts to an impairment of the Government's contract with the insured veteran, in violation of the Fifth Amendment to the Constitution. But neither the Act of 1924, as amended, nor any of the provisions of the War Risk Insurance Act purported to exempt War Risk Insurance from death duties. Therefore, no statu-

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[8] *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 592, 593; *Trotter* v. *Tennessee,* 290 U. S. 354, 356, 357; *J. W. Perry Co.* v. *Norfolk,* 220 U. S. 472, 480; *Chicago Theological Seminary* v. *Illinois,* 188 U. S. 662, 672.

[9] *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; *Chase National Bank* v. *United States,* 278 U. S. 327, 334; *United States* v. *Jacobs,* 306 U. S. 363, 367.

[10] *Chase National Bank* v. *United States, supra,* 337.

[11] *Murdock* v. *Ward,* 178 U. S. 139.

[12] *Plummer* v. *Coler,* 178 U. S. 115.

tory exemption which could be considered a provision of the insurance contract has been affected by the imposition of the estate tax in this case. The judgment is

Affirmed.

McCRONE *v.* UNITED STATES.

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

No. 660. Argued March 30, 1939.—Decided April 17, 1939.

1. Contempt of an order of the District Court, issued upon the application of an agent of the Bureau of Internal Revenue and requiring the person cited to appear and testify before such official in a lawful investigation of the tax liability of another, was a civil contempt; and a judgment that the contemnor be held in jail until he purged himself of the contempt was appealable only in accordance with the applicable statutory provisions governing appeals from judgments in civil cases. P. 64.
2. An appeal from such a judgment of contempt, which was not applied for or allowed by the trial judge or a judge of the Circuit Court of Appeals, as required by the applicable statutory provisions, was properly dismissed by the appellate court for want of jurisdiction. P. 65.
3. A contempt arising out of a proceeding to which the United States or its agents are parties is not necessarily a criminal contempt. P. 63.
4. Rule 73 of the Rules of Civil Procedure, governing appeals to the Circuit Court of Appeals, is inapplicable to a proceeding in respect of which the statutory time allowed for appeal had expired without application prior to the effective date of the Rules. Such a proceeding was not "pending" within the meaning of Rule 86. P. 65.

100 F. 2d 322, affirmed.

CERTIORARI, 306 U. S. 625, to review the dismissal of an appeal from a judgment of contempt.

Mr. H. Lowndes Maury for petitioner.

Mr. Paul A. Freund, with whom *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs.*

Sewall Key and *Earl C. Crouter* were on the brief, for the United States.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Appeals dismissed petitioner's appeal from a judgment of contempt for failure to obey a District Court's order to testify before an Internal Revenue official.[1] This dismissal was proper if the contempt proceeding was civil and not criminal. A notice of appeal was filed and a bill of exceptions signed. But petitioner's appeal was not, as appeals from civil judgments were required to be, applied for or allowed by the trial judge or a judge of the Court of Appeals.[2]

The facts disclose:

On April 21, 1938, an Internal Revenue agent, acting under 26 U. S. C., § 1514 (copied in the margin),[3] served petitioner with summons to appear before him and testify in connection with the tax liability of another. Petitioner responded to the summons, but declined to give any statement or information as to the matter under inquiry. Thereupon, both the agent and the Assistant United

[1] 100 F. 2d 322.

[2] 28 U. S. C. § 230; *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174.

[3] "The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

States Attorney for the District appeared before the District Court, and the agent filed an affidavit of facts and prayed that petitioner be ordered to submit to such questions "as may be propounded to him . . . that are material and pertinent to the subject matter" of the investigation. After hearing, in which petitioner appeared, the District Court ordered him to appear before the agent and testify upon "all matters and facts within . . . [his] knowledge and concerning the subject matter of the inquiry and investigation, . . ." Petitioner did so appear but again declined to answer the agent's questions. After a second hearing by the District Court, petitioner was found in contempt for failure to obey the Court's previous order to testify before the agent and was ordered "held in . . . jail . . . until . . . [he] purges himself of . . . contempt by obeying the order" to testify.

Petitioner insists that no civil action was involved here and that proceedings to which the United States and its agents are parties can not be civil.[4] However, Article 3, § 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the federal judiciary "to Controversies to which the United States shall be a Party." An action by the Interstate Commerce Commission to compel a witness to testify is "a direct civil proceeding, expressly authorized by an act of Congress in the name of the Commission, and under the direction of the Attorney General

[4] Petitioner relies on *Federal Trade Comm'n* v. *A. McLean & Son*, 94 F. 2d 802, 804. There the Court of Appeals for the Seventh Circuit said, "we became convinced that the [Federal Trade] Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure [civil contempt] intended to safeguard the rights and interests of private parties." Because of the conflict on this point in the judgment below we granted certiorari.

of the United States, against the witness . . . refusing to testify, . . ." [5] So here, the mere presence of the United States as a party, acting through its agents, does not impress upon the controversy the elements of a criminal proceeding.[6] In accordance with its constitutional authority to do so, Congress has expressly authorized such a proceeding by an agent of the United States in the federal courts "to compel . . . attendance, testimony, or production of books, papers, or other data." 26 U. S. C. § 1523.[7]

While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.[8] Here, the summons served on petitioner required only that he testify in a tax inquiry properly conducted by an agent of the Bureau of Internal Revenue. And the agent's petition to the District Court, to which we may look in determining the nature of the proceeding,[9] invoked judicial assistance solely in obtaining petitioner's testimony. Authority of the court was sought to buttress the procedure for collection of taxes

[5] *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447, 470.

[6] Cf., *Helvering* v. *Mitchell,* 303 U. S. 391, 402.

[7] Cf., *Brownson* v. *United States,* 32 F. 2d 844, 848, 849; *United States* v. *First National Bank,* 295 F. 142, affirmed 267 U. S. 576.

[8] *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441; *Fox* v. *Capital Co.,* 299 U. S. 105; *Lamb* v. *Cramer,* 285 U. S. 217, 220, 221; *Oriel* v. *Russell,* 278 U. S. 358, 363; *Ex parte Grossman,* 267 U. S. 87, 111; *Union Tool Co.* v. *Wilson,* 259 U. S. 107; *In re Merchants' Stock Co.,* 223 U. S. 629; *Matter of Christensen Engineering Co.,* 194 U. S. 458; *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324.

[9] Cf., *Lamb* v. *Cramer, supra,* 220; *Gompers* v. *Bucks Stove & Range Co., supra,* 448.

and not in "vindication of the public justice," [10] as in criminal cases.

The judgment of contempt was civil, and appeal from it was governed by the statutory rules of civil appeals.

There remains the suggestion that the appeal in question can be considered a civil appeal properly taken under Rule 73 of the new Federal Rules of Civil Procedure which became effective September 16, 1938.[11] However, petitioner's notice of appeal was filed May 2, 1938. The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought. The three months expired July 28, 1938, and the contempt judgment had become unappealable well before the effective date of the new Rules. Therefore, petitioner is not aided by the provision of Rule 86 that the new Rules shall "govern all . . . actions then pending, [September 16, 1938] . . ." This action—from which there was then no right of appeal—was not pending within the meaning of the Rule.

The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals. Its judgment is

Affirmed.

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[10] Cf. *Fox* v. *Capital Co., supra,* 108.

[11] "Rule 73. Appeal to a Circuit Court of Appeals.

How taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

GIBBS, ATTORNEY GENERAL, ET AL. *v.* BUCK ET AL.

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

No. 276. Argued January 10, 1939.—Decided April 17, 1939.

1. The question of jurisdictional amount is properly determined on the bill and motion to dismiss, where the motion in effect traverses only a general allegation of the amount involved, and admits the other allegations, touching the subject, merely challenging their sufficiency to show jurisdiction. P. 71.

   On submission of the question on bill and motion to dismiss, the burden of showing jurisdictional value in controversy is on the plaintiff. P. 72.
2. In a class suit by and on behalf of the members of a society who have a common and undivided interest, the jurisdictional amount or value is involved if for any member, who is a party, the matter in controversy is of that value, or if to the aggregate of all members in the suit it is of that value. P. 72.
3. In a suit to restrain enforcement of a statute prohibiting a business, the amount in controversy is the value of the right to conduct the business free of such prohibition. P. 74.

   The cost of compliance is evidence of the value of the right to be free from a statutory prohibition. P. 75.
4. Owners of the copyrights of musical compositions, with a view to protection against unlicensed public performances for profit for which they received no compensation, granted to an unincorporated association, of which they were the members, the exclusive right of public performance for a term of years. It was the function of the society to protect itself and its members from piracies and to license public performances by others, for royalties which, after certain deductions, it distributed among its members, pursuant to its articles of association. A Florida statute undertook to forbid and penalize such combinations as unlawful monopolies fixing prices in restraint of trade. In a suit by the Society and some of its members representing all, seeking to enjoin enforcement of the statute as an unconstitutional invasion of copyright,—*held:*

   (1) As the members own the copyrights, less the limited assignment to the Society of the right of public performance for

profit, and share in the earnings through mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action. P. 73.

(2) Since the members, because of the interposition of the statute, can not in combination license production and collect fees in Florida, they have a common and undivided interest in the matter in controversy in this class suit. P. 74.

(3) Admitted allegations of the bill support a finding that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value. P. 75.

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178, and *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, distinguished.

(4) In view of the allegations of the bill raising doubts of the constitutionality of the Act, and in view of the penalties attached to its violation, a motion to dismiss for failure to state a cause of action was properly overruled. P. 76.

5. A motion to dismiss a bill for failure to state a cause of action is determined on the face of the bill without resort to affidavits used on the accompanying motion for a preliminary injunction. P. 76.
6. Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the trial court. P. 76.
7. Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise grave doubts of the constitutionality of the Act in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. *Id.*

Affirmed.

APPEAL from an order of the District Court, of three judges, overruling a motion to dismiss the bill and granting an interlocutory injunction, in a suit to restrain enforcement of a Florida statute forbidding combinations of owners of copyrighted musical compositions.

Messrs. Tyrus A. Norwood, Assistant Attorney General of Florida, and *Lucien H. Boggs,* with whom *Messrs. George Couper Gibbs,* Attorney General, and *Andrew W. Bennett* were on the brief, for appellants.

Mr. Thomas G. Haight, with whom *Messrs. Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein,* and *Manley P. Caldwell* were on the brief, for appellees.

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. § 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.[1]

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for profit.[2] The bill of complaint alleges that users of musical compositions had refused to recog-

[1] Equity Rule 38.

[2] Act of March 4, 1909, § 1 (e), c. 320, 35 Stat. 1075, 17 U. S. C. § 1 (e).

nize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.[3] So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded $3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights

[3] Fla. Gen. Laws 1937, Vol. I, c. 17807.

worth in excess of $100,000; that it would cost each individual more than $10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to $59,306.81 and that similar sums were expected in the future; and that in 1936 each of the three publishers received more than $50,000 from the Society and each individual more than $5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than $50,000 from the Society in 1936, that its contract with the Society had a value in excess of $200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than $25,000. The affidavits of the individuals showed annual incomes to them from the Society of from $3,000 to $9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as $5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the

per curiam decision. It found that "the matter in controversy exceeds $3,000 exclusive of interest and costs."

Federal Jurisdiction.—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of $3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of ju-

risdiction, the mode of its determination is left to the trial court.[4] Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.[5] In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.[6] In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount,[7] or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.

This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to

[4] *Wetmore* v. *Rymer*, 169 U. S. 115, 120, 121; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278.

[5] *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 277; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189.

[6] *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189.

[7] *Grosjean* v. *American Press Co.*, 297 U. S. 233, 241–242. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583.

publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.[8] These members are real

[8] Article XV, § 1, of the articles of association, reads as follows: "Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund

parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.[9]

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.[10] To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence between the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profit of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than $150,000 yearly and

any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the 'Music Publisher' members, and one-half (½) among the 'Composer and Author' members respectively."

[9] Cf. *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39; *Shields* v. *Thomas*, 17 How. 3.

[10] *Scott* v. *Donald*, 165 U. S. 107, 114; cf. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 334; *McNeil* v. *Southern Ry. Co.*, 202 U. S. 543; *Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205; *Packard* v. *Banton*, 264 U. S. 140.

individuals more than $5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.[11] The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed $10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported.

McNutt v. *General Motors Acceptance Corp.*[12] differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press,*[13] relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a nonprofit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses

[11] *Packard* v. *Banton,* 264 U. S. 140; *Petroleum Exploration, Inc.* v. *Public Service Comm'n,* 304 U. S. 209, 215; *Healy* v. *Ratta,* 292 U. S. 263; *Buck* v. *Gallagher, post* p. 95.

[12] 298 U. S. 178.

[13] 299 U. S. 269.

among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

Failure to State a Cause of Action.—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.[14] Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.[15] Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal protection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation

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[14] *Polk Company* v. *Glover,* 305 U. S. 5, 9.

[15] *O'Keefe* v. *New Orleans,* 273 F. 560; *Wright* v. *Barnard,* 233 F. 329; *Doherty* v. *McDowell,* 276 F. 728; *Ralston Steel Car Co.* v. *National Dump Car Co.,* 222 F. 590, 592. Compare *Kansas* v. *Colorado,* 185 U. S. 125, 144–145; *Wisconsin* v. *Illinois,* 270 U. S. 634. *Wilshire Oil Co.* v. *United States,* 295 U. S. 100, 102–103.

of the act are provided.[16] The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.[17] The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

Other Assignments.—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction, (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.[18] (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.[19] The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the

[16] Fine $50 to $5,000 and imprisonment one to ten years or either. § 8, Fla. Gen. Laws, 1937, c. 17807.

[17] *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 211–213. *Polk Co.* v. *Glover,* 305 U. S. 5.

[18] *Ex parte Young,* 209 U. S. 123, 165; *Terrace* v. *Thompson,* 263 U. S. 197, 215.

[19] *Alabama* v. *United States,* 279 U. S. 229, 231; *Ohio Oil Co.* v. *Conway,* 279 U. S. 813.

Attorney General of the State, the officer charged with supervision of enforcement,[20] of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger from enforcement.[21] No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½ was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

Affirmed.

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[20] § 10, Fla. Gen. Laws, 1937, c. 17807.

[21] *Terrace* v. *Thompson*, 263 U. S. 197, 214–16; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451–52.

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

MR. JUSTICE BLACK, dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing,

(2) Complainants (appellees here) failed to sustain their burden of showing $3,000.00 in controversy, as required by statute,

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

First. Do general allegations of unconstitutionality,[1] similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique" [2] state legislation, and raise such "grave constitutional questions" that a federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the

[1] Cf. *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 203; *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447; *Public Service Comm'n* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136, 137.

[2] *Borden's Co.* v. *Baldwin, supra*, 203.

bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave," "novel," or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of state officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.[3] In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a federal court turn for the meaning of the statute, than to the decision of the highest state official charged with its enforcement? He has determined that, so far as he and the prosecuting attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,[4] and the trend of Congressional legislation,[5] would be to refrain from federal judicial interference until the state courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the constitution and laws of the United States require." [6]

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[3] Cf., *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 412.

[4] *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207; *Fenner* v. *Boykin*, 271 U. S. 240, 243–4; cf., *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 43; and see Clark, Brandeis, JJ., dissenting, *Cincinnati* v. *Cincinnati & H. Traction Co.*, 245 U. S. 446, 461.

[5] 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

[6] *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194.

Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida the traditional respect that has been accorded state officials by this Court.[7]

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or "grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a federal court of equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendi-

[7] See *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 96; *Cincinnati* v. *Cincinnati & H. Traction Co., supra*, 454, 455; *Virginia* v. *West Virginia*, 231 U. S. 89, 91; cf. *Des Moines* v. *City Ry. Co.*, 214 U. S. 179, 184. This injunction makes strikingly pertinent the question of Justice Harlan, dissenting, in *Ex parte Young*, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . .?" His apprehensive prophecy has more than come true in the present case.

tion of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of public communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a court of equity grant this combination the privilege of violating a state anti-monopoly law? [8] Does a

[8] Cf., *Continental Wall Paper Co.* v *Voight & Sons Co.*, 212 U. S. 227, 262, affirming 148 F. 939; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412. *McConnell* v. *Camors-McConnell Co.*, 152 F. 321; *Pacific*

state law prohibiting such a combination present "grave constitutional questions"?

It is my position that a state law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question," [9] and few have challenged the power of state legislatures to ordain that "competition not combination, should be the law of trade." [10] Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Puerto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any state legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legislation" upon which legislatures act.[11]

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before

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Postal Telegraph Cable Co. v. *Western Union Tel. Co.*, 50 F. 493; *American Biscuit & Mfg. Co.* v. *Klotz*, 44 F. 721; 1 Pom. Equity Juris. (3rd Ed.) § 402.

[9] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209. See, *Atlantic & Pac. Tea Co.* v. *Grosjean*, 301 U. S. 412, 425–6; *Nebbia* v. *New York*, 291 U. S. 502, 529; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 366–7.

[10] *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129; *Carroll* v. *Greenwich Ins. Co.*, *supra*, 411.

[11] *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 260, 261.

presentation of evidence to a federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted." [12]

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process," rightfully "review their economics or their facts." [13] And, although "due process" is invoked, can evidence either add to or take from the legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control

[12] *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 230.

[13] *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 161.

the performance of compositions for profit is prohibited by the statute . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly practices in pursuance of price fixing agreements made before the law was passed, can be no basis for constitutional objection.[14]

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. ". . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation." [15] It is said a drastic penalty is provided for prac-

[14] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), *supra,* 108.

[15] *Carroll* v. *Greenwich Ins. Co., supra,* 411; *Central Lumber Co.* v. *South Dakota, supra,* 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151.

ticing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which state laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of state statutes upon any general complaint to a federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States from suits in federal courts.[16] A lower federal court's refusal in its "discretion" to suspend a state statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled violated the Constitution.[17] And here, where the District Court enjoined a state law in its "discretion," the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—state statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the sub-

[16] Cf. *Ex parte Young*, 209 U. S. 123, Harlan, J., dissenting, 168–204; and see *Fitts* v. *McGhee*, 172 U. S. 516, 528, 530; *In re Ayers*, 123 U. S. 443, 496, 497, 505.

[17] *Polk Co.* v. *Glover*, 305 U. S. 5.

ject of evidence and of findings." [18] True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complainants and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . ." Appellees also allege that "unless the enforcement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . ." These are some of the strongest—if not the strongest—of the bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida," may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any state law, directly or indirectly affecting property, can become effective until injunction proceedings have dragged their weary way through federal courts. All state statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enactments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a

[18] *Borden's Co.* v. *Baldwin, supra,* at 210.

revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of state laws and state action can hang in the courts for many years before receiving final disposition.[19]

Second. Jurisdictional Amount.

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated," [20] the court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this may be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up

[19] See dissent, *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 435, and note.

[20] *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86.

the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein." [21] Appellees assert no common and undivided rights in any fund [22] or property; [23] "the amount payable to each [by the Society] depends upon his contract alone." [24] Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,[25] or rights "which . . . [no one plaintiff] can enforce in the absence of the" others because derived from a single security instrument.[26] In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount." [27]

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did

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[21] *Eberhard* v. *Northwestern Mutual Life Ins. Co.*, 241 F. 353, 356, referred to with apparent approval in *Lion Bonding Co.* v. *Karatz, supra.*

[22] *Smith* v. *Swormstedt,* 16 How. 288.

[23] *Beatty* v. *Kurtz,* 2 Pet. 566.

[24] *Eberhard* case, *supra,* 356.

[25] *Shields* v. *Thomas,* 17 How. 3, but see *Chapman* v. *Handley,* 151 U. S. 443.

[26] *Troy Bank* v. *Whitehead & Co.,* 222 U. S. 39, 41.

[27] *Id.* 40.

not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.[28]

A common desire to disregard a state law cannot serve as a common and undivided interest for purposes of federal jurisdiction; [29] otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so as to disregard the law, in order that they may escape the courts of a State and bring its law before a federal court. And the fact that a state law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a federal court by some members "on behalf and with the authority of all." [30] Here, the individual members have made no showing of what they as individuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined state officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.[31] Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to com-

[28] *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174, 177; *Christopher* v. *Brusselback,* 302 U. S. 500, 505; see, *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 279.

[29] *Pope* v. *Blanton,* 10 F. Supp. 15, 18, dismissed *per curiam* for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; *Gavica* v. *Donaugh,* 93 F. 2d 173.

[30] *Rogers* v. *Hennepin County,* 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf., *Robbins* v. *Western Auto Ins. Co.,* 4 F. 2d 249, cert. den., 268 U. S. 698; *Woods* v. *Thompson,* 14 F. 2d 951, and *Illinois Bankers' Life Assn.* v. *Farris,* 21 F. 2d 1014, cert. den., 276 U. S. 621.

[31] Cf., *Carroll* v. *Greenwich Ins. Co., supra,* 412.

bine to fix prices, and the value of that right must determine the amount in controversy.[32] That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.[33] Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than $1.50 per year.

The loss of a right to an annual gross income of $1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the $1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of

[32] *Scott* v. *Donald*, 165 U. S. 107, 114, 115.

[33] Cf., *Glenwood Light & W. Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125, 126; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 277.

income from the Society will actually be increased when the unprofitable Florida operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a federal court to enforce rights of a value far less than the jurisdictional $3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.[34] I do not believe that jurisdiction of a federal court can be rested on measurements of the imagined cost of what a complainant conceivably could but certainly would never do as an alternative to action forbidden by statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it." [35]

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[34] "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., *Kroger Grocery Co.* v. *Lutz*, 299 U. S. 300, 301; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

[35] *Elgin* v. *Marshall*, 106 U. S. 578, 581.

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of federal courts in state legislation and will accord with the policy of Congress in narrowing the jurisdiction of federal courts by successive increases in the jurisdictional amount.[36] "The policy of the statute calls for its strict construction." [37] Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a federal court on no more than the unified desire of many complainants to violate a state statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

Third. The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the people of Florida who are required to pay monopoly prices while the law remains enjoined. Thus, while the law is suspended, these non-resident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principle that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose inter-

[36] See *Healy* v. *Ratta,* 292 U. S. 263, 270.

[37] *Id.*

ests the injunction may affect." [38] The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.[39] And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper." [40] Litigation is not a game in which justice can be awarded only to the alert and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionality of a law, obtain its judicial suspension, and then continue to violate its

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[38] *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157.

[39] See, *Lamb* v. *Cramer,* 285 U. S. 217, 222; *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242, 256; Revised Rules of the Supreme Court of the United States, 27, paragraph 6; cf., *Mahler* v. *Eby,* 264 U. S. 32, 45.

[40] *United States* v. *Rio Grande Irrigation Co.,* 184 U. S. 416, 423; *Cincinnati* v. *Cincinnati & H. Traction Co., supra,* 454; *Ridings* v. *Johnson,* 128 U. S. 212, 218; cf., *Patterson* v. *Alabama,* 294 U. S. 600, 607.

terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no state law can become effective until a federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a state law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.

BUCK ET AL. *v.* GALLAGHER, STATE TREASURER, ET AL.

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

No. 329. Argued January 10, 1939.—Decided April 17, 1939.

1. In a suit to restrain the enforcement of a statute prohibiting or regulating a business, the matter in controversy is the right to carry on the business free from the prohibition or regulation. P. 100.
2. The burden of showing jurisdictional value in controversy is on the plaintiff. P. 102.

   The value of the right to be free in one's business from a statutory regulation may be shown by proving the additional cost of complying with the regulation. P. 103.
3. Owners of the copyrights of musical compositions, with a view to protection against unlicensed public performances for profit for which they received no compensation, granted to an unincorporated association, of which they were the members, the exclusive right of public performance for a term of years. It was the function of the society to protect itself and its members from piracies and to license public performances by others, for royalties which, after certain deductions, it distributed among its members, pursuant to its

articles of association. In a suit by the society and some of its members representing all, seeking to enjoin on constitutional grounds the enforcement of a statute of Washington which purports to regulate licensing by combinations of copyright owners, the bill alleged, generally, that the value of the matter in controversy exceeded $3,000, and also that the cost of complying with a provision of the statute requiring copyright owners to file yearly a list of their copyrighted works would involve costs to the society, or to each of the members individually if they acted in the matter without the society, of specified amounts each in excess of the jurisdictional value. *Held:*

(1) The allegations show that the members have a common and undivided interest in the right to license in association through the society free of the provisions of the state statute. P. 103.

(2) Upon a motion to dismiss for want of jurisdictional amount, which denied the allegations of the bill and challenged their sufficiency in that regard, the District Court erred in dismissing the bill without allowing plaintiffs the opportunity to produce evidence of the cost of complying with the statute and of the value of property rights affected by it. P. 103.

24 F. Supp. 541, reversed.

APPEAL from a decree of the District Court of three judges which dismissed, for want of jurisdiction, a bill to enjoin the enforcement of a statute of the State of Washington affecting the right of the owners of copyrights to combine in licensing performances of their musical compositions.

Mr. Thomas G. Haight, with whom *Messrs. Louis D. Frohlich* and *Herman Finkelstein* were on the brief, for appellants.

Mr. Alfred J. Schweppe, with whom *Messrs. G. W. Hamilton,* Attorney General of Washington, *John E. Belcher,* Assistant Attorney General, *Edwin C. Ewing, Ralph E. Foley,* and *Sam M. Driver* were on the brief, for appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This is an appeal, under § 266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage. All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated,

[1] *Buck* v. *Case,* 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the records shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[2] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of price and use, unnecessary to consider here.[3] The statute is directed particularly at

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[2] Considered in *Gibbs* v. *Buck, ante,* p. 66.

[3] Washington Laws, 1937, § 3, c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the

the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under § 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt* v. *General Motors Acceptance Corp.*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur

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single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—*Gibbs* v. *Buck, supra;* regulatory statutes—*McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181; *Kroger Grocery Co.* v. *Lutz*, 299 U. S. 300, 301.

[5] 264 U. S. 140.

which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount." [8]

By § 4 of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their copyrighted works, under oath.[9] By § 3, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges the cost of compliance by the Society, the com-

[6] *Western & Atlantic R. Co.* v. *Railroad Comm'n,* 261 U. S. 264, 267.

[7] *Petroleum Exploration, Inc.* v. *Public Service Comm'n,* 304 U. S. 209, 215.

[8] *Healy* v. *Ratta,* 292 U. S. 263, 271, and cases there cited; *Grosjean* v. *Am. Press Co.,* 297 U. S. 233, 241; *Henneford* v. *Northern Pacific Ry. Co.,* 303 U. S. 17, 19.

[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

bination of members, with § 4 would exceed $300,000.[10] For the individual members who now have the benefits of the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with § 4 as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree,

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000, which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

[11] *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189.

on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

The complainants in this case are the same as those in *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed out that the members share directly in the earnings of the Society and have a common and undivided interest in

[12] E. g., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

the right to license in association through the Society free of the provisions of the state statute. The allegations as to relationship between the Society and its members show the same status in this case. The fact that "neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown," [13] does not affect the rights members have in the apportionment of the royalties from license fees. These rights are granted by the articles of association which are a part of the bill. *KVOS, Inc.* v. *Associated Press*,[14] relied upon below, is distinguished in the *Gibbs* case.

The cause will be remanded to the District Court with directions to permit the introduction of evidence and for further proceedings not inconsistent herewith.

Reversed.

MR. JUSTICE BLACK dissents.

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

DRISCOLL ET AL., CONSTITUTING PENNSYLVANIA PUBLIC UTILITY COMM'N, ET AL. *v.* EDISON LIGHT & POWER CO.

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

No. 509. Argued February 7, 8, 1939.—Decided April 17, 1939.

1. The provision of the Act of May 14, 1934, withholding from the District Courts jurisdiction over suits to enjoin on the ground of unconstitutionality the enforcement of state orders fixing public utility rates, "where a plain, speedy, and efficient remedy at law or in equity may be had in the courts of such State,"—*held* inapplicable by its terms to a suit attacking temporary rates ordered by the Public Utilities Commission in Pennsylvania, where the

[13] *Buck* v. *Case*, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.

remedy by injunction is confined to proceedings "questioning the jurisdiction of the commission," and where the remedy at law by appeal does not postpone the rates *pendente lite*. Pp. 108 *et seq.*

2. The provisions of § 310 (a) of the Pennsylvania Public Utilities Act for fixing temporary public utility rates are not limited to utilities which keep continuing property records. Section 310 (b) furnishes a partial alternative method. P. 112.
3. Section 310 (a) of the Act empowers the commission to fix temporary rates, to be charged pending final determination of the rate proceedings, which shall be sufficient to provide a return of not less than 5% upon original cost, less accrued depreciation, of the utility's physical property used and useful in the public service. Section 309 requires that permanent rates when determined shall be "just and reasonable." In fixing the base for temporary rates in this case, the commission did not confine itself to the single factor of original cost less depreciation, but interpreted § 310 (a) as requiring that weight be given also to reproduction cost, going concern value and the necessity for working capital, in compliance with the rule laid down by this Court in *Smyth* v. *Ames*, 169 U. S. 400. *Held*, that in the absence of any decision of the state court on the subject, this interpretation of § 310 (a), not inconsistent with its terms, should be accepted. P. 114.

   A different construction would raise the novel and important question of the constitutionality of a temporary rate, based solely on depreciated original cost, with provision of the statute for recoupment of the loss from insufficient temporary rates as provided in § 310 (e).
4. This Court adopts a just and reasonable construction of a state statute rendering it clearly constitutional rather than another that puts its validity in doubt. P. 115.
5. In determining a rate base, failure to include allowance for cost of financing is not erroneous where the evidence reveals no actual expenditures for that purpose and furnishes no foundation for an estimate. P. 116.
6. It does not appear from evidence that in determining rate base the commission failed in this case to make due allowances for going concern value; nor that, in estimating depreciated reproduction cost, it failed to make adequate allowance for indirect costs, such as interest, supervision, financing, taxes, legal expenses, or refused to consider claimed increase of prices. P. 117.
7. Six per cent. *held* not an inadequate rate of return in the case of an electric power company which operates in a stable com-

munity accustomed to the use of electricity and close to the capital markets, with funds readily available for secure investment. Long operation and adequate records make forecasts of net operating revenues fairly certain. Under such circumstances a six per cent. return after all allowable charges can not be confiscatory. P. 119.

8. Even where the rates in effect are excessive, in a proceeding by a commission to determine reasonableness the utility should be allowed its fair and proper expenses for presenting its side to the commission. P. 120.

9. In the allowance for such rate-case expenditures, the period over which they are to be amortized will depend upon the character of services received or disbursements made. P. 121.

There could rarely be an anticipation of annually recurring charges for rate regulation. Under the circumstances here presented where full statistics on investment, inventory and labor requirements have been made which, as cumulated, will form largely the basis of all future negotiations, the Court is of the opinion that amortization over a ten year period is reasonable.

25 F. Supp. 192, reversed.

APPEAL from a decree of the District Court of three judges permanently enjoining the enforcement of temporary rates fixed for an electric power company.

Messrs. Guy K. Bard and *Edward Knuff,* with whom *Messrs. Claude T. Reno,* Attorney General of Pennsylvania, and *Samuel Graff Miller, John C. Kelley, Harry H. Frank,* and *Herbert S. Levy* were on the brief, for appellants. *Mr. Herbert B. Cohen* was on a brief for the Utility Consumers' League of York, Pa., appellant.

Mr. Clarence W. Miles, with whom *Messrs. Walter Biddle Saul, Edward F. Huber, Bradford S. Magill,* and *J. Harry La Brum* were on the brief, for appellee.

By leave of Court, briefs of *amici curiae* were filed by *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Paul A. Freund, Robert M. Cooper, Milford Springer, David W. Robinson, Jr., Richard J.*

Connor, Charles W. Smith, William J. Dempsey, and *William C. Koplovitz,* on behalf of the United States; and by *Messrs. Gay H. Brown* and *Sherman C. Ward,* on behalf of the Public Service Commission of the State of New York, urging the constitutionality of the temporary-rate provision of the Pennsylvania statute.

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from the decree of a three-judge district court granting a permanent injunction against the enforcement of temporary rates. § 266, Jud. Code.

The appellants are five named persons, individually and as members of the Pennsylvania Public Utility Commission, and the Utility Consumers League of York, Pennsylvania, intervening defendant below, an unincorporated association of consumers of electric current in the territory served by the appellee. The latter is a public utility corporation organized under the laws of Pennsylvania, which generates, transmits, distributes and sells electric energy to approximately 30,000 customers in and about York, Pennsylvania.

An investigation to determine the reasonableness of appellee's rates was instituted on January 27, 1936. During its progress the state legislature recodified the utility law of Pennsylvania. Act of May 28, 1937, P. L. 1053, Purdon's Pa. Stat. Ann., 1938 Supp., Title 66, § 1101 *et seq.* It enacted a temporary rate section, 310, which is the source of this controversy.

Acting under § 310, the commission, after notice and argument, issued a temporary rate order on July 13, 1937, requiring the utility to file rate schedules which would effect a reduction of approximately $435,000 in annual gross operating revenues. This order was replaced by another on July 27, 1937, which commanded an identical reduction. This time the commission itself prescribed a

schedule of rates. The utility filed a bill in equity in a statutory court in the Middle District of Pennsylvania. On October 15, 1937, a permanent injunction issued.[1] The Commission did not appeal. On November 30, 1937, another order was issued seeking to establish the same temporary rates and to secure the same reduction in gross revenues as the orders of July 13 and 27.

On December 14, 1937, the utility filed a bill in the United States District Court for the Eastern District of Pennsylvania to enjoin this order. A three-judge court was convened under § 266 of the Judicial Code. By stipulation of the parties the application for an interlocutory injunction brought to hearing on January 17, 1938, was treated as an application for a permanent injunction. On October 14, 1938, a permanent injunction issued.

The court concluded as a matter of law that the utility had no plain, speedy and adequate remedy in the state courts; that the order is void because the "commission acted in direct violation of the mandatory provisions of the Public Utility Act which requires rates for [the company] to be fixed under paragraph (b) of section 310"; that the order is unconstitutional because (1) it violates the procedural requirements of due process, (2) it fails to permit the utility to earn a fair return on the fair value of its property used and useful in the public service, (3) it confiscates the company's property, and (4) it is not supported by substantial evidence.[2]

Jurisdiction of the Statutory Court.—Except as modified by the Johnson Act,[3] jurisdiction exists in a statutory court, called pursuant to § 266 of the Judicial Code, to hear and finally determine bills in equity seeking tem-

[1] *Edison Light & Power Co.* v. *Driscoll,* 21 F. Supp. 1.

[2] *Edison Light & Power Co.* v. *Driscoll,* 25 F. Supp. 192.

[3] Judicial Code, § 24 (1), as amended by Act of May 14, 1934, c. 283, 48 Stat. 775.

porary and permanent injunctions against the order of a state administrative commission on the ground of irreparable injury.[4] By this amendatory act, where the order attacked as violative of the Federal Constitution affects the rates of a public utility, does not interfere with interstate commerce and has been made after notice and hearing, the jurisdiction of the district court to enjoin its enforcement is withdrawn, unless no "plain, speedy and efficient remedy may be had, at law or in equity, in the courts of such State." No challenge to the jurisdiction was made in the statutory court or on appeal. In response to questions from the bench, counsel for the commission conceded that there was no remedy in the state courts which would satisfy the Johnson Act.

The reason for this concession lies, so far as a remedy in equity is concerned, in the provision of the Pennsylvania statute forbidding an injunction against an order, "except in a proceeding questioning the jurisdiction of the commission." [5] The bill in certain allegations attacks the section of the Public Utility Law under which this order issued as violative of the Fourteenth Amendment in that it empowered the commission to fix noncompensatory and discriminatory temporary rates, in an arbitrary manner. In one sense this questions the ju-

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[4] *Oklahoma Gas Co.* v. *Russell,* 261 U. S. 290, 292; *Herkness* v. *Irion,* 278 U. S. 92, 93.

[5] § 1111, P. L. 1053, Purdon's Pa. Stat. Ann., 1938 Supp., Title 66, § 1441: "Exclusive jurisdiction of Dauphin County Court to hear injunctions.—No injunction shall issue modifying, suspending, staying, or annuling any order of the commission, or of a commissioner, except in a proceeding questioning the jurisdiction of the commission, and then only after cause shown upon a hearing. The court of common pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth, of all proceedings for such injunctions, subject to an appeal to the Superior Court as aforesaid."

risdiction of the commission. If § 310 is invalid, there is no other provision to authorize temporary rates. Jurisdiction is a word of uncertain meaning. As used in § 1111, *supra,* it apparently refers to proceedings by the commission under the terms of the statute. In this use it would permit an injunction, equitable grounds being shown, where the public utility is not covered by the act. Otherwise, action in excess of the powers of the commission, such as a confiscatory rate, might be deemed beyond its jurisdiction. At any rate, without an authoritative determination by the state courts, we cannot say, for this character of proceeding, that the remedy in the state courts is plain, speedy and efficient.[6] The remedy at law by appeal is ineffective to protect the utility's position *pendente lite.* The supersedeas does not postpone the application of the temporary rates.[7] The statutory court had jurisdiction of the bill.

Statutory Basis for the Order.—Sec. 310[8] contains several subsections. The commission fixed the temporary rates under subsection (a). The district court concluded as a matter of law that this action was invalid because they could only be fixed under subsection (b). The two subsections are set out below.[9] In its opinion, without

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[6] *Mountain States Co.* v. *Comm'n,* 299 U. S. 167, 170; *Corporation Comm'n* v. *Cary,* 296 U. S. 452.

[7] § 1103, P. L. 1053, Purdon's Pa. Stat. Ann., 1938 Supp., Title 66, § 1433.

[8] P. L. 1053, Purdon's Pa. Stat. Ann., 1938 Supp., Title 66, § 1150.

[9] "Temporary Rates.—(a) The commission may, in any proceeding involving the rates of a public utility brought either upon its own motion or upon complaint, after reasonable notice and hearing, if it be of opinion that the public interest so requires, immediately fix, determine, and prescribe temporary rates to be charged by such public utility, pending the final determination of such rate proceeding. Such temporary rates, so fixed, determined, and prescribed, shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical

discussing § 310 (b), the court declared § 310 (a) unconstitutional because it permitted the commission to fix a temporary rate based upon the single factor of original cost less depreciation.[10] The commission, however, did not confine itself to that one element in setting the fair value of the appellee's property, for the purpose of temporary rates, at $5,250,000. It gave weight to reproduction cost, original cost, going concern value and the necessity for working capital, and it allowed on this rate base a return of more than six per cent. This, of course,

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property (when first devoted to public use) of such public utility, used and useful in the public service, and if the duly verified reports of such public utility to the commission do not show such original cost, less accrued depreciation, of such property, the commission may estimate such cost less depreciation and fix, determine, and prescribe rates as hereinbefore provided.

"(b) If any public utility does not have continuing property records, kept in the manner prescribed by the commission, under the provisions of section five hundred two of this act, then the commission, after reasonable notice and hearing, may establish temporary rates which shall be sufficient to provide a return of not less than an amount equal to the operating income for the year ending December thirty-first, one thousand nine hundred thirty-five, or such other subsequent year as the commission may deem proper, to be determined on the basis of data appearing in the annual report of such public utility to the commission for the year one thousand nine hundred thirty-five, or such other subsequent year as the commission may deem proper, plus or minus such return as the commission may prescribe from time to time upon such net changes of the physical property as are reported to and approved for rate-making purposes by the commission. In determining the net changes of the physical property, the commission may, in its discretion, deduct from gross additions to such physical property the amount charged to operating expenses for depreciation or, in lieu thereof, it may determine such net changes by deducting retirements from the gross additions: Provided, That the commission, in determining the basis for temporary rates, may make such adjustments in the annual report data as may, in the judgment of the commission, be necessary and proper."

[10] *Edison Light & Power Co.* v. *Driscoll,* 25 F. Supp. 192.

satisfies the requirement of § 310 (a) that the temporary rates shall produce not less than 5% on the "original cost, less accrued depreciation."

Appellee's first contention is that the decree may be sustained for the sole reason that the commission should have proceeded under subsection (b) because the appellee does not have continuing property records. As the conclusion of the lower court on this point is not supported by a state decision, we analyze for ourselves the provisions of the sections. It is clear from the language of § 310 (a) that it is applicable not only to public utilities whose reports to the commission show the original cost of their physical property but also to those whose original cost is not so shown. The last clause of the section authorizes the commission to estimate such cost. There is no provision in 310 (a) which limits its application to those utilities which maintain the continuing property records of § 502.[11] Section 310 (b), see note 9, furnishes a partial alternative for § 310 (a). Where there are no continuing property records, as provided by § 502, the commission must in fixing the temporary rate arrange for at least a five per cent return on original cost under (a) or the return of an operating income under (b) equal to that for the year 1935 or a subsequent year, as determined by the commission.

[11] P. L. 1053, Purdon's Pa. Stat. Ann., 1938 Supp., Title 66, § 1212. "Continuing property records.—The commission may require any public utility to establish, provide, and maintain as a part of its system of accounts, continuing property records, including a list or inventory of all the units of tangible property used or useful in the public service, showing the current location of such property units by definite reference to the specific land parcels upon which such units are located or stored; and the commission may require any public utility to keep accounts and records in such manner as to show, currently, the original cost of such property when first devoted to the public service, and the reserve accumulated to provide for the depreciation thereof."

Appellee urges next that the section permits the commission to disregard present cost, depreciate original cost, omit indirect and overhead items of construction, and exclude allowances for working capital or going concern value. Although these items were considered by the commission, the appellee contends that the order is invalid because § 310 (a) might have been complied with by providing a return of 5% on the original cost depreciated. The argument seems to be that a statute which permits an unconstitutional determination is invalid, even though it is actually applied in a constitutional manner.[12]

The commission drew the order in accord with the prior ruling of the Middle District Court on a former order in this rate proceeding.[13] The former order had also fixed temporary rates but had not set out the findings of value deemed essential by the court. Although the reversal of the commission's order had actually turned on the failure to show the factual basis for the rates, as the district court had stated that compliance with *Smyth* v. *Ames* [14] was necessary in temporary rate making, the commission based the order now under review on evidence requisite under that rule. By taking this position, it interprets the statute as requiring consideration of elements other than original cost in fixing temporary rates. It is not suggested that the commission omitted consideration of any necessary element in the present order. If we assume with the appellee that the constitutionality of a

[12] Cf. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420; *Wuchter* v. *Pizzutti,* 276 U. S. 13, 24; *People* v. *Klinck Packing Co.,* 214 N. Y. 121, 138; 108 N. E. 278; *Montana Company* v. *St. Louis Mining Co.,* 152 U. S. 160, 170. But see *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Tyler* v. *Judges,* 179 U. S. 405, 410; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 37; *Lieberman* v. *Van De Carr,* 199 U. S. 552, 562; *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265, 278.

[13] *Edison Light & Power Co.* v. *Driscoll,* 21 F. Supp. 1.

[14] 169 U. S. 466.

delegation of rate making authority is to be tested by what a rate making body may rightfully do under the delegation rather than what it does, appellee's case is advanced not one whit. We have here an interpretation of the Pennsylvania statute by the board charged with its enforcement that it must weigh all the essential elements of valuation required by our past decisions.

There is nothing in the language of § 310 (a) which requires a different construction. The commission is authorized to fix temporary rates. There is no requirement as to how the rates are to be determined, except that they shall be sufficient to return a given minimum—not less than 5% on the original cost, less depreciation. The language authorizing the fixing of temporary rates is cast, except as to the limitation just referred to, in much the same pattern as the language of § 309 authorizing the determination of permanent rates. The latter section reads: ". . . the commission shall determine the just and reasonable rates . . ." A different construction would raise the novel and important question of the constitutionality of a temporary rate, based solely on depreciated original cost, with provision for recoupment of the loss from insufficient temporary rates.[15] In the absence of an

[15] "(e) Temporary rates so fixed, determined, and prescribed under this section shall be effective until the final determination of the rate proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined, and prescribed under this section, the commission shall consider the effect of such rates in fixing, determining, and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined, are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such tem-

authoritative state decision, we are reluctant to accept a construction which brings forward that issue, particularly when the case may reasonably be determined upon the interpretation of the officials of the state charged with the administration of the act.[16] This course observes the very salutary rule that "this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided under a construction of the statute under which the act is clearly constitutional." [17]

Confiscation.—There remains for examination the appellee's argument that the decree of the district court enjoining the enforcement of the order should be sustained because it is confiscatory. The commission, as of November 30, 1937, found the rate base, revenue, expenses and rate, as set out below.[18] Appellee urges here that the commission's figures are erroneous in the following particulars: (1) The rate base should be $5,866,081; (2) the rate should be 7½ per cent; (3) two items of expense, disallowed by the commission should be added to the operating expenses, (a) some increase in annual salaries and (b) rate case expenses on books to November

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porary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect." Cf. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43; *Bronx Gas & Electric Co.* v. *Maltbie*, 271 N. Y. 364; 3 N. E. 2d 512.

[16] *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 97; *Union Ins. Co.* v. *Hoge*, 21 How. 35, 66.

[17] *Thompson* v. *Consolidated Gas Corp.*, 300 U. S. 55, 75–76, and cases cited; cf. *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 217.

[18]

Rate Base or Fair Value of Property			$5, 250, 000. 00
Rate of return 6%.			
Required return			315, 000. 00
Revenue after Reduction		$1, 767, 329. 00	
Operating Expenses	$1, 033, 898. 00		
Taxes	206, 400. 00		
Annual Depreciation	142, 531. 00	1, 382, 829. 00	
Estimated Return			384, 500. 00

15, 1937; (4) allowance should be made for a prospective loss of annual profit by reason of the loss of a large customer, through abandonment of railway service by York Railways Company.

(1) The commission estimated the original cost as of December 31, 1936, at $4,576,169.73. The company estimated the original cost as of November 30, 1936, exclusive of financing charges, at $4,619,364.00 and its book cost as of December 31, 1936, at $4,578,793.00. If, to the highest of these items, we add $164,000 for working capital and $142,851.07, representing net additions to September 30, 1937, the amounts claimed by the company, the original cost rate base is found to be not more than $4,926,215.07.

The commission excluded the cost of financing because there was no evidence of any actual expenditures for such purpose or of any studies of such cost. We find no error in this.[19] There was here no foundation for an estimate.[20] Appellee's suggestion that evidence supporting its claim is found in the capitalization chart of York Railways Company, the owner of appellee's common stock, is not accepted. This shows the discount, $298,825.00, paid by the parent company on $2,706,000 face amount of bonds of various issues between 1909 and 1925. It appears that $1,027,904 of the proceeds was expended for construction work of the York Edison Company, apparently appellee's predecessor. Nothing is shown as to the cost of this money to the appellee. It may have given notes for or been charged with this exact amount, without a finance charge. The financing cost to appellee may have been covered by the interest rate.

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[19] *Wabash Valley Elec. Co.* v. *Young,* 287 U. S. 488, 500; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 397.

[20] Cf. *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 309–10; *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 310.

The commission made no specific allowance for going concern value. It did, however, state that it had weighed the going concern value with other factors to determine fair value. It gave practical effect to this consideration when it fixed fair value several hundred thousand dollars in excess of its average of original and reproduction cost, both depreciated. In the computations by the company of original and reproduction costs, allowances were made for the overhead expense of creating the aggregate of land, buildings, and equipment, making up the utility. No tangible evidence of any unusual situation justifying any definite further allowance appears in the testimony of appellee's witness Seelye. The plant of the utility without the utilization of its production by the community would be of little value. Expenditures to secure customers through advertisement and solicitation, as well as to install connections do not appear separate from the ordinary operating and construction costs. The appellee points to the character of the territory served, the company's ability to earn, the efficiency of the management, the adequate available power supply and the excellent capital structure as indicative of a going concern value above tangible property plus overhead. To appraise these elements apart from and in addition to reasonable cost figures would require evidence of a failure on the part of the commission to give reasonable weight to these factors. This evidence is lacking here.[21]

For depreciated reproduction cost as of November 30, 1936, the commission accepted the estimate of the company for direct costs, $3,981,347. It added 19%, $756,456,

[21] *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 478; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 62. Cf. *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 308; *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, 334; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *McCardle* v. *Indianapolis Co.,* 272 U. S. 400, 413.

for indirect costs and reached a total of $4,737,803. This finding reduced the indirect costs from the 24.3 per cent claimed by the company. Evidence was introduced before the commission supporting each percentage estimate. The amount of these indirect costs likely to be incurred is too uncertain for us to conclude that the percentage adopted is erroneous.[22] We cannot see that the failure of the commission's witness Bierman to inspect the property made less valuable his estimate on the proper percentage to be applied for indirect costs. These indirect costs are of the character of interest, supervision, cost of financing, taxes and legal expense.

The utility states that the commission, in fixing the reproduction cost, erred by refusing to consider the effect of a claimed increase of prices. The commission, on November 30, 1937, fixed reproduction cost upon a computation based by the utility upon prices as of November 30, 1936. This showed a gross cost of $5,572,134, depreciated and reduced by the commission, as explained in the preceding paragraph, to $4,737,803. The utility presented a further computation, showing as of May 31, 1937, that increased prices, due to a rising level, would increase the gross cost to $6,019,832. The argument is that the later estimate should have been considered.[23] Proportionally reduced to accord with the action of the commission, this latter figure would become $5,118,465. If to this higher reproduction cost we add working capital, there appears a reproduction cost depreciated figure of $5,282,465.

It is furthermore to be observed that the commission's figures do not differ far as to fair value, from the estimate of an important witness for the utility, Mr. Seelye, who testified on March 12, 1937, that the fair value was not less than $5,500,000 and said later in answer to the com-

[22] *Dayton P. & L. Co.* v. *Comm'n,* 292 U. S. 290, 311.

[23] *McCart* v. *Indianapolis Water Co.,* 302 U. S. 419.

missioner's question that the fair value, in his opinion, was $5,500,000. This estimate was reiterated on December 20, 1937, in the affidavits of Mr. Seelye and Mr. Wayne, the President of the company, in support of the motion for temporary injunction.

For the purpose of passing upon the issue of confiscation in the temporary rates, we shall accept $5,500,000 as the fair value of the property as of November 30, 1937.

(2) The rate of return was fixed by the commission at six per cent. Witnesses for the utility brought out facts deemed applicable in the determination of a proper rate of return on the fair value of the property. Their evidence took cognizance of the yield of bonds, preferred and common stocks of selected comparable utilities, the stagnant market for new issues, prevailing cost of money, the implications of the possible substitution of some governmentally operated or financed utilities for those privately owned and the dangers of a fixed schedule of rates in the face of possible inflation. From these factors they deduced that a proper rate of return would be from 7.8 per cent to 8 per cent. An accounting expert of the commission countered with tables showing yields of bonds of utilities; the yield to maturity of Pennsylvania public utility securities, approved by the commission between July 1, 1933, and May 7, 1937, long term and actually sold for cash to non-affiliated interests; yield of Pennsylvania electric utilities; financial and operating statistics of Pennsylvania electric utilities; money rates, and other material information. He concluded 5.5 per cent was a reasonable rate of return.

It must be recognized that each utility presents an individual problem.[24] The answer does not lie alone in

[24] *United Railways* v. *West*, 280 U. S. 234, 249; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 48; *Bluefield Co.* v. *Public Service Comm'n*, 262 U. S. 679, 692; *Knoxville* v. *Water Co.*, 212 U. S. 1, 17.

average yields of seemingly comparable securities or even in deductions drawn from recent sales of issues authorized by this same commission. Yields of preferred and common stocks are to be considered, as well as those of the funded debt. When bonds and preferred stocks of well seasoned companies can be floated at low rates, the allowance of an over all rate return of a modest percentage will bring handsome yields to the common stock. Certainly the yields of the equity issues must be larger than that for the underlying securities. In this instance, the utility operates in a stable community, accustomed to the use of electricity and close to the capital markets, with funds readily available for secure investment. Long operation and adequate records make forecasts of net operating revenues fairly certain. Under such circumstances a six per cent return after all allowable charges cannot be confiscatory.

(3) and (4). The utility urges that two items of expense and a prospective loss should be added to the operating expenses, allowed by the commission, of $1,382,-829. The most important of these items is the rate case expenses. The company by its Exhibit 21 shows these incurred to November 15, 1937, to be $178,374.50. The commission from Exhibit 23 found them to be $127,935 for the twelve months ending September 30, 1937. The difference probably comes from the expenses before and after the period considered by the commission. We assume the higher figures to be correct. As the commission concluded that the prior rates of the company were obviously excessive, it allowed nothing for expense in defending them. Consequently there is no discussion of the reasonableness of the amount of the company's charge and we accept them as reasonable. Even where the rates in effect are excessive, on a proceeding by a commission to determine reasonableness, we are of the view that the utility should be allowed its fair and proper

expenses for presenting its side to the commission. We do not refer to expense of litigation in the courts. "A different case would be here if the company's complaint had been unfounded or if the cost of the proceeding had been swollen by untenable objections." [25]

In the allowance of these expenses, the period over which they are to be amortized will depend upon the character of services received or disbursements made. There could rarely be an anticipation of annually recurring charges for rate regulation. Under the circumstances here presented where full statistics on investment, inventory and labor requirements have been made which, as cumulated, will form largely the basis of all future negotiations, we are of the opinion that amortization over a ten year period is reasonable.[26] As such an adjustment produces an estimated return very close to the reasonable rate, even with the addition to the operating expenses of the other items of increased salaries, $20,593, and prospective loss of annual profit, $15,089, we do not enter into a discussion of them. Experience will add its weight to the other evidence on further hearing. The note below shows the calculation.[27]

At best, these estimates are prophecies of expected returns. The incalculable factors of business activity, un-

[25] *West Ohio Gas Co.* v. *Comm'n* (No. 1), 294 U. S. 63, 74; see *Wabash Valley Elec. Co.* v. *Young*, 287 U. S. 488, 500.

[26] *Wabash Valley Elec. Co.* v. *Young*, 287 U. S. 488, 500; *West Ohio Gas Co.* v. *Comm'n* (No. 1), 294 U. S. 63, 74.

[27] Compare with the computation of the Commission, note 18.

Rate Base or Fair Value of Property			$5,500,000.00
Rate of return 6%.			
Required return			330,000.00
Revenue after Reduction		$1,767,329.00	
Operating Expenses	$1,033,898.00		
Taxes	206,400.00		
Annual Depreciation	142,531.00		
Rate Expense, 10-year Amortization	17,838.00		
Salary Increase	20,593.00		
Prospective Loss	15,089.00	1,436,349.00	
Estimated Return			330,980.00

anticipated demand or forbearance, substitution and other variables lead us to approximations. We are satisfied the reduction required is not shown to be confiscatory.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

The decree below was clearly wrong. But in reversing it, the Court's opinion appears to give new vitality needlessly to the mischievous formula for fixing utility rates in *Smyth* v. *Ames,* 169 U. S. 466. The force of reason, confirmed by events, has gradually been rendering that formula moribund by revealing it to be useless as a guide for adjudication. Experience has made it overwhelmingly clear that *Smyth* v. *Ames* and the uses to which it has been put represented an attempt to erect temporary facts into legal absolutes. The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. These are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process.

Mr. Justice Bradley nearly fifty years ago made it clear that the real issue is whether courts or commissions and legislatures are the ultimate arbiters of utility rates, (dissenting, in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 461). Whatever may be thought of the wisdom of a broader judicial rôle in the controversies between public utilities and the public, there can be no

doubt that the tendency, for a time at least, to draw fixed rules of law out of *Smyth* v. *Ames* has met the rebuff of facts. At least one important state has for decades gone on its way unmindful of *Smyth* v. *Ames,* and other states have by various proposals sought to escape the fog into which speculations based on *Smyth* v. *Ames* have enveloped the practical task of administering systems of utility regulation.

Smyth v. *Ames* should certainly not be invoked when it is not necessary to do so. The statute under which the present case arose represents an effort to escape *Smyth* v. *Ames* at least as to temporary rates. It is the result of a conscientious and informed endeavor to meet difficulties engendered by legal doctrines which have been widely rejected by the great weight of economic opinion,[1] by authoritative legislative investigations,[2] by utility commissions throughout the country,[3] and by impressive judicial dissents.[4] As a result of this long process of experience and reflection, the two states in which utilities play the biggest financial part—New York and Pennsylvania—have evolved the so-called recoupment scheme for temporary rate-fixing (thereby avoiding some of the most

[1] See 2 BONBRIGHT, THE VALUATION OF PROPERTY, 1081–1086, 1094–1102; 3A SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 121–137.

[2] N. Y. State Commission on Revision of the Public Service Commission Law, *Report of Commissioners, passim* (1930).

[3] Proceedings of the Forty-Seventh Annual Convention of the National Association of Railroad and Utilities Commissioners, 232 *et seq.;* Proceedings of the Forty-Eighth Annual Convention of the National Association of Railroad and Utilities Commissioners, 115 *et seq.,* 289 *et seq.;* Proceedings of the Forty-Ninth Annual Convention of the National Association of Railroad and Utilities Commissioners, 159 *et seq.*

[4] See, e. g., Brandeis, J., concurring, in *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276, 289, and bibliography therein contained.

wasteful aspects of rate litigation) as a fair means of accommodating public and private interests. It is a carefully guarded device for securing "a judgment from experience as against a judgment from speculation," *Tanner* v. *Little,* 240 U. S. 369, 386, in dealing with a problem of such elusive economic complexity as the determination of what return will be sufficient to attract capital in the special setting of a particular industry and at the same time be fair to the public dependent on such enterprise.

That this Court should not "decide an issue of constitutionality if the case may justly and reasonably be decided under a construction of the statute under which the act is clearly constitutional" is, as an abstract proposition, basic to our judicial obligation. But this is not a formal doctrine of self-restraint. Its rationale is avoidance of conflict with the legislature. The opinion from which the preceding quotation is taken and the decisions to which it refers are all cases in which constitutionality was in obvious jeopardy. It is one thing to avoid unconstitutionality even at the cost of a tortured statutory construction. It is quite another to recognize the validity of a statute directed expressly to the situation in hand and so employed by the state authorities, when constitutionality of that statute is as incontestably clear as the decision of the New York Court of Appeals has demonstrated it to be in sustaining the sister statute of the Pennsylvania Act, *In the Matter of Bronx Gas & Electric Co.* v. *Maltbie,* 271 N. Y. 364; 3 N. E. 2d 512. The Court's opinion in the present case does not avoid issues of constitutionality. It accepts the much more dubious constitutional doctrines of *Smyth* v. *Ames* and its successors to solve the very easy constitutional issues raised by the Pennsylvania Act.

MR. JUSTICE BLACK concurs in the above views.

Counsel for Parties.

ROCHESTER TELEPHONE CORP. *v.* UNITED STATES ET AL.

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

No. 481. Argued March 7, 1939.—Decided April 17, 1939.

1. Factors involved in reviewability *vel non* of orders of administrative bodies such as the Interstate Commerce Commission and the Federal Communications Commission are analyzed and the governing principles stated. Pp. 129 *et seq.*
2. Any distinction between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review commission orders, serves no useful purpose, and in so far as earlier decisions have been controlled by this distinction, they can no longer be guiding. P. 143.
3. An order of the Federal Communications Commission determining the status of a telephone company as one subject to jurisdiction under § 2 (b) of the Communications Act of 1934, because of its control by another, and therefore bound by earlier general orders requiring all telephone carriers so subject to file schedules of charges, copies of contracts, and other information, *held* reviewable on questions of law under the Urgent Deficiencies Act of Oct. 22, 1913, as extended to the Communications Act. P. 143.
4. A finding of the Federal Communications Commission that a telephone company, engaged in interstate commerce solely through physical connection with the facilities of another, was under the other's control within the meaning of § 2 (b) of the Communications Act of 1934,—*held* justified by the facts before the Commission concerning the relations between the two companies. P. 144.

   The existence of such "control" is an issue of fact to be determined by the Commission by the special circumstances of each case and not by artificial tests.

23 F. Supp. 634, affirmed.

APPEAL from a District Court of three judges dismissing on the merits a bill to set aside an order of the Federal Communications Commission.

Mr. T. Carl Nixon, with whom *Messrs. E. Willoughby Middleton* and *Justin J. Doyle* were on the brief, for appellant.

Mr. Hugh B. Cox, with whom *Assistant Solicitor General Bell, Assistant Attorney General Arnold,* and *Messrs. Robert M. Cooper* and *William J. Dempsey,* and *Elizabeth C. Smith* were on the brief, for appellees.

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal, under § 238 of the Judicial Code as amended (28 U. S. C. § 345), from a final decree by a district court of three judges, under the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. §§ 45, 47a) as extended by § 402 (a) of the Federal Communications Act (47 U. S. C. § 402 (a)), dismissing on the merits a bill to review an order of the Federal Communications Commission.

At the outset a challenge to the jurisdiction of the District Court confronts us. It involves those problems of administrative law which are implied by the doctrine of "negative orders." Inasmuch as this phrase is shorthand for a variety of situations, sharp heed must be given to the precise circumstances—*inter alia,* the statutory provisions for review, the terms of the contested order, the grounds of objection to it—which in this and other cases have invoked the doctrine.

Section 2 (b) of the Communications Act of 1934 provides that, with certain exceptions not here material, the Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." The appellant, Rochester Telephone Corporation (hereafter called the Rochester), is a New York corporation maintaining a system of telephone communications in and around the City of Rochester. For present purposes the Rochester is to be

deemed as engaged in interstate communications solely because of physical connections with the facilities of the New York Telephone Company (hereafter called the New York).

The present controversy grew out of a ruling by the Federal Communications Commission that the Rochester owed obedience to a series of orders issued by the Commission. These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes. Copies of these orders were duly served on the Rochester. No response being had, the Telephone Division of the Communications Commission, on October 9, 1935, ordered the Rochester to show cause why it should not be required to file responses to the general orders theretofore served upon it.[1] The Rochester answered, claiming to be outside the requirements of the Act except as to matters not here questioned.

To ascertain the facts in the contested issue, the Commission appointed a trial examiner. At hearings held by him the Rochester entered a special appearance, denying the Commission's jurisdiction and contending that the burden of proof was on the Commission to show that Rochester did not come within the exclusionary provisions of § 2 (b) (2). After a thorough hearing[2] and the submission of briefs, the examiner filed his report, to which the Rochester duly excepted. Upon the basis of these proceedings and of argument before it, the Commission, through its Telephone Division, sustained the findings of its chief examiner, determined that the Rochester was

[1] On November 13, 1935, the order was amended in matters not here relevant.

[2] The hearing before the examiner lasted two days; 221 pages of testimony were taken and 34 exhibits were introduced.

under the "control" of the New York and therefore not entitled to the classification of a mere connecting carrier under § 2 (b) (2). Accordingly, the Commission ordered the Rochester classified "as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." A petition for rehearing before the full Commission was denied.

The Rochester thereupon filed the present bill, alleging that the order entered by the Commission on November 18, 1936, pursuant to its Report, was contrary to undisputed facts and erroneous as a matter of law, and that the Commission's threat to enforce it put the Rochester to the hazard of irreparable injury, and praying that the District Court

"make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission hereinbefore mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders . . . have already been complied with."

The case was disposed of in the District Court on the pleadings and the record before the Commission.

Below, the Government made no objection to the District Court's jurisdiction, nor did that Court raise the question *sua sponte*.[3] It sustained the Commission's action on the merits and dismissed the bill. Here, the Government urges that under the doctrine of "negative orders" the Commission's order was not reviewable, but, in the alternative, supports the decree on the merits.

The relation of action by the Federal Communications Commission to the reviewing power of the courts is here

[3] Under *United States* v. *Corrick*, 298 U. S. 435, 440, and *United States* v. *Griffin*, 303 U. S. 226, 229, the doctrine of "negative orders" implies a jurisdictional defect which courts must consider *sua sponte*.

for the first time. The jurisdictional objection raised by the Government in this case implicates other federal regulatory bodies as well, because the various statutory schemes for judicial review have either been carried over from the Urgent Deficiencies Act, pertaining to orders under the Acts to Regulate Commerce, or because different statutory provisions have by analogy been assimilated to the "negative order" doctrine. That doctrine has not had wholly plain sailing in the many cases, both here and in the lower federal courts, since it first got under way in 1912, in *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

The important procedural problems with which this case is entangled therefore call for clarification.

The prior decisions involving the "negative order" doctrine fall into three categories: [4]

(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.

(2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part. The most obvious case is a denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

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[4] All except one of the prior decisions of this Court on the "negative order" doctrine involved review of action by the Interstate Commerce Commission. *United States* v. *Corrick, supra,* note 3, involved review of action by the Secretary of Agriculture under the Packers and Stockyards Act.

(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person. A familiar example is that of a shipper requesting the Interstate Commerce Commission for an order compelling the carrier to adopt certain rates or practices which the Commission, on the merits, declines. Another instance is where the Commission authorizes the carrier to depart from the long-short haul clause and a shipper adversely affected seeks to have the authorization set aside.

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction,[5] or rendering a tentative [6] or final valuation [7] under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable.[8]

The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from

[5] *United States* v. *Illinois Central R. Co.*, 244 U. S. 82. Compare *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375.

[6] *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438.

[7] *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299.

[8] *Shannahan* v. *United States*, 303 U. S. 596; compare *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182–184.

doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310.

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, § 2, U. S. Constitution.[9] Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.[10]

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[9] *Hayburn's Case*, 2 Dall. 409, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, *United States* v. *Ferreira*, 13 How. 40; *Muskrat* v. *United States*, 219 U. S. 346.

[10] Prior to § 7 of the Act of March 3, 1891, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by § 6 of the Act of April 29, 1802. See *United States* v. *Bailey*, 9 Pet. 267. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. § 237, Judicial Code as amended, 28 U. S. C. § 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. §§ 129 and 238 of the Judicial Code as amended, 28 U. S. C. §§ 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted.

Group (2) is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant. To rid himself of these restrictions the complainant either asks the Interstate Commerce Commission to place him outside the statute, or, being concededly within it, he invokes the Commission's dispensing power. In this type of situation a complainant seeking judicial review under the Urgent Deficiencies Act of adverse action by the Commission must clear three hurdles: (a) "case" or "controversy" under Article III; (b) the conventional requisites of equity jurisdiction; (c) the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, or where the Commission's order denies an exemption from the terms of the statute, as in the *Intermountain Rate Cases,* 234 U. S. 476, the road to the courts' jurisdiction seems to be clear. There is a constitutional "case" or "controversy," *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one "to enjoin, set aside, or annul" an "order of the Commission." 28 U. S. C. §§ 46, 47.[11] While the penal-

[11] The *Lehigh Valley* case apparently originated the statement, often made in "negative order" cases, that the risk results from the statute, not from the order. But this formula hardly squares with the actualities of the situation in that case. The Panama Canal Act, paragraphs 19–21 of § 5 of the Act to Regulate Commerce, as amended, forbade community of interest between any common carrier subject to the Act and a competing water carrier. Under

ties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative. The complainant can come into court, of course, not to review action within the discretionary au-

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paragraph 20, jurisdiction was conferred on the Commission to determine questions of fact as to the existence of actual or potential competitive conditions, either on the application of the carrier or on the Commission's motion, its determination to be filed. Under paragraph 21, the Commission was given jurisdiction to extend the time within which operations otherwise prohibited by the statute might be carried on after July 1, 1914, if such extension did not reduce competition and benefited the public. After receipt of notice of the Act from the Commission, the Lehigh applied to the Commission for a ruling that it was not subject to the Act, or, in the alternative, for an extension. The Commission issued an order subjecting the Lehigh to the Act and denying an extension. Thereupon the Lehigh brought a suit to set aside this order and to enjoin the Commission from enforcing it.

As a practical matter the risk of prosecution to which the Lehigh was subjected if it wished to continue to operate its boats was the result of the order. Since the Panama Canal Act provided that the Commission should find the facts under it, there could have been no prosecution without a previous finding by the Commission that the Lehigh was within the Act; once such a finding was made it was subject to the rule of administrative finality. Compare *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156. Therefore the Commission's order that the Lehigh was subject to the Panama Canal Act was responsible for the risk, as much so as if it had expressly commanded the Lehigh to stop running its boat lines. And assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exception had the same practical effect as a direct command. *Intermountain Rate Cases*, 234 U. S. 476.

Piedmont & Northern Ry. Co. v. *United States*, 280 U. S. 469, presents a more complicated situation. Section 1 (18–22) of the Act to Regulate Commerce, as amended, prohibits any common carrier by rail subject to the Act from extending its lines or constructing new lines without a certificate of convenience and necessity. This requirement did not apply to "interurban electric railways, which are not operated as a part or parts of a general steam rail-

thority of the Commission to render an adverse rather than a favorable decision but because he urges errors of law outside the Commission's final say-so. Such an analysis emerges from a long sequence of cases under the Urgent Deficiencies Act viewed in the setting of general doctrines of federal jurisdiction. On the other hand, the result in the *Lehigh Valley* case was reached in the earlier phases of modern administrative law and did not deal with its specific jurisdictional problems in the perspective of underlying principles governing federal equitable jurisdiction. In consequence, the phrase "negative orders" gained currency as though it were descriptive of some technical doctrine of jurisdiction having peculiar relevance to judicial review of orders of the Interstate Commerce Commission and comparable regulatory bodies.[12]

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road system of transportation." Upon an application for a certificate by the Piedmont & Northern, coupled with a motion to dismiss on the ground that it was an "interurban electric" railway, for which no certificate was required, the Commission denied the motion to dismiss and denied the certificate on the merits. The bill to enjoin the Commission from taking any proceedings against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The Court held the order was not reviewable, on the ground that the order did not adjudicate the railroad's status, did not command it to do anything, but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function. But this is to view the matter too abstractly. For the Commission itself had instituted the system whereby it requested preliminary submission to it of the status of "interurban" roads. Such a decision was at least the equivalent of a threat of prosecution under the statute, and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation. Compare *United States* v. *Village of Hubbard*, 266 U. S. 474.

[12] The initial decision in this group of cases, the *Intermountain Rate Cases*, 234 U. S. 476, held reviewable the action of the Commission in refusing to grant requested consent to depart from the long-short haul clause. (§ 4 of the Act to Regulate Commerce,

This brings us to the cases in group (3). Here review is sought of action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person. This type of situation is illustrated by *Procter & Gamble Co.* v. *United States,* 225 U. S. 282. Since this case gave rise to the notion that there is a specialized jurisdictional doctrine pertaining to "negative orders," it calls for re-examination. Procter & Gamble Co. filed a complaint with the Interstate Commerce Commission to set aside demurrage rules that imposed charges on private cars left unloaded for over forty-eight hours on private tracks. The Commission dismissed the complaint on the ground that the rules were within the carriers' authority to make conditions for the acceptance of private cars. Procter & Gamble then petitioned the Commerce Court to annul the Commission's action and to enjoin the carriers from enforcing the rules. The Commerce Court took jurisdiction but found the Commission's action to be within its authority. On appeal this Court held that the Com-

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as amended.) While this case would seem to control the *Lehigh Valley* case and at least to be persuasive in the *Piedmont & Northern* case, it was not mentioned in them. After these two cases, subsequent decisions in this group indicated that the "negative order" doctrine might prevent review of the refusal by the Secretary of Agriculture to accept rates for filing, the Packers and Stockyards Act prohibiting the charging of rates except those on file with the Secretary, *United States* v. *Corrick,* 298 U. S. 435, and of the refusal to grant an increase in rates of compensation for carrying of mail, the Railway Mail Pay Act of 1916 requiring the carrier to carry the mail at the rate set, *United States* v. *Griffin,* 303 U. S. 226. But in both these decisions the result reached was supported by factors irrelevant to the present discussion. On the other hand, in *Powell* v. *United States,* 300 U. S. 276, action of the Commission, striking from its files a tariff on the ground that a point was not served by the carrier, was held subject to review as a command to the railway which had filed the tariff not to give the service covered by the tariff.

merce Court erred in taking jurisdiction and remanded the cause for dismissal.

Clearly Procter & Gamble was authorized under § 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. Compare *Interstate Commerce Comm'n* v. *Brimson, supra; Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 38. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of Congress authorizing suits "to enjoin, set aside, annul, . . . any order of the Interstate Commerce Commission." To be sure, the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review.[13]

[13] The *Chicago Junction Case,* 264 U. S. 258; *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127; *Colorado* v. *United States,* 271 U. S. 153; *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382; *United States* v. *Idaho,* 298 U. S. 105.

The impelling consideration underlying the decision in the *Procter & Gamble* case did not concern technical procedure. It was part of the process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the purposes of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language,[14] particularly when regard is had to the fact that the Court's spokesman was Chief Justice White, who had such a large share in developing modern administrative law.[15] While the

[14] " . . . we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act." 225 U. S. at 296–97. " . . . the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative." 225 U. S. at 298–99.

[15] See Chief Justice Taft's estimate of the services of Chief Justice White in "a new field of administrative law": "The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White in construing the measure and its great amendments has had more to do with placing this vital part of our practical govern-

Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act, in 1906,[16] and the Mann-Elkins Act, in 1910,[17] the establishment of similar agencies in many states following the lead of New York [18] and Wisconsin,[19] the widespread recognition that these specific instances marked a general movement,[20] made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court "ascribed" to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454. Recognition of the Commission's expertise also led this Court not to bind the Commission to common

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ment on a useful basis than any other judge. His opinions in the case of the *Texas & Pacific Railway Co.* v. *The Abilene Cotton Oil Co.*, and the cases which followed it, are models of clear and satisfactory reasoning which gave to the people, to state legislatures, to Congress, and the courts a much-needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing governmental machinery, for the vindication of the rights of the public in respect of national transportation. They are a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." Proceedings on the Death of Chief Justice White, 257 U. S. v, xxv.

[16] 34 Stat. 584.

[17] 36 Stat. 539.

[18] Laws of New York, One Hundred and Thirtieth Session, c. 429 (1907).

[19] Wisconsin Laws of 1907, c. 499, st. 1797 m.

[20] See, *e. g.*, Hughes, *Some Aspects of the Development of American Law* (1916) 39 N. Y. B. A. Rep. 266, 269–70; Root, *Public Service by the Bar* (1916) 41 A. B. A. Rep. 355, 368–69; Sutherland, *Private Rights and Government Control* (1917) 42 A. B. A. 197.

law evidentiary and procedural fetters in enforcing basic procedural safeguards.[21]

From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.[22] The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review

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[21] *Interstate Commerce Comm'n* v. *Baird*, 194 U. S. 25, 44; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; compare *Douglas* v. *Noble*, 261 U. S. 165, 169. "It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evidence applying to the introduction of testimony in courts." Twenty-second Annual Report of the Interstate Commerce Commission, 10.

[22] See, also, *e. g.*, *Baltimore & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Director General* v. *Viscose Co.*, 254 U. S. 498; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456; *Western & Atlantic R. Co.* v. *Georgia Public Service Comm'n*, 267 U. S. 493; *Midland Valley R. Co.* v. *Barkley*, 276 U. S. 482; *Board of Railroad Comm'rs* v. *Great Northern Ry. Co.*, 281 U. S. 412. The doctrine has been given general application, *e. g.*, *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (Shipping Board); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (National Labor Relations Board). Compare, also, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541.

In translating these important objectives for effectuating the Congressional scheme to enlarge the independent powers of the Interstate Commerce Commission into a seemingly technical distinction between "negative" and "affirmative" orders, the opinion in *Procter & Gamble* v. *United States* gave authority to a doctrine which harmonizes neither with the considerations which induced it nor with the course of decisions which have purported to follow it.[23] Subsequent cases have made it abundantly clear that "negative order" and "affirmative order" are not appropriate terms of art.[24] Thus, the Court has had occa-

[23] In *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, the Court treated as reviewable the action of the Commission in failing to require an absorption of switching charges or a requested joint rate but held not reviewable refusal to fix divisions. In part this may have been on the theory that the issue of the divisions was not properly before the Commission. See 246 U. S. at 482–483. In *United States* v. *New River Co.*, 265 U. S. 533, the Court held reviewable the action of the full Commission dismissing a complaint by a shipper against certain car practices held invalid by one division of the Commission. *Standard Oil Co.* v. *United States*, 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the "negative order" doctrine but the statutory scheme dealing with reparations. In *Alton R. Co.* v. *United States*, 287 U. S. 229, the Court held reviewable the action of the Commission refusing to interfere with divisions set by a railroad in violation of a previous agreement, the Court stating that the action of the Commission validated divisions which were previously invalid. See 287 U. S. at 236–237.

[24] The only test which can be derived from the cases in notes 11–13, 23, *supra*, is that an order is "affirmative" if it has the legal effect

sion to find that while an order was "negative in form" it was "affirmative in substance." [25] "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability.[26] "Negative"

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of changing the *status quo*, permitting what was previously not allowed or compelling what was previously not required. But on this test the order in the *Lehigh Valley* case was "affirmative." The decision in the *New River Coal Co.* case could hardly be hung on such a gossamer thread as this test, since there the only change in the *status quo* resulting from an order considered "affirmative" was that the order of the full Commission held unobjectionable a car practice which was the subject of complaint. A division of the Commission in the same proceeding had stated that the practice was invalid and should be abandoned and it was abandoned. After the full Commission found the practice not invalid and dismissed the complaint, the practice was adopted again.

[25] See *Alton R. Co.* v. *United States*, 287 U. S. 229, 235.

[26] This becomes clear on analysis of the precise problem presented in the *Procter & Gamble* case. It was a dispute between shippers who owned private cars and those who did not as to the distribution of the cars owned by the carriers. The Commission was called upon to resolve that economic conflict by virtue of its authority to prevent practices which unfairly discriminated against one group at the expense of the other. Its final decision was based on a comprehensive policy concerning the place of private cars in our transportation system. Had the prior practice of the carriers been inconsistent with this policy, and the order of the Commission compelled a change, the private car shippers would admittedly have been entitled to test the validity of the Commission ruling in the courts, subject, of course, to the canons of administrative finality. It seems capricious that the fact that the Commission's order authorizing the preservation of the *status quo* should block any review at all. The force of this reasoning is emphasized when it is realized what small factors may determine whether the *status quo* has been changed, *e. g.*, a difference of views within the Commission, as in the *New River Coal Co.* case, *supra*, note 24. See the opinion of the

and "affirmative," in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance." [27]

The considerations of policy for which the notions of "negative" and "affirmative" orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted.[28] An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. The nature of judicial relief, that is the

Commerce Court sustaining reviewability in *Procter & Gamble Co.* v. *United States,* 188 F. 221.

[27] The Restatement of Torts does not employ this nomenclature. See, also, 7, LABATT, MASTER AND SERVANT, § 2586.

[28] Compare *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157: " . . . the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system."

form of directions available, in situations like those presented by the *Procter & Gamble* and the *Lehigh Valley* cases, were the Commission's orders reviewed, would be no different than was that used in the *Intermountain Rate* and the *New River Coal Co.* cases.[29] In both types of situations "a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant," *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 38. We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act,[30] nor was it a stage in an incomplete process of administrative adjudication. The

[29] In the *Procter & Gamble* case the judicial relief asked was that the order of the Commission dismissing the complaint against the demurrage rules be annulled and that the carriers be enjoined from applying those rules. In the *New River Coal Co.* case the judicial relief asked was that the car rule under attack be adjudged invalid, that the order of the Commission dismissing the complaint against it be adjudged invalid, that the carriers be enjoined from complying with the rule and that the Commission be enjoined from restricting the commerce of the complainants by its order and by the rule.

In the *Lehigh Valley* case the judicial relief asked was that the enforcement of the order of the Commission and the institution of any proceedings thereunder against the complainant be enjoined. In the *Intermountain Rate* cases the judicial relief asked was that the order of the Commission be set aside, that § 4 of the Act to Regulate Commerce be declared invalid, and that the Commission and the Attorney General be enjoined from taking any proceedings to prosecute the carriers for violation of § 4.

[30] Compare *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522.

contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.

But while the Rochester had a right to challenge the order, it cannot prevail on the merits.

The ultimate legal issue is the validity of the Commission's finding that the Rochester "is under the control of the New York Telephone Company." The justification for this finding clearly emerges from a rapid summary of the governing facts adduced before the Commission concerning the relationship between the New York and the Rochester.

Prior to 1920 an independent telephone company and the New York (which was part of the Bell system) were competitors in Rochester. As part of an endeavor to meet an arrangement which the Bell system had, in 1913, made with the Department of Justice, the details of which need not here be recited, the Rochester was formed to consolidate the two previously competing enterprises. The property of the independent was paid for by bonds of the Rochester, and the property of the New York by preferred stock, later designated as second preferred, of which the New York had the entire issue, 48,140 shares at $100 par. The Rochester issued 1000 shares of common stock, at $100 par, of which the New York purchased 335 shares. The New York also paid the officers of the independent company $70,000 for their services in consummating the consolidation, but $66,500 of this amount was to be used in purchasing the remaining 665 shares of common stock

for deposit in a voting trust. Other outstanding securities of the Rochester, first preferred stock and bonds, neither of which had any voting rights, were held by the public. There were complicated limitations upon the voting rights of the second preferred stockholders, but the dominating circumstances touching voting rights were that in major matters no vote of stockholders could be effective unless concurred in by eighty per cent of the common stock and that the Executive Committee and the Board of Directors were elected by cumulative voting of the common stock, thereby assuring New York five out of fifteen members of the Board of Directors and two members in an Executive Committee of five.

Putting all these factors in the context of the circumstances under which the Rochester came into being, the manner in which it was financed, the operation of the voting trust, and the stake of the New York in the Rochester, the Commission, after full hearing and due consideration, concluded that

"the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation."

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control.[31] This is an issue of fact to be determined by the special circumstances of each case. So long

[31] See House Report 1850, 73d Cong., 2d Sess., 4–5; compare 78 Cong. Rec. 8446.

as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303, *et seq.*

Decree affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE BUTLER.

Appellant's complaint shows that prior to making its final order November 18, 1936, the commission made general orders 1, 2, 3, 5, 6a and 9, directing that every telephone carrier subject to the Act file statements concerning its business and affairs. Declining to recognize the Act as applying to it, appellant withheld compliance. The commission ordered it to obey or to file answer setting forth the facts on which it relied as justification for failure so to do. Appellant then applied to the commission for determination that it is not subject to the Act or the commission's jurisdiction because exempted under § 2 (b) (2). After hearing, the commission made the final order declaring appellant subject to all common carrier provisions of the Act "and, therefore, subject to all orders of the Telephone Division applicable to wire telephone car-

riers . . ." Thus plainly it made the general orders above mentioned applicable to appellant.

The complaint challenged the validity of these orders on the ground *inter alia* that appellant as a matter of law is, and by the evidence and facts found by the commission is shown to be, not subject to any of them. The prayer is for decree "setting aside and annulling said orders . . . and each and all of them and enjoining the enforcement of" them. In the district court, appellees raised no question as to its jurisdiction. But here they argue: The commission's determination classifying the appellant as subject to its jurisdiction and to the general orders is not an order reviewable under the terms of the Urgent Deficiencies Act of 1913; the determination neither commands nor directs appellant to do or refrain from doing anything; the commission could not have instituted a proceeding to enforce it and consequently the court has no jurisdiction to set it aside.

The final order is much more than a mere determination that appellant is subject to the Act. When read, as it must be, in connection with the general orders, it unmistakably puts appellant under a series of affirmative mandates which, if valid, may be enforced under the Act. See 47 U. S. C. §§ 401, 409, 501, 502; 28 U. S. C. § 47, made applicable by 47 U. S. C. § 402a. These unequivocally impose upon appellant burden and expense of preparing and reporting to the commission a vast amount of statistical and other information.

The case presents no debatable question as to the jurisdiction of the district court. A statement of the facts alleged conclusively shows that in purpose, terms and effect the final order constitutes not mere determination or declaration but affirmative commands. There is no occasion to review earlier decisions dealing with affirmative and negative administrative orders and obviously

none to overrule any of them or to repudiate or impair the doctrine they establish.* The Court's discussion, extraneous to the issue involved, confuses rather than clarifies.

The findings of the district court are amply sustained by the evidence, and its decree should be affirmed.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

UNITED STATES ET AL. *v.* MAHER, DOING BUSINESS AS INTERSTATE BUSSES.

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

No. 432. Argued February 6, 1939.—Decided April 17, 1939.

1. The Interstate Commerce Commission denied an application of a common carrier by motor vehicle for a certificate of public convenience and necessity authorizing him to operate over a designated route, and ordered him to cease operating, holding inapplicable to his case a provision of § 206 (a) of the Motor Carrier Act, upon which he relied, whereby carriers in *bona fide* operation on

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* See e. g.: *Procter & Gamble* v. *United States,* (1912) 225 U. S. 282, 292 *et seq. Hooker* v. *Knapp,* 225 U. S. 302. *United States* v. *Baltimore & Ohio R. Co.,* 225 U. S. 306, 320. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412. *United States* v. *Illinois Central R. Co.,* 244 U. S. 82, 89. *Chicago Junction Case,* 264 U. S. 258, 263–264. *United States* v. *New River Co.,* 265 U. S. 533, 539–541. *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, 448. *Minneapolis & St. L. R. Co.* v. *Peoria Ry. Co.,* 270 U. S. 580. *Colorado* v. *United States,* 271 U. S. 153, 161. *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 309. *Gt. Northern Ry. Co.* v. *United States,* 277 U. S. 172. *Piedmont & N. Ry. Co.* v. *United States,* 280 U. S. 469, 475–477. *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522. *Standard Oil Co.* v. *United States,* 283 U. S. 235. *Alton R. Co.* v. *United States,* 287 U. S. 229. *United States* v. *B. & O. R. Co.,* 293 U. S. 454. *Powell* v. *United States,* 300 U. S. 276, 284. *United States* v. *Griffin,* 303 U. S. 226, 232 *et seq. Shannahan* v. *United States,* 303 U. S. 596, 599.

June 1, 1935, and since are relieved from further proof of public convenience and necessity. *Held* that the construction of the Act in this ruling is reviewable by suit in the District Court to set aside and annul the order. P. 152.

2. Under § 206 (a) of the Motor Carrier Act of 1935, a carrier who was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time is entitled to a certificate of public convenience and necessity without further proof that public convenience and necessity will be served by such operation. *Held* inapplicable where operation over the route applied for, between fixed termini, began in May, 1936, whereas the previous operation was an "anywhere for hire" service that was abandoned when the new route was instituted. P. 154.
3. Where an application for a certificate based solely upon the exception in § 206 (a) of the Motor Carrier Act is found unsupported by the evidence, the Commission is not obliged to inquire whether it should be allowed under the general provisions of § 207 (a). P. 156.

23 F. Supp. 810, reversed.

APPEAL from a decree of the District Court of three judges which set aside an order of the Interstate Commerce Commission denying an application for a certificate under the Motor Carrier Act and commanding the applicant to cease and desist from operating.

Mr. Hugh B. Cox, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. N. A. Townsend, Elmer B. Collins, Frank Coleman, Nelson Thomas, Daniel W. Knowlton,* and *Carl C. Donaugh* were on the brief, for appellants.

Mr. William L. Harrison, with whom *Mr. W. Lair Thompson* was on the brief, for appellee.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here on appeal, under § 238 of the Judicial Code as amended (28 U. S. C. § 345), to review a final

decree, setting aside an order of the Interstate Commerce Commission, granted by a district court of three judges under the Motor Carrier Act, 1935, (49 U. S. C. Supp. § 305 (h)), in connection with the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. §§ 45, 47a).

The application to the special facts of this case of what is colloquially known as "the grandfather clause" of the Motor Carrier Act is the substantive question at issue. There is a preliminary jurisdictional problem touching those phases of the relations of the Interstate Commerce Commission to the courts which are implied by the claim that the Commission had issued a "negative order."

Section 206 of the Motor Carrier Act, Act of August 9, 1935, 49 Stat. 543, forbids common carriers by motor vehicle subject to its provisions from engaging in interstate operations without a certificate of public convenience and necessity to be issued by the Interstate Commerce Commission under § 207 of the Act. "The grandfather clause" of § 206, however, provides that "if any such carrier . . . was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation."

On January 24, 1936, the appellee, Maher, filed an application under the "grandfather clause" for a certificate to engage in the transportation of passengers and baggage over U. S. Highway No. 99 between Portland and Seattle and intermediate points. After a hearing was had before a "Joint Board" composed of members from the states involved (§§ 203 (a) (4) and 205) at which competing carriers and the Public Utilities Commission of Oregon appeared in opposition to the application, and after a report was filed by the Joint Board with the Inter-

state Commerce Commission recommending that the application be denied, the Interstate Commerce Commission, Division 5, on October 27, 1937, found the facts to be as follows: From 1931 until May 29, 1936, the appellee had engaged in *bona fide* "anywhere-for-hire" operations in Oregon with occasional entries into Washington. There were rare trips to Seattle, no service at all to most of the intervening points, and no showing that passengers were transported on return trips to Portland. On May 29, 1936, the appellee began his regular-route service between Portland and Seattle which he conducted regularly since that time. But upon the institution of the regular-route service between Portland and Seattle the appellee discontinued the "anywhere-for-hire" operations theretofore conducted. Upon this showing Division 5 found that the service conducted by the appellee since May 29, 1936, was a different service from that conducted by him prior to that time, and therefore concluded that he did not come within "the grandfather clause." And so, the Commission denied Maher's application and ordered him "to cease and desist" from "all operations" as a common carrier in interstate commerce. Thereupon the appellee filed the present suit in the District Court for the District of Oregon against the United States and the Interstate Commerce Commission, praying that the Commission's order be set aside and "any construction thereunder" enjoined. The suit was disposed of on the pleadings, the answer of the Commission having incorporated its report and orders. A majority of the District Court entertained jurisdiction and held that the appellee was entitled to an "anywhere-for-hire" permit under "the grandfather clause" as well as the regular-route permit under § 207. 23 F. Supp. 810. Circuit Judge Haney found jurisdiction to review the cease and desist order, although not the order denying the certificate of convenience and necessity, but sustained the Commission's view of the Act.

The jurisdictional problem presents another instance of the Interstate Commerce Commission having been invested with power to free a complainant of restrictions placed upon his conduct by a statutory scheme and having definitely rejected the claim for dispensation. The applicant before the Commission then came into court to "set aside" and "annul" the "order" of the Interstate Commerce Commission, claiming that the Commission's action was based on a wrong reading of the authority which the Act of Congress gave it. To the hearing of such a claim there is no jurisdictional barrier, as we have held today in *Rochester Telephone Corp.* v. *United States, ante,* p. 125.[1]

On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon § 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of § 206 (a) from the requirements of § 207.[2] The latter section requires a find-

[1] For reasons on which its legislative history appears to shed no light, the phrase "negative order" crept into § 205 of the Motor Carrier Act in a context not covering the present situation.

[2] "Sec. 206. (a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity

ing by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under § 206 (a) the Commission must issue "such certificate without requiring further proof that public convenience and necessity will be served" by an applicant who "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application was made and has so operated since that time." By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking ex-

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will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

"(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation,

emption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission. The legal issues presented by this record are relatively simple once the somewhat confused operations of the appellee's business are clearly defined.

Invoking the "grandfather clause" the appellee sought from the Commission a certificate authorizing continuance of his regular service between the fixed termini of Portland and Seattle on U. S. Highway 99. But the Commission found that the regular operation over this route had only been instituted on May 29, 1936. Theretofore, and including the crucial period prior to June 1, 1935, the appellee had been engaged in quite different services from those for which it asked a certificate, namely, "an

require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

"Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington" over any route adapted to a particular trip, but using at least for part of the distance U. S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee's regular route was established. Applying these findings which are binding here, the Commission ruled that the appellee did not bring himself within the privilege of the "grandfather clause." In making this application of the statute, the Commission properly construed it.

The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory," Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini.[3] Such recognition is implicit also in the provision of § 208 (a) that "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the Commission passed upon the application for a

[3] See Motor Bus and Motor Truck Operation, 140 I. C. C. 685, 699; Coördination of Motor Transportation, 182 I. C. C. 263, 274. See also Coördination of Motor Transportation, Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 34–35; Regulation of Transportation Agencies, Sen. Doc. No. 152, 73d Cong., 2d Sess., pp. 176, 191–192.

"grandfather" certificate, the Commission rightly rejected the application.

But the District Court set aside the Commission's order on another ground. It held that when the Commission rejected appellee's claim under the "grandfather clause" another provision of § 206 (a) sprang into relevance, to wit "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly." We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application for a certificate based on "public convenience and necessity" when the applicant himself only seeks the favor of the "grandfather clause" and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the "grandfather clause."

Reversed.

FEDERAL POWER COMMISSION *v.* PACIFIC POWER & LIGHT CO. ET AL.

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

No. 508. Argued March 9, 1939.—Decided April 17, 1939.

Section 313 (b) of the Federal Power Act, forbidding dispositions, consolidations, acquisitions, etc. of public utility facilities without prior authorization by order of the Federal Power Commission, further provides that if the Commission after notice and opportunity for hearing finds that a proposed disposition will be consistent with the public interest, it shall approve the same. *Held:*

1. That an order of the Commission denying an application of

two power companies for approval of a proposed transfer, upon the ground that the applicants had failed to establish that the transfer would be consistent with the public interest, was reviewable on questions of law under § 313 (b) of the Act, which provides that any party to a proceeding under the Act aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the Circuit Court of Appeals. P. 159.

2. The objection that review of the order presents no case or controversy, because the court can not itself approve the proposed transfer, is rejected, since, without intruding upon the province of the Commission, the court can adjudicate the legal principles involved and its judgment will be final and binding on the Commission. P. 159.

98 F. 2d 835, affirmed.

CERTIORARI, 305 U. S. 593, to review an order of the court below which denied a motion to dismiss a petition to review an order of the Federal Power Commission.

Assistant Solicitor General Bell, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Paul A. Freund, Robert M. Cooper, David W. Robinson, Jr.,* and *Louis W. McKernan* were on the brief, for petitioner.

Messrs. A. J. G. Priest and *John A. Laing,* with whom *Mr. Henry S. Gray* were on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here on *certiorari* to the Circuit Court of Appeals for the Ninth Circuit, granted because of the intrinsic importance of the issue raised and of a conflict between the decision below, 98 F. 2d 835, and that of the Circuit Court of Appeals for the Second Circuit. *Newport Electric Corp.* v. *Federal Power Comm'n,* 97 F. 2d 580 (C. C. A. 2d).

The sole issue before us is whether an order of the Federal Power Commission, denying an application under § 203 (a)[1] of the Federal Power Act as amended, [49 Stat. 849] is reviewable under § 313 (b) of that Act.

The Inland Power & Light Company, an Oregon corporation, owns three hydro-electric projects in Oregon and Washington, two of which are operated under license of the Federal Power Commission, and the third, under a permit issued by the Secretary of the Interior. The Pacific Power & Light Company, a Maine corporation, is engaged in generating and distributing electric energy in Washington and Oregon, and owns and operates facilities for interstate transmission of electricity. The Inland and Pacific Companies filed a joint application with the Power Commission for approval, under §§ 8 and 203 of the Act, of a proposed transfer of all the assets, including licenses, of Inland to Pacific, and of the termination of Inland's existence. Having found after due hearing and consideration that "applicants have failed to establish that said transfer will be consistent with the public interest within the contemplation of § 203 (a) of the Federal Power Act," the Commission ordered that "the application be and the same hereby is denied."

Invoking § 313 (b) of the Federal Power Act, the applicants initiated the present proceedings in the Circuit Court of Appeals for the Ninth Circuit to review the

[1] "No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. . . . After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same."

order of the Commission as unwarranted in law and unsupported in its findings. The exact scope of the prayer is postponed for later consideration. The Power Commission challenged the jurisdiction of the Circuit Court of Appeals by a motion to dismiss the petition on the ground that the court was without jurisdiction under § 313 (b), since the order sought to be set aside was negative in character. The denial of that motion brought the case here.

If the Federal Power Act had formally taken over the statutory provisions of the Urgent Deficiencies Act pertaining to review of orders of the Interstate Commerce Commission, the decision in *Rochester Telephone Corp.* v. *United States, ante,* p. 125, would dispose of this case and sustain the assumption of jurisdiction below. But the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower federal courts. Section 313 (b) provides that "Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the Circuit Court of Appeals of the United States." The denial by the Commission of approval of the application by petitioners of the transfer of Inland to Pacific as not "consistent with the public interest" was an "order," and the petitioners were "aggrieved" by it since without such approval the transfer was forbidden. § 203 (a). Thus the statutory scheme of the Power Act only reinforces the analysis made in the *Rochester* case.

But it is urged that review of the Power Commission's order does not present a "Case" or "Controversy," because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is

claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar federal regulatory body comes for scrutiny before a federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. ". . . a judgment rendered will be a final and indisputable basis of action between the commission and the defendant." *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 38. In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of "Case" or "Controversy" are satisfied. For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so.

Affirmed.

SPRAGUE *v.* TICONIC NATIONAL BANK ET AL.

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

No. 543. Argued March 28, 1939.—Decided April 24, 1939.

1. When a litigant in the District Court, through the prosecution of a suit on his own behalf and at his own expense, has affixed a lien on earmarked funds in an insolvent bank for the repayment in full, with ordinary costs and interest, of a sum theretofore deposited by him in trust, and, by so doing, has incidentally, through the principle of *stare decisis*, established like rights for other depositors, not parties to the suit, but in like situation, it lies within the power of the court as a court of equity to make the successful litigant an allowance of costs "as between solicitor and client," for counsel fees and litigation expenses, to be paid out of the earmarked funds. P. 163.
2. Costs "as between solicitor and client" are allowed only in exceptional cases, for dominating reasons of fairness and justice in the circumstances of the particular case. P. 167.
3. While a mandate is controlling as to the matters within its compass, on the remand the lower court is free to act as to other issues. P. 168.
4. The equitable right of a litigant to reimbursement for expenses (costs "as between solicitor and client") incurred in a successful suit redounding also to the benefit of others in like situation, may appropriately be asserted by supplemental petition, after the suit, in other respects, has been finally disposed of in the District Court and on review. P. 168.

   This right was not waived by failure to claim it expressly in the original suit, nor was it impliedly an issue; hence it was not covered by the original decree and appellate mandates which allowed recovery of principal, interest and ordinary costs.
5. An application to the District Court for an allowance of costs as between solicitor and client, at the foot of the main decree and not involving any modification of it, need not be made before the expiration of the term at which the decree was entered. P. 170.

99 F. 2d 583, reversed.

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CERTIORARI, 306 U. S. 623, to review the affirmance of a decree of the District Court denying a petition for an allowance of counsel fees and expenses over and above the regular taxable costs.

Mr. Harvey D. Eaton for petitioner.

Mr. George P. Barse, with whom *Messrs. F. Harold Dubord, James Louis Robertson,* and *Trevor V. Roberts* were on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here on *certiorari* to the Circuit Court of Appeals for the First Circuit which affirmed, 99 F. 2d 583, a decree of the District Court for the District of Maine, 23 F. Supp. 59, denying a petition for the allowance of counsel fees and expenses over and above the regular taxable costs. *Certiorari* was granted, 306 U. S. 623, because an important question of judicial administration pertaining to the exercise of federal equity jurisdiction was raised.

This case is another phase of a litigation that has been here before, *Ticonic Bank* v. *Sprague,* 303 U. S. 406, the circumstances of which must be summarized to lay bare the problem now before us. On March 28, 1931, Lottie F. Sprague, the petitioner here, delivered $5,022.18 to the Ticonic National Bank of Waterville, Maine, in trust in which she and others had beneficial interests. Under the trust agreement part of the amount was to be deposited by the Bank in its savings department. The rest of the funds was deposited by the Bank in its commercial checking department, as were other trust funds awaiting investment or distribution, secured by an appropriate amount of bonds set aside in its trust department as required by § 11 (k) of the amended Federal Reserve Act, 38 Stat. 262, as amended, 49 Stat. 722. On August 3,

1931, the People's National Bank took over all the assets, including these earmarked bonds, and assumed the indebtedness of the Ticonic Bank. On March 4, 1933, the People's Bank closed, and both banks went into the hands of a receiver. Thereafter, on July 29, 1935, the petitioner and her beneficiary filed a bill in the District Court against the banks and their receiver to impress upon the proceeds of the bonds a lien for their trust deposit. The District Court sustained the claim and entered a decree for the discharge of the lien with interest from the date of the filing of the bill and payment to the plaintiffs of "their taxable costs," 14 F. Supp. 900. On appeal, the Circuit Court of Appeals at first disallowed interest, 87 F. 2d 365, but on rehearing affirmed the decree of the District Court "with costs," 90 F. 2d 641. This Court then granted certiorari "limited to the question as to the allowance of interest," 302 U. S. 675. Before its disposition, *Ticonic Bank* v. *Sprague, supra,* the present proceedings were begun.

Petitioner alleged that, by vindicating her claim to a lien on the proceeds of the earmarked bonds to the amount of her trust funds, she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own; that she had prosecuted the litigation solely at her own expense; that although the total assets of the bank were not sufficient to satisfy the unsecured creditors, the proceeds of the bonds were more than sufficient to discharge all trust obligations; and she therefore prayed the court for reasonable counsel fees and litigation expenses to be paid out of the proceeds of the bonds.

The District Court held that it "had no authority to grant the petition" on the ground that, after the appeal from its decree in 14 F. Supp. 900, it "had no further function to perform other than to carry out the mandate of the Supreme Court when received. The mandate from

the Supreme Court simply had the effect of directing this court to carry out the mandate of the Circuit Court of Appeals which in turn, simply, in effect, required this court to execute its original final decree by issuing its execution for a certain sum of money with costs of both courts." The Circuit Court of Appeals affirmed "for the reasons stated" by the District Court, and "for the further reason that the term of court at which the decree was entered, when the petition to amend was filed, had long since passed . . ." Obviously, both courts disposed of the petition not as a considered disallowance of attorney's fees and litigation expenses in the circumstances of the particular suit but because they deemed award of such costs beyond the power of the District Court.

Whether action by the District Court on the merits of the petition was foreclosed by this Court's mandate in *Ticonic Bank* v. *Sprague, supra,* and was further limited by restrictions which terms of court may impose, are questions subsidiary to the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute.

Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery,[1] subject, of course, to modifications

[1] See *Robinson* v. *Campbell,* 3 Wheat. 212, 222; *Boyle* v. *Zacharie,* 6 Pet. 648, 658; *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How. 518, 563; *Payne* v. *Hook,* 7 Wall. 425, 430; Rule XXXIII, Rules of Practice for the Courts of Equity of the United States (1822) 7 Wheat v, xiii; Rule XC, Rules of Practice for the Courts of Equity of the United States (1842) 1 How. xli, lxix; 1 Story, Equity Jurisprudence (14th ed.) §§ 57, 58; 1 Street, Federal Equity Practice, § 97.

by Congress, *e. g., Michaelson* v. *United States,* 266 U. S. 42. The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs "between party and party," but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs "as between solicitor and client." [2] To be sure,

[2] See *Lomax* v. *Hide,* 2 Vern. 185; *Ramsden* v. *Langley,* 2 Vern. 536; *Attorney General* v. *Carte,* 1 Dick. 113; *Attorney General* v. *Haberdashers' Co. and Tonna,* 4 Brown C. C. 179; *Ex parte Thorp,* 1 Ves. Jun. 394; *Moggridge* v. *Thackwell,* 1 Ves. Jun. 464; *Dungey* v. *Angove,* 2 Ves. Jun. 304. See 2 ADAIR, LAW OF COSTS IN COURTS OF EQUITY, 81, 87, 179; 2 BARBOUR, CHANCERY PRACTICE (2d ed.) 889–894; BEAMES, COSTS IN EQUITY (2d ed.) 144–146; 3 DANIELL'S, CHANCERY PLEADING AND PRACTICE (2d ed.) 1434–35; 2 SMITH, CHANCERY PRACTICE (2d ed.) 697–700. One must, of course, be not unmindful of the inadequacy of eighteenth-century chancery reports, see 2 YORK, LIFE OF LORD CHANCELLOR HARDWICKE 429, particularly as to matters of costs. See BEAMES, COSTS IN EQUITY (Advertisement to Second Edition). But the current of authority is uniform and unequivocal.

The power of the federal courts to give costs was recognized by implication in the First Judiciary Act. Act of September 24, 1789, Ch. 20, § 20, 1 Stat. 83. The statutory-system prior to 1853 required "party and party" costs to be taxed on the basis of the fees allowed by state practice, but the Act of Feb. 26, 1853, Ch. 80, 10 Stat. 161, set a uniform scale of fees for "party and party" costs in the federal courts. See Costs in Civil Cases, 30 Fed. Cas. 18, 284; STREET, FEDERAL EQUITY PRACTICE §§ 1984–1988. As to costs "as between solicitor and client," the English practice was followed by the Supreme Court and it was held that the allowance of such costs was within the authority of the federal courts. *Trustees* v. *Greenough,* 105 U. S. 527; *Dodge* v. *Tulleys,* 144 U. S. 451; *Meddaugh* v. *Wilson,* 151 U. S. 333; compare *Central R. Co.* v *Pettus,* 113 U. S. 116; see 4 CYCLOPEDIA OF FEDERAL PROCEDURE § 1086; 2 FOSTER, FEDERAL PRACTICE (6th ed.) § 422; 2 STREET, FEDERAL EQUITY PRACTICE §§ 2033–2048. Compare the practice in admiralty, shown in *The Apollon,* 9 Wheat. 362; *Canter* v. *Insurance Companies,* 3 Pet. 307. The pro-

the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest [3] while in others his litigation results in a fund for a group though he did not profess to be their representative.[4] The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis,* the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.

That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.[5]

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visions of the fee bill of 1853 that certain specified fees and no others shall be taxed to attorneys in the courts of the United States applies only to "party and party" costs. *Trustees* v. *Greenough,* 105 U. S. 527.

[3] *E. g., Tootal* v. *Spicer,* 4 Sim. 510; *Hood* v. *Wilson,* 2 Russ. & M. 687; *Stanton* v. *Hatfield,* 1 Keen 358; *Sutton* v. *Doggett,* 3 Beav. 9; *Goldsmith* v. *Russell,* 5 De. G. M. & G. 547; *Henderson* v. *Dodds,* L. R. 2 Eq. 532; *Ferguson* v. *Gibson,* L. R. 14 Eq. 379; *Jervis* v. *Wolferstan,* L. R. 18 Eq. 18.

[4] *E. g., Thomas* v. *Jones,* 1 Dr. & Sm. 134; compare *In re Richardson,* 14 Ch. Div. 611.

[5] For examples of the discretionary nature of the authority of equity to tax costs, see 3 DANIELL'S, CHANCERY PLEADING AND PRAC-

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs "as between solicitor and client" all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation.[6] And so, the circumstances under which the petitioner enforced the fiduciary obligation of the Ticonic Bank—the relation of its vindication to beneficiaries similarly situated but not actually before the court, as well as the interest of the common creditors where the funds of the bank are not sufficient to pay them in full, and doubtless other considerations—must enter into the ultimate judgment of the District Court as to the fairness of making an award, or the extent of such award, "as between solicitor and client" in this case. In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice. But here we are concerned solely with the power to entertain such a petition.

Without considering the historic authority of a court of equity in such matters, the District Court deemed itself

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TICE (2d ed.) 1381–1410; 2 STREET, FEDERAL EQUITY PRACTICE §§ 1994–2007.

[6] See 3 DANIELL'S, CHANCERY PLEADING AND PRACTICE (2d ed.) 1434–1440; 2 STREET, FEDERAL EQUITY PRACTICE §§ 2033–2048.

powerless because foreclosed by the mandate in *Ticonic Bank* v. *Sprague, supra.* The general proposition which moved that Court—that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest—is indisputable. Compare *Kansas City Southern Ry. Co.* v. *Guardian Trust Co.*, 281 U. S. 1.[7] But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Ex parte Century Indemnity Co.*, 305 U. S. 354. Certainly the claim for "as between solicitor and client" costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this Court. Its disposition, therefore, by the mandate of either Court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal places such a claim in much better perspective than it would have at an earlier stage. Such are the considerations which

[7] In *Kansas City Southern Ry. Co.* v. *Guardian Trust Co., supra,* costs "as between solicitor and client" had been asked in suggestions on appeal from the original disposition of the cause. The Circuit Court of Appeals, while affirming on the merits, passed on these suggestions in a way interpreted by this Court to allow only "party and party" costs. No appeal had been taken on this point. A subsequent application in the District Court for "solicitor and client" costs was therefore held barred.

underlay the decision in *Trustees* v. *Greenough,* 105 U. S. 527, in holding that an order allowing costs "as between solicitor and client" was a final judgment for purposes of appeal because "the inquiry was a collateral one, having a distinct and independent character." [8] We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits.

Finally, we must notice the separate ground taken by the Circuit Court of Appeals on the basis of what it deemed the requirements of terms of court. The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity,[9] but the ruling of the District Court here

[8] In *Trustees* v. *Greenough,* suit was brought by a holder of certain bonds against the trustees of the state improvement fund alleging mismanagement and waste of the fund which was to secure the bonds and asking that his claim be allowed, that the fund be charged with the payment thereof, and that an accounting be had. This relief was granted, much property was reclaimed to the fund and agents were appointed for the sale of the property of the fund for the purposes of liquidation. During the liquidation, the holder of the bonds who had initiated the proceedings filed his petition for an allowance from the fund of his costs as between solicitor and client. Such costs were allowed without any suggestion that the application for them was not timely.

[9] Prior to the adoption of the new Rules of Civil Procedure, a final decree in a suit in equity could be revised only during the term of court of its entry. *Cameron* v. *M'Roberts,* 3 Wheat. 591; *Buckeye Co.* v. *Hocking Valley Co.,* 269 U. S. 42. The same limitation existed on the power of a district court to grant a rehearing of an appealable decree. Equity Rule 88. These time limitations are no longer applicable. Rules 59 and 60 of the Rules of Civil Procedure set forth the time in which these actions may be taken, but under those sections the passage of the term of court is not material. Indeed,

in question was made prior to the operation of the new Rules. Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late—falls.

The decision of the Circuit Court of Appeals must be reversed so that the District Court may entertain the petition for reimbursement in the light of the appropriate equitable considerations.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in the result.

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

Rule 6 (c) provides: "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a district court to do any act or take any proceeding in any civil action which has been pending before it." It was stated in the Notes to the Rules of Civil Procedure, prepared by the Advisory Committee, March 1938, that this section "eliminates the difficulties caused by the expiration of terms of court."

Counsel for Parties.

WILLIAM JAMESON & CO. *v.* MORGENTHAU, SECRETARY OF THE TREASURY.

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

No. 717. Argued May 1, 1939.—Decided May 15, 1939.

1. Section 3 of the Act of August 24, 1937, providing for a court of three judges and a direct appeal to this Court, is not applicable unless the questions raised as to the constitutional validity of an Act of Congress are substantial. P. 172.
2. There is no substance in the contention that the Twenty-first Amendment gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. P. 172.
3. A suit challenging the validity of regulations and administrative action under the Federal Alcohol Administration Act, but raising no substantial question of constitutional validity as to the Act itself, is not within § 3 of the Act of August 24, 1937, providing for a three-judge District Court, and direct appeal to this Court, in cases of attack upon an "Act of Congress" upon the ground that "such Act or any part thereof is repugnant to the Constitution of the United States." P. 173.
4. Lacking jurisdiction to review the merits on an appeal mistakenly taken under § 3 of the Act of August 24, 1937, this Court vacates the decree below and remands the case to the District Court for further proceedings to be taken independently of that section. P. 174.

25 F. Supp. 771, decree vacated.

APPEAL from a decree of the District Court denying an application for a preliminary injunction and dismissing the bill in a suit to enjoin enforcement of provisions of the Alcohol Administration Act and of regulations thereunder.

Mr. William D. Mitchell, with whom *Messrs. John F. Moore* and *William E. Stevenson* were on the brief, for appellant.

Solicitor General Jackson and *Mr. Philip E. Buck,* with whom *Assistant Attorney General Arnold,* and *Messrs. Charles A. Horsky* and *John Paulding Brown* were on the brief, for appellees.

PER CURIAM.

Appellant, an importer and distributor of alcoholic beverages, having been denied the right to import its product into the United States under the label of "blended Scotch whisky," upon the ground that it was improperly labeled, brought this suit against the Secretary of the Treasury and other officials to enjoin them from refusing to release the product from customs custody upon payment of the required customs duties. Appellant also asked for a declaratory judgment that the Federal Alcohol Administration Act, 49 Stat. 977, 1965, is unconstitutional and void and that Regulations No. 5 promulgated thereunder, and particularly §§ 21 (k), 34 (f) and 46 (a) of these Regulations, are unenforceable as against appellant and are without warrant of statutory authority.

In the view that the question of the validity of an Act of Congress was involved and that the suit was within the purview of § 3 of the Act of Congress of August 24, 1937, 50 Stat. 751, the case was heard below by a court of three judges, which denied an application for preliminary injunction and dismissed the complaint. 25 F. Supp. 771. From its decree a direct appeal has been taken to this Court.

Section 3 of the Act of Congress of August 24, 1937, providing for a court of three judges and a direct appeal to this Court, is not applicable unless the questions raised as to the constitutional validity of an Act of Congress are substantial. *California Water Service Co.* v. *Redding,* 304 U. S. 252, 254, 255.

Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amend-

ment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.

The other contentions of appellant assailed the Regulations and administrative action thereunder rather than the Act of Congress. So far as the Federal Alcohol Administration Act itself is concerned, no substantial question of constitutional validity was raised.

Section 3 of the Act of Congress of August 24, 1937, while providing for a procedure analogous to that under § 266 of the Judicial Code, 28 U. S. C. 380, creates a distinction which we think is controlling. Section 266 of the Judicial Code provides for a court of three judges where an injunction is sought to restrain the enforcement "of any statute of a State" or "of an order made by an administrative board or commission acting under and pursuant to the statutes of such State," upon the ground of unconstitutionality. The provision in relation to administrative orders was added by an amendment to the original section. Act of March 4, 1913, 37 Stat. 1013. While that addition has been said to be unnecessary, as such orders were previously covered, *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 292, Congress adopted the amendment out of abundant caution. But with these provisions of § 266 before it, Congress in enacting § 3 of the Act of August 24, 1937, did not refer to "any statute" or to administrative orders, but confined its requirement to cases of attack upon an "Act of Congress" upon the ground that "such Act or any part thereof is repugnant to the Constitution of the United States." This is not an apt description of administrative regulations or orders. We must regard the choice of language as deliberate and as indicating a limitation deemed to be advisable. It does not appear to have been the intention of Congress that

direct appeal should lie to this Court when administrative action and not the Act of Congress is assailed.

While we are of the opinion that the Court is without jurisdiction to review the merits on this appeal, the Court does have jurisdiction to make such corrective order as may be appropriate to the enforcement of the limitations which § 3 imposes, and in the circumstances disclosed the appropriate action 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. See *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16; *Oklahoma Gas Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392.

Decree vacated.

UNITED STATES *v.* MILLER ET AL.

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

No. 696. Argued March 30, 1939.—Decided May 15, 1939.

The National Firearms Act, as applied to one indicted for transporting in interstate commerce a 12-gauge shotgun with a barrel less than 18 inches long, without having registered it and without having in his possession a stamp-affixed written order for it, as required by the Act, *held:*

1. Not unconstitutional as an invasion of the reserved powers of the States. Citing *Sonzinsky* v. *United States*, 300 U. S. 506, and Narcotic Act cases. P. 177.

2. Not violative of the Second Amendment of the Federal Constitution. P. 178.

The Court can not take judicial notice that a shotgun having a barrel less than 18 inches long has today any reasonable relation to the preservation or efficiency of a well regulated militia; and therefore can not say that the Second Amendment guarantees to the citizen the right to keep and bear such a weapon.

26 F. Supp. 1002, reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment for violation of the National Firearms Act.

Mr. Gordon Dean argued the cause, and *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Fred E. Strine, George F. Kneip, W. Marvin Smith,* and *Clinton R. Barry* were on a brief, for the United States.

No appearance for appellees.

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton

"did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, bearing identification number 76230, said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934, c. 737, Sec. 4 [§ 5], 48 Stat. 1237), and not having in their possession a stamp-affixed written order for said firearm as provided by Section 1132c, Title 26, United States Code (June 26, 1934, c. 737, Sec. 4, 48 Stat. 1237) and the regulations issued under authority of the said Act of Congress known as the 'National Firearms Act' approved June 26, 1934, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States." [1]

[1] Act of June 26, 1934, c. 757, 48 Stat. 1236–1240, 26 U. S. C. § 1132.

That for the purposes of this Act—

"(a) The term 'firearm' means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except

A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution—"A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed."

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a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition, [The Act of April 10, 1936, c. 169, 49 Stat. 1192 added the words] but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length.

"Sec. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

"Sec. 4. (a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

"(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof with stamps affixed, shall be returned to the applicant.

"(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such

The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

The cause is here by direct appeal.

Considering *Sonzinsky* v. *United States* (1937), 300 U. S. 506, 513, and what was ruled in sundry causes aris-

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person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms.

"Sec. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

"Sec. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

"Sec. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

"Sec. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

"Sec. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

"Sec. 16. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

"Sec. 18. This Act may be cited as the 'National Firearms Act.'"

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ing under the Harrison Narcotic Act [2]—*United States* v. *Jin Fuey Moy* (1916), 241 U. S. 394; *United States* v. *Doremus* (1919), 249 U. S. 86, 94; *Linder* v. *United States* (1925), 268 U. S. 5; *Alston* v. *United States* (1927), 274 U. S. 289; *Nigro* v. *United States* (1928), 276 U. S. 332—the objection that the Act usurps police power reserved to the States is plainly untenable.

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette* v. *State,* 2 Humphreys (Tenn.) 154, 158.

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they

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[2] Act December 17, 1914, c. 1, 38 Stat. 785; February 24, 1919, c. 18, 40 Stat. 1057.

were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Blackstone's Commentaries, Vol. 2, Ch. 13, p. 409 points out "that king Alfred first settled a national militia in this kingdom," and traces the subsequent development and use of such forces.

Adam Smith's Wealth of Nations, Book V, Ch. 1, contains an extended account of the Militia. It is there said: "Men of republican principles have been jealous of a standing army as dangerous to liberty." "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force."

"The American Colonies In The 17th Century," Osgood, Vol. 1, ch. XIII, affirms in reference to the early system of defense in New England—

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to

cooperate in the work of defence." "The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former." "A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts]."

Also "Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals. According to the usage of the times, the infantry of Massachusetts consisted of pikemen and musketeers. The law, as enacted in 1649 and thereafter, provided that each of the former should be armed with a pike, corselet, head-piece, sword, and knapsack. The musketeer should carry a 'good fixed musket,' not under bastard musket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match. The law also required that two-thirds of each company should be musketeers."

The General Court of Massachusetts, January Session 1784, provided for the organization and government of the Militia. It directed that the Train Band should "contain all able bodied men, from sixteen to forty years of age, and the Alarm List, all other men under sixty years of age, . . ." Also, "That every non-commissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm," &c.

By an Act passed April 4, 1786 the New York Legislature directed: "That every able-bodied Male Person, be-

ing a Citizen of this State, or of any of the United States, and residing in this State, (except such Persons as are hereinafter excepted) and who are of the Age of Sixteen, and under the Age of Forty-five Years, shall, by the Captain or commanding Officer of the Beat in which such Citizens shall reside, within four Months after the passing of this Act, be enrolled in the Company of such Beat. . . . That every Citizen so enrolled and notified, shall, within three Months thereafter, provide himself, at his own Expense, with a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, two spare Flints, a Blanket and Knapsack; . . ."

The General Assembly of Virginia, October, 1785, (12 Hening's Statutes) declared, "The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."

It further provided for organization and control of the Militia and directed that "All free male persons between the ages of eighteen and fifty years," with certain exceptions, "shall be inrolled or formed into companies." "There shall be a private muster of every company once in two months."

Also that "Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows: . . . every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each non-commissioned officer and private shall have at every muster one pound of good

powder, and four pounds of lead, including twenty blind cartridges; and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer out of the monies arising on delinquencies. *Provided,* That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer. If any private shall make it appear to the satisfaction of the court hereafter to be appointed for trying delinquencies under this act that he is so poor that he cannot purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents."

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

In the margin some of the more important opinions and comments by writers are cited.[3]

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[3] Concerning The Militia—*Presser* v. *Illinois,* 116 U. S. 252; *Robertson* v. *Baldwin,* 165 U. S. 275; *Fife* v. *State,* 31 Ark. 455; *Jeffers* v. *Fair,* 33 Ga. 347; *Salina* v. *Blaksley,* 72 Kan. 230; 83 P. 619; *People* v. *Brown,* 253 Mich. 537; 235 N. W. 245; *Aymette* v. *State,* 2 Humphr. (Tenn.) 154; *State* v. *Duke,* 42 Texas 455; *State* v. *Workman,* 35 W. Va. 367;14 S. E. 9; Cooley's Constitutional Limitations, Vol. 1, p. 729; Story on The Constitution, 5th Ed., Vol. 2, p. 646; Encyclopaedia of the Social Sciences, Vol. X, p. 471, 474.

We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

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

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

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

No. 221. Argued October 20, 21, 1938. Reargued April 20, 1939.—Decided May 15, 1939.

1. Where an order of the Secretary of Agriculture fixing stockyards rates was set aside for procedural defects without judicial determination of the reasonableness of the rates fixed by the order, the moneys representing the difference between the scheduled rates in effect and the lower rates of the order, which were required to be paid into the District Court as a condition to the granting of an interlocutory injunction, should on motion of the defendants (the United States and the Secretary of Agriculture) be retained in the registry to await a further and valid determination of reasonable rates by the Secretary in a pending proceeding in which he had reopened on his own motion the proceedings under the Packers and Stockyards Act, and for disposition accordingly. Pp. 185, 198.
2. The dominant purpose of the Packers and Stockyards Act is to secure to patrons of the stockyards prescribed stockyard services at just and reasonable rates. P. 188.
3. In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are to be regarded as the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed to attain that end through coördinated action. P. 191.
4. In reviewing an order of the Secretary of Agriculture fixing rates under the Packers and Stockyards Act, the District Court sits as

a court of equity, and in exerting its extraordinary powers to stay execution of the order, and in directing payment into court of so much of the rates in effect as has been found administratively to be excessive, the court assumes the duty of making disposition of the fund in conformity with equitable principles. P. 191.

5. The Packers and Stockyards Act denounces unreasonable rates as unlawful. Reasonableness of the rates was not established by the filed schedules. And where an order of the Secretary of Agriculture fixing new and lower stockyards rates in substitution for the filed rates has been set aside for lack of due procedure, he remains free under the Act to determine in a reopening of his proceedings what rates will be reasonable for the future and for the period in which the original order was made. Pp. 195, 197.

His determination will afford a proper basis for the action of the District Court in making disposition of the fund here in question.

The District Court, in staying the Secretary's order in this case and at the same time arresting excess payments under scheduled rates, acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. The duty was the more imperative because the injunction not only deprived the public of the lower rates, but obstructed any effective reparation order by the Secretary under the provisions of the statute. P. 193.

6. The extent to which a court of equity may grant its aid, and the moulding of its remedies, may be affected by the public interest involved. P. 194.

24 F. Supp. 214, reversed.

APPEAL from an order of the District Court respecting the disposition of funds impounded in the litigation over the validity of the order of the Secretary of Agriculture which this Court held invalid for want of due procedure in *Morgan* v. *United States,* 298 U. S. 468, *id.,* 304 U. S. 1, 23. The decree permanently enjoined against enforcement of the order but, as permitted by the mandate from this Court, undertook to make proper disposition of the fund. It overruled the motion of the Government and

the Secretary of Agriculture for a stay to await the outcome of further proceedings by the Secretary, and granted a counter-motion of the plaintiffs, who had paid the money into court, that it be returned to them.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold,* and *Messrs. Wendell Berge, M. S. Huberman, Brunson MacChesney,* and *Warner W. Gardner* were on the briefs, on the reargument and on the original argument, for appellants.

Mr. Frederick H. Wood on the original argument, and with *Mr. John B. Gage* on the reargument, for appellees. *Mr. Thomas T. Cooke* was with them on the briefs.

Mr. Justice Stone delivered the opinion of the Court.

On this appeal we are asked to determine the proper disposition to be made of a fund paid into the court below pending a suit instituted in that court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City stockyards. The fund is made up of the difference between the scheduled rates and those prescribed by the Secretary's order, which was ultimately set aside by this Court in *Morgan* v. *United States,* 304 U. S. 1, without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute.

On June 14, 1933, the Secretary of Agriculture promulgated an order under the Packers and Stockyards Act, 1921, 42 Stat. 159; 7 U. S. C. §§ 181–229, setting aside a schedule of maximum rates to be charged for stockyard services, filed by market agencies at the Kansas City stockyards, and prescribing a new and lower rate schedule for the future. In a suit brought in the district court for western Missouri by appellees, conducting market agencies at the Kansas City stockyards, to set aside the

order as confiscatory and as having been rendered without procedural due process, the court on July 22, 1933, entered a temporary restraining order enjoining enforcement of the Secretary's order upon condition that appellees should:

"deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

After two appeals we reversed the final decree of the district court, which had sustained the order of the Secretary. This Court held that he had not accorded to appellees the "full hearing" which § 310 of the Act requires, and, without considering the merits, it remanded the cause for further proceedings. *Morgan* v. *United States,* 298 U. S. 468; 304 U. S. 1. A petition for rehearing, in part on the ground that the mandate of this Court had made no provision for the distribution of the fund paid into the district court pursuant to its restraining order, was denied in a memorandum opinion stating that the questions raised were appropriately for the district court, to which the cause had been remanded for further proceedings. The opinion added:

"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 pro-

ceedings, are not matters which we should attempt to forecast or hypothetically to decide." 304 U. S. 23, 26.

By this remand the Secretary was left free to take such further proceedings as the statute permits. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n,* 162 U. S. 197, 238–239; *Southern Railway Co.* v. *St. Louis Hay & Grain Co.,* 214 U. S. 297, 302; *Florida* v. *United States,* 292 U. S. 1, 9.

The Secretary thereupon, by order of June 2, 1938, reopened the original proceedings which had resulted in the challenged order of June 14, 1933. He directed that the "Proceedings, Findings of Fact, Conclusion, and Order" of June 14, 1933, be served upon the appellee market agencies as his tentative findings and order, with an opportunity for appellees to file exceptions to them and to make oral argument upon the exceptions. This action was followed, June 11, 1938, by the present proceeding, begun by motion of appellants in the district court to stay further proceedings there and to direct the clerk of the court to retain the impounded funds until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. This motion was denied, and from the order of the district court granting a counter-motion by appellees to distribute the fund among them, the case comes here on appeal.[1] § 316 of the Packers and Stock-

[1] On the same date the district court entered a decree on the mandate of this Court setting aside the Secretary's order of June 14, 1933, and permanently enjoining its enforcement. In that decree the district court retained jurisdiction and decreed that "such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain."

yards Act, 42 Stat. 168; 7 U. S. C. § 217; 38 Stat. 220, 28 U. S. C. §§ 47, 47 (a); § 238 (5) of the Judicial Code; 28 U. S. C. § 345 (5). This Court has stayed and superseded the order of the district court pending appeal. October 10, 1938.

The district court held that the fund should presently be distributed to appellees, both because the Secretary is without authority under the Act to make any order prescribing rates and charges which will be effective as of June 14, 1933, the date of his original order, and because it construed the terms of its own restraining order as requiring distribution of the fund to appellees on the final determination by this Court that the Secretary's order of June 14, 1933, was invalid. Thus, as a result of the litigation, the district court has twice sustained the determination of the Secretary that the rates prescribed by him, on the basis of voluminous evidence, were reasonable; but because of this Court's decision that the Secretary had failed to observe the statutory requirement of a full hearing, we have never reviewed that determination. The question now arises whether upon a redetermination of that issue by the Secretary the district court will have, and should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them. This issue must be decided now, for unless the court will have such power there is no occasion to retain the fund pending further proceedings before the Secretary, and distribution of it must be made as the district court has directed.

Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons

of the stockyards prescribed stockyard services at just and reasonable rates, and upon the authority and duty of the district court to effectuate that purpose in making disposition of the fund. Section 304 of the Act requires every stockyard owner and market agency to furnish nondiscriminatory and reasonable stockyard services, and § 305 declares that "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful." Section 307 makes a like requirement as to regulations and practices in respect to furnishing stockyard services. Section 306 makes it the duty of stockyard owners and market agencies to file with the Secretary a schedule of rates for stockyard services and to charge and collect such rates, unless they are set aside by appropriate action of the Secretary or changed by the filing of new rates as authorized by the section. Section 308 (a) provides that any stockyard owner or market agency violating any of the previously mentioned sections shall be liable to the persons injured to the full extent of the damage sustained. Section 308 (b) provides for enforcement of such liability either by complaint to the Secretary or by suit in any district court, and concludes with the declaration that "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 310 authorizes the Secretary "after full hearing" on complaint, or on his own initiative, to prescribe just and reasonable rates for the future.

Appellees insist that notwithstanding the command of § 305 that all rates shall be "just, reasonable, and nondiscriminatory," its mandate is effective only so far as implemented by the other sections of the Act; that except

in a reparation case the statute forbids the Secretary to make orders affecting completed transactions, and that acting on his own initiative, as he does here, he can fix rates for the future only. They point out that under § 309 (a) and (e) and § 310, any person aggrieved may, on petition to the Secretary, seek damages for the exaction of an unreasonable rate in the past, the naming of a new rate for the future, or both, but that when the Secretary institutes such proceedings on his own motion he is precluded by § 309 (c) from making any order for the payment of money. As the original proceeding here and the action of the Secretary in reopening it were taken on his own motion, the conclusion is drawn that there can be no legal warrant for restitution of the impounded moneys to the patrons of the market agencies, even though the Secretary shall now determine, on evidence and by proper procedure, that the scheduled rates exceeded the reasonable rates prescribed by § 305.

Even though the premises be accepted as in all respects sound, the conclusion does not follow. There is here no question of the Secretary's making an order for the payment of money. The fund having been taken into custody of the court, in consequence of its order restraining the operation of the rate schedule prescribed by the Secretary, the questions for our decision are whether the district court, in the discharge of the duty which it has thus assumed as a court of equity, can rightly dispose of the fund without regard to the command of § 305 if the Secretary shall determine that the rates exacted by aid of the court, and paid into its registry, are excessive; and whether, in the exercise of its discretion, the court should retain the fund until such time as the Secretary, proceeding with due expedition, shall make his final determination and order.

In answering these questions there are two cardinal principles which must guide us to our conclusion. The

one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; [2] neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373; *Inland Steel Co.* v. *United States,* 306 U. S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles.

Assuming, as appellees contend, that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of

[2] See Y. B. 22 Ed. IV Mich. pl. 21; *Heath* v. *Rydley,* (1614) Cro. Jac. 335; 1 Holdsworth, History of English Law, 459–465.

money, he was still not without authority in the premises under the statute and the mandate of this Court. He was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make. See *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 312. No prior decision of the Secretary stands in the way of his making the determination now. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370. The sole limitation upon his power, prescribed by § 309 (c), is that upon an inquiry instituted by him he may not order the payment of money. In other respects his power to investigate and decide is unaffected.[3] He may make inquiry "as to any matter or thing concerning which a complaint is authorized to be made" to him, "or concerning which any question may arise under any of the provisions" of the Act, "or relating to the enforcement of any" provision. He is given "the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money." § 309 (c).

[3] § 309 (c): "The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money."

That the Secretary, acting under § 309 (a), could now entertain a complaint by the patrons of appellees who have contributed to the fund in court charging that the rates exacted were in violation of § 305, seems to be conceded and is, we think, plain. Section 309 (a) specifically provides: "If . . . there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper." It seems equally plain that under § 309 (c) the Secretary, in the exercise of his discretion, may conduct such an investigation on his own motion. Ordinarily, it is true, there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order. But, as we shall presently point out, when the alleged excessive rates are *in custodia legis,* the court has authority and is under an equitable duty to dispose of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund.

The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the fund upon the termination of the litigation. The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both

with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. *Inland Steel Co.* v. *United States, supra.*

It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. *Central Kentucky Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271; *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 552 *et seq.* Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates, and equally so to direct it to the restitution of rates which it has taken into its own custody, once they are shown to have been unlawful. If such a determination had already been made by the Secretary in the proceeding before him, after full hearing, and if it were found by the district court to be supported by evidence, the duty of the court to make restitution forthwith would seem evident, notwithstanding the absence of any order of the Secretary directing the payment. *Inland Steel Co.* v. *United States, supra.*[4] The Secretary, as we

[4] In *Inland Steel Co.* v. *United States,* 306 U. S. 153, the Interstate Commerce Commission had ordered certain railroads to cease

have seen, is authorized to make the determination. Section 305 denounces unreasonable rates as unlawful. The statute, as declared by § 308 (b), saves to the court authority to give any remedy which in the present circumstances it might otherwise afford.

This Court went much further in *Atlantic Coast Line R. Co.* v. *Florida, supra,* in denying, on equitable grounds, restitution to shippers of the excess of an intrastate rate, prescribed by order of the Interstate Commerce Commission to avoid discrimination against interstate commerce, over that prescribed by the state commission, where the order of the former was later set aside by this Court for want of proper findings by the Commission. Upon further proceedings before the Commission it made a second order, upon proper findings of discrimination, establishing the rate as before. The final result of the litigation was that the railroads were permitted to collect and retain the higher rates for a period during which there was no lawful order of the Commission superseding the state commission rates. There, as here, the administrative

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the payment to shippers, in conformity to a filed tariff, of switching charges which the Commission had found to be unlawful. On review of the action of the Commission the district court stayed the Commission's order and directed the railroads, pending final disposition of the cause, to place further payments due under the tariff in a special fund to be held subject to the order of the court. The Commission's order was ultimately sustained, but meanwhile the Commission, pending review in the courts, had postponed the effective date of its order, so that during the litigation there was no operative Commission order forbidding the unlawful payments. This Court rejected the contention of the shippers that the fund must be paid over to them because it was accumulated in the absence of a controlling order of the Commission. We held that it was the duty of the district court, resulting from its injunction and its control over the fund, to make equitable disposition of it, and we sustained the district court's order that the fund should be turned over to the railroads in conformity to the Commission's determination, confirmed on judicial review, that the switching allowances were unlawful.

agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. *Ewell* v. *Daggs,* 108 U. S. 143, 148, 149; *Weeks* v. *Bridgman,* 159 U. S. 541, 547; *Toy Toy* v. *Hopkins,* 212 U. S. 542, 548. Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action. *Atlantic Coast Line R. Co.* v. *Florida, supra,* 312–313, 317; *New York Edison Co.* v. *Maltbie,* 244 App. Div. 436; 279 N. Y. S. 949; *Brooklyn Union Gas Co.* v. *Maltbie,* 245 App. Div. 74; 281 N. Y. S. 233.

It is said that the distinction between this and the *Atlantic Coast Line* case is the distinction between judicial inaction and judicial action; that there the court, upon settled equitable principles, was free to refrain from compelling restitution if satisfied that no injustice had been done, see *Tiffany* v. *Boatman's Institution,* 18 Wall. 375, 385; *Mississippi & M. R. Co.* v. *Cromwell,* 91 U. S. 643, 645; *Deweese* v. *Reinhard,* 165 U. S. 386, 390, but that here the court is called on by appellants to act by withholding from ap-

pellees rates which are still lawfully in force because the filed schedule has not been set aside by a valid order of the Secretary. While at the moment appellants are content with inaction, and it is appellees who are demanding action—the payment to them of rates whose lawfulness is challenged and not yet determined—the actual posture of the case is such that the court is under a self-imposed duty to act by virtue of having taken the fund into its possession, and in acting to dispose of the fund it must conform to controlling legal principles. Reasonableness of the rates was not established by the filed schedules. Had the rates collected been paid to appellees instead of to the clerk of the court, the Secretary could have ordered reparation upon proper findings that they were unreasonable. And the question is whether the court must now, in the face of a proceeding by the Secretary to determine the reasonableness of the challenged rates, use its power to complete their collection at the risk of obstructing reparation, or whether it should itself remain inactive until their lawfulness is determined and then act accordingly.

It is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, 219. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. *Northwestern Fuel Co.* v. *Brock, supra; Ex parte Lincoln Gas & Electric Co.*, 257 U. S. 6; *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due

from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See *New York Edison Co.* v. *Maltbie, supra; Brooklyn Union Gas Co.* v. *Maltbie, supra;* cf. *United States* v. *Klein,* 303 U. S. 276.

A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co.* v. *Florida, supra,* 312–313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. *Mahler* v. *Eby,* 264 U. S. 32; *Tod* v. *Waldman,* 266 U. S. 113. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.

Reversed.

Mr. Justice Reed took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER, dissenting.

In proceedings instituted on complaint of shippers in 1922, the Secretary, July 27, 1923, approved a 15 per cent reduction of market agencies' charges. In May, 1932, the agencies filed tariffs, which were not challenged by shippers or suspended by the Secretary, making additional reductions of about 10 per cent. These rates remained in force until November 1, 1937. Then there became effective a new schedule established by agreement between the agencies and the Secretary. There being no question as to reasonableness of charges made since that date, the appellees were not required to continue making deposits to secure their compliance with the Secretary's order of June 14, 1933 challenged in this suit, and so impounding ceased.

The money on deposit in the district court is made up of amounts taken from charges as low as, or lower than, those so put and kept in force and applied until November 1, 1937. In the proceedings pending before him, the Secretary may not order reparation (see § 309; also *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389) and is without jurisdiction to do more than prescribe charges to be applied after the effective date of that order if one shall be made. The challenged order having been adjudged invalid because made in violation of the Act, *Morgan* v. *United States*, 304 U. S. 1, the appellees immediately became entitled to the money that, in pursuance of the restraining order, was deposited in court by them to secure their compliance with the Secretary's order if found valid. The record contains nothing to support the idea that the pledge was for any other purpose, or to justify or excuse withholding it for another use. For the reasons stated in its opinion, 24 F. Supp. 214, the district court rightly held appellees entitled

to have their money returned to them. Its decree should be affirmed.

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

UNITED STATES *v.* MARXEN, TRUSTEE.

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

No. 544. Argued March 28, 1939.—Decided May 15, 1939.

R. S. § 3466, giving to the United States priority in payment of debts due to it by any person who is insolvent, is inapplicable to a general claim in bankruptcy which was transferred to the United States, or to which it became subrogated, after the filing of the petition in bankruptcy. P. 207.

So *held* as to a claim—assumed to be a claim of the United States—upon a note assigned to the United States by a bank after the filing of a petition in bankruptcy by the maker. The note was covered by a policy of insurance issued to the bank under the National Housing Act; the maker had defaulted; and the balance due was paid to the bank by U. S. Treasury check subsequently to the filing of the petition in bankruptcy.

QUESTION certified by the Circuit Court of Appeals upon an appeal from an order of the District Court, 24 F. Supp. 463, which confirmed and approved an order of the referee in bankruptcy denying priority to a claim.

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

Mr. Clarence Hansen, with whom *Mr. Thomas S. Tobin* was on the brief, for Marxen, Trustee.

By leave of Court, *Mr. Harry Loeb Mostow* filed a brief, as *amicus curiae,* urging that the question certified be answered in the negative.

Mr. Justice Reed delivered the opinion of the Court.

The case is here on certificate from the Circuit Court of Appeals for the Ninth Circuit with a request for instructions needed in a pending cause. § 239, Jud. Code; 28 U. S. C. § 346. The following facts are stated: On August 10, 1934, the Federal Housing Administrator issued a policy of insurance, under the provisions of the National Housing Act, Title 1, § 2,[1] to the California Bank, a banking corporation. On January 2, 1936, the California Bank, under the protection of this policy, made a loan to the Monterey Brewing Company. The company paid part of the indebtedness but defaulted on the balance on February 2, 1937. On April 5, 1937, it filed a petition in bankruptcy and was adjudicated a bankrupt. Under the insurance contract the bank had to wait until 60 days after default before making claim upon the Administrator. The 60 days expired two days before bankruptcy of the company. The bank, however, did not present its claim to the Administrator until July 3, 1937; the latter paid August 4, 1937, by draft drawn on the

[1] "Sec. 2. The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks . . . which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them . . . for the purpose of financing alterations, repairs, and improvements upon real property. In no case shall the insurance granted by the Administrator under this section to any such financial institution exceed 20 per centum of the total amount of the loans, advances of credit, and purchases made by such financial institution for such purpose . . ." Act of June 27, 1934, c. 847, 48 Stat. 1246.

Treasury of the United States; the bank assigned the note to the "United States of America." Later the Administrator filed a claim upon the note in the name of the United States of America.

The referee allowed it as a general claim only. The district court approved. *In re Monterey Brewing Co.*, 24 F. Supp. 463. On the appeal to the circuit court of appeals the following question, decisive of the controversy,[2] was certified:

"Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64 (b) (7) [11 U. S. C. A. § 104 (b) (7)]."

Section 64 (b) (7) conferred priority upon "debts owing to any person who by the laws of . . . the United States is entitled to priority: *Provided,* that the term

[2] *United States* v. *Mayer,* 235 U. S. 55, 66; cf. *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, 577; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 573.

'person' . . . shall include . . . the United States . . ." [3] Section 3466 of the Revised Statutes, the basis for the claimed priority, provides that "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; and the priority hereby established shall extend . . . to cases in which an act of bankruptcy is committed."

Although an amendment of the National Housing Act authorized the Administrator to sue and be sued in any court of competent jurisdiction, state or federal,[4] it is not necessary in answering the present certificate to determine whether by this addition the Congress intended to give the Administrator the status of a corporation or other entity distinct from the United States and by such status to confer on or withhold from claims of the Federal Housing Administration against bankrupts the advantages of § 3466.[5] We can deal only with a claim of the Federal Housing Administration assigned to the United States after the adjudication in bankruptcy of the obligor. It is assumed that such a claim belongs to and is made by the United States.[6]

[3] Act of May 27, 1926, c. 406, 44 Stat. 667, 11 U. S. C. § 104 (b) (7). This section has been amended by the Act of June 22, 1938, c. 575, § 64, 52 Stat. 874.

[4] Act of August 23, 1935, c. 614, § 344 (a), 49 Stat. 722.

[5] The purpose of the amendment was said to be "clarifying." Sen. Rep. No. 1007 on H. R. 7617, 74th Congress, 1st Session, p. 24. The House Report merely stated its substance. H. R. Rep. No. 1822 on H. R. 7617, 74th Congress, 1st Session, p. 57. The Congressional Record is silent on this clause of the Banking Act of 1935.

A corporation wholly owned by the United States is held without the advantages of § 3466. *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549, 570.

[6] Cf. *Wagner* v. *McDonald,* 96 F. 2d 273, 274; *In re Dickson's Estate,* 84 P. 2d 661, 664; *DuPont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *Clallam County* v. *United States,* 263 U. S. 341; *North Dakota-Montana Wheat Growers Assn.* v. *United States,* 66 F. 2d 573, 576–577.

Before considering the applicability of § 3466 to claims of the United States acquired after the bankruptcy of the obligor, we must examine the contention of the Government that it possessed a provable claim at the time the petition in bankruptcy was filed. This assertion predicates an agreement, express or implied, by the obligor to indemnify the Government for any loss it may sustain by reason of its insurance of the bank. The question certified contains nothing as to the contract of insurance except that it was under the provisions of the National Housing Act and "insured the payee bank against the non-payment of the note by its maker." The section of that act, quoted above, does not indicate any privity between the bankrupt maker and the Government based upon the insurance contract. Even if we accept as accurate the statement in the certificate that the Administration insured against the non-payment of this note,[7] there is nothing in the record to connect the maker with the insurance. The Government attempts to fill in the facts lacking in the certification by printing in its brief a regulation of the Federal Housing Administration, Number 10 of July 15, 1935,[8] and the form of credit statement from the note maker to the bank in use, presumably, at

[7] This is not in accord with the practice under Title I of the National Housing Act. The act is administered so as to create an insurance reserve for each approved financial institution of not to exceed the authorized percentage of the total amount of qualified paper. Cf. Regulations, Federal Housing Administration, Property Improvement Loans, 3 Federal Register 358, regulation number 17.

[8] "The question of the financial condition of the borrower is left to the reasonable judgment of the insured institution as a credit matter. The borrower must furnish the lending institution a financial or credit statement, approved as to form by the Administrator, which in the judgment of the insured institution shows the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk in view of the insurance provided by the National Housing Act."

the time of the loan. The form contains this sentence, as well as information as to the applicant's employment or business, his income and the property to be improved: "The following information is given for the purpose of inducing you to grant credit under the provisions of Title I of the National Housing Act."

The regulation and the credit statement certainly do not supply the facts necessary to the conclusion that this particular form of credit statement was used. As the certificate does not show the State in which the note was executed, payable or enforceable, we are left to speculate as to the applicable law of indemnity. It is not clear that a voluntary guarantor can recover in every jurisdiction from the involuntary principal who has not requested the service.[9] But even if we assume that such a guarantor may recover upon an implied promise of reimbursement, the rule is not effective here. The statement of the case and the question certified show that the claim in bankruptcy of the Government is based upon the note, duly assigned to it after bankruptcy. As no proof was made of any claim for reimbursement, such a claim is not involved.[10]

The claim on the note, assigned to the United States subsequently to the maker's bankruptcy, has priority, if at all, by virtue of the general provisions of § 3466, as recognized by § 64 (b) (7) of the Bankruptcy Act.[11]

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[9] Cf. *Leslie* v. *Compton,* 103 Kan. 92; 172 P. 1015; *Marsh* v. *Hayford,* 80 Me. 97; 13 A. 271; *McPherson* v. *Meek,* 30 Mo. 345.

[10] Cf. *Insley* v. *Garside,* 121 F. 699, 702. Cf. also § 57 (i) which provides that "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, 11 U. S. C. § 93.

[11] See note 3, *supra.*

That subdivision granted priority ahead of dividends to creditors, to claims entitled to priority under the laws of the United States. Priority has been secured to the United States in varying language throughout its history.[12] The tendency has been to interpret these provisions liberally to secure the advantage sought by the Congress.[13] "As this statute has reference to the public good it ought to be liberally construed."[14] It has been said that "nothing else appearing" even claims under the railroad Federal Control Act would be entitled to priority.[15] But this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States, only, and by legislative intention, as shown by other statutes. Consequently priority was refused to corporations wholly owned by the United States[16] and to the Director General of Railroads because

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[12] The Government summarizes the legislative background as follows: "The Act of July 31, 1789, Sec. 21, c. 5, 1 Stat. 29, 42, first gave the United States priority but was limited to debts due on bonds for duties. The Act of May 2, 1792, Sec. 18, c. 27, 1 Stat. 259, 263, allowed sureties who paid their debts to the United States to exercise their priority. The Act of March 3, 1797, Sec. 5, c. 20, 1 Stat. 512, 515, extended the priority to all debts due from any person. The Act of March 2, 1799, Sec. 65, c. 22, 1 Stat. 627, 676, applied to bonds for duties. R. S., Sec. 3466 is derived from the Acts of 1797 and 1799."

[13] *United States* v. *Fisher*, 2 Cranch 358; *Harrison* v. *Sterry*, 5 Cranch 289, 298–299; *United States* v. *State Bank*, 6 Pet. 29, 35; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134; *Lewis* v. *United States*, 92 U. S. 618, 621; *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 487; *Price* v. *United States*, 269 U. S. 492, 500.

[14] *Beaston* v. *Farmers' Bank*, *supra*.

[15] *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 239.

[16] *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 570. Even though private parties might have participated in stock ownership under the law. See p. 565.

§ 10 of the Federal Control Act manifested an intention that the carriers under federal control should be treated as before their transfer to federal operation.[17] The United States itself when it sought priority for its loans under the Transportation Act was denied the benefits of § 3466 because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority.[18]

We are of the view that § 3466 is inapplicable to general claims in bankruptcy transferred to the United States, or to which it has become subrogated on payment, after the filing of the petition, for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves.[19] The assets at that time are segregated for the benefit of creditors.[20] The transfer of the assets to someone for application to "the debts of the insolvent, as the rights

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[17] *Mellon* v. *Michigan Trust Co., supra,* 240.

[18] *United States* v. *Guaranty Trust Co.,* 280 U. S. 478, 485–86.

[19] *White* v. *Stump,* 266 U. S. 310, 313; *In re C. H. Earle, Inc.,* 2 F. Supp. 15, affirmed on the opinion below, 65 F. 2d 1013. Cf. *Spokane County* v. *United States,* 279 U. S. 80, 93; *United States* v. *Oklahoma,* 261 U. S. 253, 260, as to receivership proceedings.

The lower courts have divided upon the issue whether a Federal Housing Administration claim is entitled to priority. Priority has been given in *Wagner* v. *McDonald,* 96 F. 2d 273; *In re Wilson,* 23 F. Supp. 236; *In re T. N. Wilson, Inc.,* 24 F. Supp. 651; cf. *In re Dickson's Estate,* 84 P. 2d 661. Priority has been denied in *In re Hansen Bakeries, Inc.,* 103 F. 2d 665; *Federal Housing Administrator* v. *Moore,* 90 F. 2d 32; *In re Stamford Auto Supply Co.,* 25 F. Supp. 530; *In re Miller,* 25 F. Supp. 336; cf. *Paul* v. *Paul Lighting Fixture Co.,* 13 Ohio Op. 27. The assignment was made prior to bankruptcy or insolvency in the *Wagner* and *Dickson* cases. In the *Wilson* and *T. N. Wilson, Inc.,* cases the time of assignment is uncertain. In the remaining cases it came after bankruptcy or insolvency.

[20] *Mueller* v. *Nugent,* 184 U. S. 1, 14; *May* v. *Henderson,* 268 U. S. 111, 117.

and priorities of creditors may be made to appear," [21] takes place as of that time.

The question certified should therefore be answered in the negative.

Question answered "no."

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

RORICK ET AL. *v.* BOARD OF COMM'RS OF EVERGLADES DRAINAGE DIST. ET AL.

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

No. 554. Argued March 28, 29, 1939.—Decided May 15, 1939.

A suit by bondholders of a state drainage district to restrain the enforcement of state statutes effecting changes in rates, collection and disposition of taxes on lands of the district, and authority to issue bonds, etc., upon the ground that such changes unconstitutionally impair the obligations of the plaintiffs' contracts, can not be tried under Jud. Code § 266 by a District Court of three judges, nor be appealed directly to this Court, the statutes attacked not being of general application, but affecting exclusively the particular district of the State. P. 211.

Jurisdiction is not conferred in such a case by joining as defendants state officials whose duties under the statutes in question are of local, not of state-wide, concern.

24 F. Supp. 458, vacated.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed a suit seeking an injunction against the enforcement of certain Florida statutes alleged to be unconstitutional. See, also, s. c., 57 F. 2d 1058. This Court, finding itself without jurisdiction, vacates the decree and remands the case to the District

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[21] *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 490.

Court for further proceedings to be taken independently of Jud. Code § 266.

Mr. William Roberts, with whom *Messrs. W. H. Watson* and *Samuel Pasco* were on the brief, for appellants.

Mr. Clarence G. Ashby, with whom *Mr. Fred H. Kent* was on the brief, for the Board of Commissioners, appellee.

Messrs. Tyrus A. Norwood and *Marvin C. McIntosh,* Assistant Attorneys General of Florida, with whom *Mr. George Couper Gibbs,* Attorney General, was on the brief, for the Trustees of the Internal Improvement Fund, appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here on appeal under § 238 of the Judicial Code as amended, 28 U. S. C. § 345, to review a decree of a district court of three judges convened under § 266 of the Judicial Code as amended, 28 U. S. C. § 380, denying an interlocutory injunction and dismissing the bill and supplemental bills. The bills challenged the validity of certain Florida statutes as impairments of the obligation of contract between the Board of Commissioners of Everglades Drainage District and the appellants, as holders of some of its outstanding bonds. The decree of the district court was based on its conception of the applicability of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, but this and other questions are not now open for consideration if § 266 does not cover a situation like the present. If there be a jurisdictional barrier here, it binds us though not invoked by the appellees.

The record is singularly obscure. This litigation, which has extended over eight years, is but one phase of a complicated controversy pursued in both state and federal courts.

The bill was filed on May 19, 1931. A supplemental bill was filed July 4, 1931. The prayers of the bills were amended on November 5, 1931. A district court of three judges was convened on November 14, 1931. On September 17, 1932, orders were entered denying a motion to dismiss, and granting an interlocutory injunction conditioned on the filing of a bond for $50,000. Answers were filed in October and November, 1932. The required bond was not given and on February 23, 1933 an order was entered that the interlocutory injunction should be vacated. The matter then lay dormant until a second supplemental bill was filed on July 19, 1937. It was not until August 2, 1938, that the order sought here to be reviewed, denying the motion for an interlocutory injunction and dismissing the bill, was made.

The facts will be summarized only to the extent necessary to expose the jurisdictional problem. The Everglades Drainage District (hereafter called District), comprising a large acreage in the southern part of Florida, was established by Chapter 6456, Laws of Florida, Acts of 1913. The administration of the District was entrusted to a Board of Commissioners (hereafter called the Board), a body corporate. The lands were originally part of a grant made by Congress to Florida in 1850 whereby Florida undertook to apply the lands and proceeds derived from them to drainage and reclamation purposes. In fulfillment of this obligation Florida, in 1855 (Chapter 610, Laws of Florida, Acts of 1855), vested the lands in trustees of the Internal Improvement Fund (hereafter called Trustees) consisting of designated state officials. Subsequent legislation for the District made numerous changes affecting its financial administration and the relations between the District and the Trustees (Chapters 13,633, 14,717; 17,902, Laws of Florida, 1929, 1931 and 1937). The changes concerned rates of taxes, disposition of their proceeds, procedure in cases of tax delinquency, and authorization of bond issues.

Appellants sued as holders of bonds issued prior to these latter statutes claiming that they impaired obligations created by such bonds as defined by § 23 of the Act of 1913 which specifically provided that the terms of that Act should constitute "an irrepealable contract" between bondholders and the District. In substance the bill and the supplemental bills alleged a reduction of the available taxes below those in effect at the time the bonds were issued, an adverse change in the debt service, and a diversion of revenues to purposes other than those required by the Act of 1913. The bills also complained of important changes effected by the later Acts regarding tax delinquencies on the lands in the District. It was alleged that under the earlier Act lands on which taxes were delinquent were to be sold at auction and, for want of bidders for the amount of taxes plus costs, were to be bid off to Trustees who were under a duty to pay for tax certificates as well as the drainage taxes in the future. Violation of contractual rights were alleged in that Trustees had ceased paying for the tax certificates as well as the drainage taxes, and that § 65 of the 1931 statute had declared that Trustees held the certificates in trust for the District and required them to transfer the certificates to the District. Further violations of the contract were attributed to powers given to the District, after 1913, whereby it was authorized to compromise taxes, to accept bonds for redemption of lands, and to cancel tax liens on lands which came into the ownership of the United States. Finally, a claim of impairment of contract was based on changes in the membership of the District after 1913.

The Board of Commissioners, the Trustees and various county tax officials were named as defendants in the suit. The bills sought to enjoin the defendants distributively, and with much particularity, from effectuating the various modifications made by the Acts of 1929, 1931 and 1937 concerning the rates of taxes, the disposition of

their proceeds, the procedure in cases of tax delinquency, the authorization of bond issues, and the internal relations between the District and the Trustees as all these were claimed to be originally defined by the Act of 1913.

This appeal is properly here only if the present suit required the convening of a district court of three judges under § 266. We do not think that this was such a suit, because the state statutes from which relief was sought do not constitute legislation "of general application," *Ex parte Collins,* 277 U. S. 565.

Ex parte Collins, supra, reinforced by *Ex parte Public National Bank,* 278 U. S. 101, authoritatively established the restricted class of cases to which the special procedure of § 266 must be confined. "Despite the generality of the language" of that Section, it is now settled doctrine that only a suit involving "a statute of general application" and not one affecting a "particular municipality or district" can invoke § 266. Plainly, the matter here in controversy is not one of statewide concern but affects exclusively a particular district in Florida. This Court in effect so held in denying a motion for leave to file a petition for writ of mandamus to convene a court under § 266 made by the Board of Commissioners in a suit by a bondholder claiming impairment of the obligation of contracts existing under the 1913 Act. *Ex parte Everglades Drainage District,* 293 U. S. 521. The present suit differs from the earlier case in that here the trustees of the Internal Improvement Fund were made defendants. But what is decisive under § 266 is not the formal status of the officials sued but the sphere of their functions regarding the matter in issue. An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which "embodies a policy of statewide concern," be performing a state function within the meaning of § 266. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89. Conversely a

state official charged with duties under a statute not of statewide concern is not a state functionary within the purposes for which § 266 was designed. What was matter of local concern in *Ex parte Everglades Drainage District, supra,*—the administration of the affairs of the District—remains matter of local concern in the present suit. The nature of the controversy—legislation affecting a locality "as against a policy of statewide concern"—has remained unchanged even though the present bills made it pertinent to join the Trustees. This suit thus fails to satisfy an essential requirement of § 266.

Since the time for appeal to the Circuit Court of Appeals has expired, and since the jurisdictional problem determined in this case had not been fully settled prior to this decision, we will not terminate the litigation by dismissing the appeal but, in accordance with the practice followed in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, we will order the decree vacated and the cause remanded to the district court for further proceedings to be taken independently of § 266 of the Judicial Code.

Decree vacated.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of this case.

UNITED STATES *v.* POWERS ET AL.

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

No. 687. Argued April 21, 1939.—Decided May 15, 1939.

1. Whether an offense against a temporary Act may be punished after the Act has expired depends upon the legislative purpose. P. 216.
2. An Act of Congress, designed to protect interstate and foreign commerce from "contraband" oil and to encourage oil conservation and containing administrative and punitive provisions for its effectuation, provided that it should "cease to be in effect on June 16, 1937." It was amended June 14, 1937 by an Act which declared its purpose to continue the earlier Act until June 30, 1939 and which merely changed the date of expiration accordingly.

   Held, a clear indication of purpose to treat the entire Act as if by its original terms it was to expire on the day to which it was so extended; and that violations of the Act committed prior to the original date of expiration were indictable thereafter. P. 217.
3. Article I, § 9, cl. 3 of the Federal Constitution, proscribing ex post facto laws, does not bar such prosecution. P. 218.
4. A statute susceptible of more than one interpretation should be given that which will make it effective. P. 217.

Reversed.

APPEAL under the Criminal Appeals Act and § 238 Jud. Code, from a judgment sustaining demurrers to an indictment and motions to quash it.

Mr. Charles A. Horsky, with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Amos W. W. Woodcock, George F. Kneip,* and *Douglas W. McGregor* were on the brief, for the United States.

Mr. John D. Cofer, with whom *Messrs. Elbert Hooper, Myran G. Blalock, Jack Blalock, Clarence Lohman,* and *Robert E. Cofer* were on the brief, for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal, under the Criminal Appeals Act of March 2, 1907, 18 U. S. C. § 682, and § 238 of the Judicial Code, 28 U. S. C. § 345, from a judgment of a district court sustaining demurrers and motions of the appellees to quash an indictment.

The indictment, filed September 17, 1938, charges appellees with violations of the Connally (Hot Oil) Act of February 22, 1935, as amended, 15 U. S. C. § 715 *et seq.*, and with conspiracy to violate such Act, 18 U. S. C. § 88. The various substantive counts charge that appellees, in violation of the Act, as amended, transported in interstate commerce from the Conroe Oil Field in Montgomery County, State of Texas, to Marcus Hook, Pa. certain petroleum products in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of Texas and the regulations and orders prescribed by the Railroad Commission of Texas. These transportations are alleged to have been made on various dates from November 4, 1935, to March 20, 1936. The conspiracy count charges a conspiracy by appellees to violate the Act, as amended, by producing, transporting, and withdrawing from storage petroleum in excess of the amounts permitted to be produced, transported, and withdrawn from storage under the laws of Texas and the regulations and orders promulgated thereunder. These transportations are alleged to have been made between the same places alleged in the substantive counts, on various dates from on or about September 4, 1935, to on or about March 15, 1937.

Sec. 13 of the Act of February 22, 1935, provided that "This Act shall cease to be in effect on June 16, 1937." This section was amended by the Act of June 14, 1937,

"by striking out 'June 16, 1937' and inserting in lieu thereof 'June 30, 1939'." No other amendments to the Act were made.

The single question before us is whether violations of this Act alleged to have been committed prior to June 16, 1937, may be prosecuted under an indictment returned subsequent thereto. The district court by sustaining the demurrers and motions to quash answered that question in the negative. We think it erred.

The Congress alone may declare whether those who, before June 16, 1937, violated the Act may be prosecuted thereafter. The question is one of the purpose of Congress. Explicit provisions in the amendment preserving the right of prosecution after the date originally set for expiry of the Act would have made that purpose clear beyond question. But the surrounding circumstances here make this purpose as clear and as unequivocal as an explicit provision. This is an Act designed to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil, (as defined in the Act) and to encourage the conservation of deposits of crude oil within the United States. Administrative machinery is provided for the control of shipment or transportation of contraband oil in interstate commerce. §§ 4, 5 and 9. Such shipment or transportation is prohibited, unless on appropriate findings the President, by proclamation, lifts the prohibition. §§ 3 and 4. Penalties are provided for violations of the Act or any regulations prescribed thereunder. §§ 6 and 7. And § 10 implements the Act with civil and criminal procedures to enforce its sanctions. The Act is thus a self-sustained and organic whole, equipped to effectuate a declared policy of the Congress. By its original terms it would have expired June 16, 1937. But it never expired, for on June 14, 1937,

the whole Act was continued in effect until June 30, 1939. Its substantive phases were not altered one whit or tittle; its sanctions were neither reduced nor increased. Precisely the same acts continue to be prohibited after the amendment as before. The amendment merely perpetuated the entire Act for another term.

In view of these circumstances, it seems clear beyond question that it was the purpose of Congress, expressed in the amendment of June 14, 1937, to treat this Act precisely in the same way as if by its original terms it was to expire on June 30, 1939. Due to the amendment, the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life. There was no First Connally Act followed by a Second Connally Act. During the periods in question there was but one Act. No evidence has been brought to our attention, and we have found none, that Congress proposed to waive or to pardon violations which occurred prior to June 16, 1937, but which were not prosecuted until subsequent thereto.

There is a secondary consideration which points to the same conclusion. If the appellees are right in their contention, a temporary act such as this one would lose, as a practical matter, some of its sanctions. Violations could occur with impunity months before its expiry, for in practice there frequently is an unavoidably substantial lag between violation and prosecution. The statute should not be so construed if another interpretation will make it effective. As this Court said in *Bird* v. *United States,* 187 U. S. 118, 124, "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." We are unwilling to conclude that although the same acts continue to be prohib-

ited after June 16, 1937, as before, violations committed prior to that date are not punishable thereafter.

In view of this conclusion, we do not reach the nub of appellees' argument based on Chief Justice Marshall's statement in *The Irresistible,* 7 Wheat. 551, 552 "that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose." For in this case, as we have said, the Act of February 22, 1935, did not expire on June 16, 1937.

But even if we assume the validity of that statement, it seems to us clear that though the Act be treated as having expired or terminated on June 16, 1937, the result is the same. For in this case "particular provision" has been made "by law for the purpose" of extending the enforcement machinery with reference to prior criminal violations. The "particular provision" was the amendment of June 14, 1937, extending the effective period of the Act. That amendment was passed prior to the original expiration date. When read in light of the title of the amendatory statute, viz. "An Act to continue in effect until June 30, 1939, the Act . . . approved February 22, 1935," the statement of purpose becomes plain and unambiguous. If the amendment of June 14, 1937, had merely "extended" the duration, or postponed the expiration, of § 10 of the Act dealing with criminal penalties, "particular provision" for subsequent prosecutions would have been indubitably clear. The fact that all sections, including § 10, were extended makes it nonetheless plain. The whole, though larger than any of its parts, does not necessarily obscure their separate identities.

In view of these various considerations, we hold that this prosecution does not offend the prohibition in Article I, § 9, cl. 3 of the Constitution against *ex post facto* laws.

Judgment reversed.

UNITED STATES *v.* ONE 1936 MODEL FORD V–8 DE LUXE COACH, COMMERCIAL CREDIT COMPANY, CLAIMANT.*

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

No. 10. Reargued May 1, 1939.—Decided May 22, 1939.

1. Upon the facts, *held* that claimants for remission of forfeitures of automobiles seized for unlawful transportation of tax unpaid liquors, had complied with the conditions imposed by § 204 (b) of the Liquor Law Repeal and Enforcement Act of August 27, 1935, and that the courts below properly remitted the forfeitures. Pp. 224 *et seq.*
2. A claimant (automobile finance company) who in good faith purchased from a dealer a conditional sale contract covering the sale of an automobile; who believed that the vendee named therein was the real purchaser and owner of the automobile; and who had no knowledge, information or suspicion of facts to the contrary until the car was later seized for violation of the revenue laws,—had an "interest in such vehicle . . . acquired in good faith," within § 204 (b) (1) of the Liquor Law Repeal and Enforcement Act. P. 224.
3. Where such claimant, before acquiring such sale contract, investigated the person named therein as purchaser and found that he had no record or reputation for violation of liquor laws; and believed that such person was the real purchaser; and had no knowledge, information, or suspicion that he was merely a "straw" purchaser—this was a sufficient showing under § 204 (b) (2) that the claimant had no reason to believe that the car would be used in violation of liquor laws. The contention that, since claimant knew that automobiles were frequently used for violation of liquor laws, he had reason to believe that the car in question would be so used, is rejected. P. 224.
4. Subsection (b) (3) of § 204 of the Liquor Law Repeal and Enforcement Act does not require, as a condition to remission of for-

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* Together with No. 627, *United States* v. *Automobile Financing, Inc.* On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued May 1, 1939.—Decided May 22, 1939.

feiture by the court, that the claimant shall have investigated, at his peril, every person with record or reputation for violating the liquor laws who in fact, although wholly unsuspected, had acquired some right to the vehicle. The subsection was intended to prevent remission to a claimant who had failed to make inquiry when he should have done so, to one chargeable with willful negligence or purpose of fraud. P. 235.

5. Forfeitures are not favored; they should be enforced only when within both the letter and the spirit of the law. P. 226.

93 F. 2d 771, 19 F. Supp. 470, affirmed.

99 F. 2d 498, 22 F. Supp. 507, affirmed.

CERTIORARI, 303 U. S. 633; 306 U. S. 625, to review the affirmances of judgments in two cases in which the District Courts ordered remission of forfeitures under the Liquor Law Repeal and Enforcement Act. In No. 10, the judgment below was previously affirmed here by an equally divided Court, 305 U. S. 564; a rehearing was subsequently granted, 305 U. S. 666. No. 627 was assigned for argument immediately following the reargument in No. 10.

Mr. Gordon Dean, with whom *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* were on the brief, on the reargument and on the original argument in No. 10, and on the argument in No. 627, for the United States.

Messrs. Duane R. Dills and *Eugene E. Heaton,* on the reargument and on the original argument, for Commercial Credit Co., claimant in No. 10. *Mr. Duane R. Dills* argued the cause, and *Mr. James F. Kemp* was on a brief, for respondent in No. 627.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In each of these causes the District Court, proceeding under the "Liquor Law Repeal and Enforcement Act"

of August 27, 1935 (c. 740, 49 Stat. 872, 878, Title 27 U. S. C. § 40a), mitigated the forfeiture of an automobile seized for unlawful transportation of distilled spirits upon which the federal tax had not been paid. (One was seized December 3, 1936; the other, March 15, 1937.) The forfeiture was decreed in a proceeding based upon § 3450 R. S. (Title 26 U. S. C. § 1441). The Circuit Courts of Appeals rightly approved and their judgments must be affirmed.

The facts, undisputed, are essentially alike in both causes. The points of law are the same. A statement based on Record No. 10 will suffice.

The Repeal Enforcement Act provides—

"Sec. 204. (a) Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

"(b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, which ever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the

headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation."

The following findings by the District Court, it is agreed, correctly set out "the facts in this case"—

The Ford automobile in question was sold by the Greenville Auto Sales, Incorporated (the dealer) October 3, 1936, through its agent, Elrod, to Guy Walker, who in part payment exchanged an old car paid for by him, but registered in his wife's name. He was given terms for payment under a conditional sales contract, drawn by an agent of the dealer, in the name of his brother, Paul Walker, who formally executed the agreement. Guy Walker had the conditional sales contract drawn and executed in the name of his brother in order to place the title "where his wife could not reach it." Paul Walker had no interest in the transaction except to comply with his brother's request. Guy Walker made the transaction with the dealer. He selected the car, made the agreement and handled the transaction himself. Paul Walker drove the car from the dealer's place of business. Guy Walker at the time, and for two or three weeks after the purchase, was living at his brother's house. Only one payment was made on the conditional sales contract before the seizure, and that by Guy Walker to the dealer.

It was admitted that Guy Walker had a previous record and reputation for violating both state and federal laws relating to liquor. Paul Walker was convicted of violating the National Prohibition Act in 1929, and was duly

sentenced therefor, but his record and reputation since serving the sentence were good.

On the date when the sale was consummated the dealer submitted the contract to the Commercial Credit Company, the claimant here, who accepted by telephone, and subsequently on October 5th, in the usual course of business the dealer assigned the contract to the claimant and received a check therefor.

The claimant before accepting assignment of the sales contract made an investigation of Paul Walker by inquiring at the headquarters of the Sheriff of Greenville County, and at the headquarters of the Chief of Police of Greenville, the County and City where the interest was acquired and the locality where Paul Walker resided, as to his record and reputation for violation of the liquor law. Information was received from these offices that he had no such record or reputation. Information was given, however, from the Sheriff's office that Guy Walker had both record and reputation as violator of state and federal laws relating to liquor. No inquiry or investigation was made at the headquarters of the principal federal internal-revenue officer engaged in the enforcement of the liquor laws in that locality, or at the headquarters of any other principal local or federal law enforcement officer of the locality as to Paul Walker, and no inquiry or investigation whatsoever was made of Guy Walker, the admitted real owner and purchaser of the automobile.

The claimant had Paul Walker investigated in August, 1936, by the Business Service Bureau of Greenville, South Carolina, in connection with the purchase of a refrigerator. No investigation at that time was made as to his reputation or record for violating the liquor laws; the investigation did disclose that he had a good reputation in the community where he lived, and this was the reputation given him by his employer at that time.

The claimant purchased the conditional sales contract in good faith, believing that Paul Walker was the pur-

chaser and owner of the automobile. It had no knowledge, information or suspicion of the true facts until after the automobile had been seized by federal officers.

Petitioner challenges the judgment below because of claimant's failure to establish compliance with the conditions imposed by sub-section (b) § 204. Especially because claimant failed to show that it had no reason to believe the automobile was being used or would be used to violate the liquor laws; also because it made no adequate inquiry concerning the record and reputation of the real purchaser—Guy Walker.

Respondent's interest in the automobile is not questioned. It "purchased the conditional sales contract in good faith, believing that Paul Walker was the purchaser and owner of the automobile. It had no knowledge, information or suspicion of the true facts until after the automobile had been seized." This is enough to show compliance with sub-section (b) (1). There was an interest acquired in good faith.

After investigation of the record and reputation of Paul Walker, followed by favorable reports, and believing him to be purchaser and owner of the automobile, claimant in good faith acquired the sales contract. It had no knowledge, information or suspicion that Paul Walker was only a "straw" purchaser. This is enough to show compliance with sub-section (b) (2). The suggestion that since respondent knew automobiles were frequently used for violation of liquor laws it therefore had reason to believe that the one in question would be so used is not well founded. The findings positively affirm that it entertained no such belief or suspicion.

The difficult phrasing of sub-section (b) (3) has produced divergent views concerning its meaning.

In *Federal Motor Finance* v. *United States,* 88 F. 2d 90, 93, the Circuit Court of Appeals Eighth Circuit said—

"We think the fair intendment of the language of subsection (3) concerning remission of forfeiture is that the

appellant could not rely entirely upon a course of business whereby it acquired an interest in the car so nearly approximating the total value thereof without taking care to ascertain who the real owner was in possession of and using the car."

In the causes now before us (93 F. 2d 771, 773; 99 F. 2d 498, 500), the Circuit Court of Appeals accepted the view that—

"The involved language of subsection (b) (3) of the act does permit the possible interpretation that the lienor is charged with the duty of making inquiry as to every one, bearing a bad reputation or record, who may have a right under the contract of sale, whether or not it appears on the face of the instrument. See Federal Motor Finance *v.* United States, 8 Cir., 88 F. 2d 90. But in our view Congress did not intend to impose upon the lienor the obligation to ascertain at his peril the identity of every person having an interest in the property and to make inquiry of the law enforcement officers as to the previous record and reputation of every such person, unless from the documents themselves or other surrounding circumstances the lienor possesses information which would lead a reasonably prudent and law-abiding person to make a further investigation."

See also *C. I. T. Corporation* v. *United States,* (Fourth Circuit) 86 F. 2d 311, and *United States* v. *C. I. T. Corporation,* (Second Circuit) 93 F. 2d 469.

Counsel for petitioner now maintain: "That under the language of the statute [(b) (3)] the claimant is required to investigate the real purchaser at its peril and that if it fails to do so, as between it and the Government, the claimant assumes the risk of fraud perpetrated upon it by the dealer and the bootlegger. In any event, the claimant should have been required to show that it at least made a reasonable effort to ascertain who the real

purchaser and user of the car was so that he could be investigated as required by the statute."

Manifestly, § 204 is a remedial measure. It empowers the courts, exercising sound discretion, to afford relief to innocent parties having interests in condemned property where the claim is reasonable and just. Its primary purpose is not to protect the revenues; but this is proper matter for consideration whenever remission is sought. The section must be liberally construed to carry out the objective. The point to be sought is the intent of the lawmaking powers. Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law. *Farmers' & M. National Bank* v. *Dearing*, 91 U. S. 29, 33–35. If any claimant has been negligent or in good conscience ought not be relieved, the court should deny his application.

Consideration of the statutory provisions relative to remissions prior to § 204 and the circumstances of its adoption will enlighten the purpose entertained by Congress.

Sections 3450 and 3453 Revised Statutes (Title 26 U. S. C. §§ 1441, 1620–1621)—derived from Acts June 30, 1864 and July 13, 1866—provide that whenever any commodity in respect of which a tax is imposed, is removed with intent to defraud the United States, it shall be forfeited "and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." "The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made." [1]

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[1] R. S. § 3450 (Act July 13, 1866, c. 184, § 14, 14 Stat. 98, 151; 26 U. S. C. § 1441)—

"(a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or com-

Sections 3460 and 3461 (Title 26 U. S. C. § 1624) derived from Acts July 13, 1866 and June 6, 1872—provide that when goods, wares, or merchandise seized as subjects of forfeiture, do not exceed $500 in value, they may be restored to the claimant upon the execution of a bond and this shall be delivered to the District Attor-

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modities for or in respect whereof any tax is imposed, with intent to defraud the United States of such tax on any part thereof, shall be liable to a fine or penalty of not more than $500.

. . . . . .

"(3) Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

[This section was amended by Act June 26, 1936 (c. 830, Title III, § 325, 49 Stat. 1939, 1955) which changed the provision for $500 penalty to a "fine of not more than $5,000 or be imprisoned for not more than three years, or both."]

Revised Statutes § 3453 (Act June 30, 1864, c. 173, § 48, 13 Stat. 223, 240; Act July 13, 1866, c. 184, § 9, 14 Stat. 98, 111; 26 U. S. C. §§ 1620–1621)—

"All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made."

ney for proper proceedings; if no bond, the articles shall be sold and the proceeds paid into the Treasury. Within a year any claimant may apply to the Secretary for remission which may be granted "upon satisfactory proof, to be furnished in such manner as he shall prescribe: *Provided,* That it shall be satisfactorily shown . . . that the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property." [2]

Where the value exceeds $500 or bond is given, forfeiture must be sought in court through a libel in rem.

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[2] Revised Statutes §§ 3460 and 3461 (Act July 13, 1866, c. 184, § 63, 14 Stat. 98, 169; Act June 6, 1872, c. 315, § 40, 17 Stat. 230, 257; 26 U. S. C. § 1624)—

"Sec. 3460. In all cases of seizure of any goods, wares, or merchandise, as being subject to forfeiture under any provision of the internal-revenue laws, which, in the opinion of the collector or deputy collector making the seizure, are of the appraised value of five hundred dollars or less, the said collector or deputy collector shall, except in cases otherwise provided, proceed as follows:

. . . . . .

"Second. If the said goods are found by the said appraisers to be of the value of five hundred dollars or less, the said collector or deputy collector shall publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice.

"Third. Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the said collector or deputy collector a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of two hundred and fifty dollars, with sureties to be approved by the said collector or deputy collector, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon delivery of such bond to the collector or

United States v. *Two Bay Mules, Etc.,* 36 F. 84; *United States* v. *Mincey,* 254 F. 287; *Logan* v. *United States,* 260 F. 746; *United States* v. *One Bay Horse,* 270 F. 590.

Section 3229 Revised Statutes (Act July 20, 1868, c. 186, § 102, 15 Stat. 125, 166; 26 U. S. C. § 1661) provides—

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may

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deputy collector, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and said attorney shall proceed thereon in the ordinary manner prescribed by law.

"Fourth. If no claim is interposed and no bond is given within the time above specified, the collector or deputy collector, as the case may be, shall give ten days' notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall sell the articles so seized at public auction, and, after deducting the expense of appraisement and sale, he shall deposit the proceeds to the credit of the Secretary of the Treasury.

"Sec. 3461. Within one year after the sale of any goods, wares, or merchandise, as provided in the preceding section, any person claiming to be interested in the property sold may apply to the Secretary of the Treasury for a remission of the forfeiture thereof, or any part thereof, and a restoration of the proceeds of the sale; and the said Secretary may grant the same upon satisfactory proof, to be furnished in such manner as he shall prescribe: *Provided,* That it shall be satisfactorily shown that the applicant, at the time of the seizure and sale of the said property, and during the intervening time, was absent, out of the United States, or in such circumstances as prevented him from knowing of the seizure, and that he did not know of the same; and also that the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property. If no application for such restoration is made within one year, as hereinbefore prescribed, the Secretary of the Treasury shall, at the expiration of the said time, cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares, or merchandise condemned and sold pursuant to the decree of a competent court."

compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise."

(Amended, Acts February 26, 1926, c. 27, § 1201, 44 Stat. 9, 126; May 10, 1934, c. 277, § 512 (b), 48 Stat. 680, 759; May 28, 1938, c. 289, § 815, 52 Stat. 447, 578.)

Wilson Motor Co. v. *United States,* (Ninth Circuit) 84 F. 2d 630, 632, states—"The government's brief advises that prior to the Act of August 27, 1935, the procedure of the government to afford relief to these innocent owners was under the provisions of compromise powers given the Attorney General and the Treasury under section 1661, 26 U. S. C. A."

In connection with the sections referred to above the United States Code Annotated points to their origin and history.

The National Prohibition Act (October 28, 1919, c. 85, Title II, § 26, 41 Stat. 305, 315, Title 27 U. S. C. § 40) provided that "whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." The person

arrested shall be proceeded against but the vehicle or conveyance shall be returned upon execution of a bond. Upon his conviction the court shall order the liquor destroyed "and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized." [3] See *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. This was repealed by The Repeal and Enforcement Act, *supra.*

[3] "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property."

The Act of September 21, 1922, (c. 356, § 618, 42 Stat. 858, 987) provides—

"Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this Act, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Secretary of Commerce if under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, or the Secretary of Commerce, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

[Reënacted by Act July 17, 1930, c. 497, § 618, 46 Stat. 590, 757; 19 U. S. C. § 1618.]

The Act May 29, 1928 (c. 852, § 709, 45 Stat. 791, 882, 26 U. S. C. § 1626) extended "the provisions of law applicable to the remission or mitigation by the Secretary of the Treasury of forfeitures under the customs laws . . . to forfeitures incurred or alleged to have been incurred, before or after the enactment of this Act, under the internal-revenue laws."

In the situation disclosed by the foregoing summary, Congress came to consider the Act of August 27, 1935. The Judiciary Committees of Senate and House made reports (Senate Report No. 1330, House Report No. 1601,

74th Cong., 1st Session). In each the paragraphs relative to § 204 (a) and (b) are the same in substance.[4]

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[4] House Reports, Vol. 4, 74th Congress, 1st Session, 1935, Report No. 1601, p. 6—

"Section 204 (a) of section 204 provides that in any court proceeding for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall, upon decree of forfeiture, have exclusive jurisdiction to remit or mitigate the forfeiture. At the present time, the court has authority only to decree the forfeiture, and remission or mitigation is dependent upon administrative action. Section 204 extends to the court which determines whether the vehicle or aircraft shall be forfeited by reason of having been used in the violation of internal-revenue laws relating to liquor, the power to determine whether the claim of any person having an interest in the vehicle or aircraft should be allowed after forfeiture. Thus, in all cases where the value of the seized property exceeds $500, and in all cases where the value is $500 or less, but a bond is posted in order to bring the forfeiture proceeding into court, the court will have exclusive jurisdiction to remit or mitigate the forfeiture. In the event that a bond is not filed in cases where the property is of the value of $500 or less, the power to remit or mitigate will remain in the Secretary of the Treasury.

"Certain standards are given to the court to guide it in this determination. Thus, under subsection (b), the claimant must prove that he acquired his interest in good faith, that he had no knowledge or reason to believe that the vehicle or aircraft was being or would be used in violating Federal or State liquor laws, and that, if his interest arises out of, or is subject to, any agreement under which any person having a record or reputation for violating Federal or State liquor laws has a right with respect to the vehicle or aircraft, the claimant, before he acquired his interest, or before the other person acquired his right, which ever of these events occurred later, inquired of the law enforcement officers in the locality where such other person acquired his right, of the locality in which such other person then resided, and of each locality where the claimant made inquiry as to the character or credit standing of such other person, whether the other person had such a record or reputation, and was informed he had not. This last requirement is predicated upon the

A representative of the Treasury Department made a statement to the Senate Judiciary Committee. An extract from this appears in the margin.[5]

A rearrangement of the words of sub-section (b) (3) will enlighten its meaning—

"The court shall not allow the [request]—claim—of any claimant for remission or mitigation, if it appears that

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recognition of the 'bootleg hazard' as an element to be considered in investigating a person as a credit risk. As a matter of sound business practice, automobile dealers, finance companies, and prospective lienholders on automobiles examine records, and make inquiry of references and credit rating agencies as to the owner's or prospective purchaser's reputation for paying his debts and his ability to do so. This subsection merely requires that in the making of such inquiry, the 'bootleg hazard' also be examined as one aspect of the credit risk."

[5] Senate Committee Hearings, 1935, Vol. 495, No. 4, p. 13—

"Section 204 . . . relates to proceedings in court for the forfeiture of vehicles or aircraft seized for violations of internal-revenue laws. At the present time, claimants of interests in vehicles or aircraft that have been seized and forfeited for violation of internal-revenue laws, petition the Secretary of the Treasury for the remission or mitigation of the forfeiture, and the Secretary, under the law, requires the person claiming to have an innocent interest to show that he had no knowledge of the unlawful use of the vehicle or aircraft. What this section will do, in the case of any court proceeding for the forfeiture of vehicles or aircraft, is to give the court jurisdiction to determine whether or not the person claiming to have an innocent interest actually had such an interest. Under the present practice the Secretary of the Treasury requires such a showing. . . . This section is of particular importance in connection with the discounting by a finance company of an automobile dealer's paper.

"At the present time, the Secretary of the Treasury considers that the bootleg hazard is an element involved in the credit risk, and is just as much a part of the investigation by the finance company of a person as a credit risk as is his financial standing in the community. He requires that before a car be returned to the person claiming an innocent interest, the latter must prove that he made an investigation as to whether or not the purchaser had a bootlegger record, and found that he had none."

the interest asserted by [him]—the claimant—arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, *unless and until* he [the claimant] proves that before [he]—such claimant—acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, [he]—the claimant—his officer or agent, was informed in answer to his inquiry, at [certain headquarters specified in the alternative] as to the character or financial standing of such other person, that such other person had no such record or reputation."

If the words of § 204 (b) (3) be taken literally, without regard to history or purpose of the enactment, they inhibit remission by the court unless one who claims an interest made actual inquiry concerning every person with record or reputation for violating the liquor laws who in fact (although wholly unsuspected) had acquired some right to the vehicle. There would be absolute forfeiture although the claimant acquired his interest in the utmost good faith and without suspicion of any undisclosed interest; although indeed, he had diligently but unsuccessfully sought information concerning all the facts from every person connected with the transaction. Thus construed the provision would require absolute forfeiture notwithstanding the claimant could not by the utmost diligence ascertain the true situation. No greater reason exists for saying a claimant should be relieved if he made unsuccessful inquiry of the seller concerning undisclosed matters than there is for relief when he had no cause to suspect the existence of an undisclosed interest—no cause to question appearances. A measure requiring absolute forfeiture under such circumstances probably would be expressed in language sufficiently plain to admit no reasonable doubt.

During many years innocent claimants had a clear remedy either by appeal to the discretion of the Secretary of the Treasury or by application for compromise addressed to the Attorney General and Treasury officials (*Wilson Motor Co.* v. *United States, supra*); or under the Prohibition Act, to the court (*Richbourg Motor Co.* v. *United States, supra*). This situation was called to the attention of the Senate Committee by the representative of the Treasury. He also pointed out that before restoring a car the Secretary required that the claimant "must prove that he made an investigation as to whether or not the purchaser had a bootlegger record and found that he had none." The Secretary "considers that the bootleg hazard is an element involved in the credit risk, and is just as much a part of the investigation by the finance company of a person as a credit risk as is his financial standing in the community." The Committee reported in respect of 204 (b) (3)—"This last requirement is predicated upon the recognition of the 'bootleg hazard' as an element to be considered in investigating a person as a credit risk."

These facts indicate that Congress intended a reasonable inquiry concerning the bootleg risk should be made in connection with the investigation of financial responsibility. They negative the notion that a wholly innocent claimant at his peril must show inquiry concerning something unknown and of which he had no suspicion. Dealers do not investigate what they have no cause to suspect.

The forfeiture acts are exceedingly drastic. They were intended for protection of the revenues, not to punish without fault. It would require unclouded language to compel the conclusion that Congress abandoned the equitable policy, observed for a very long time, of relieving those who act in good faith and without negligence, and adopted an oppressive amendment not demanded by

the tax officials or pointed out in the reports of its committees.

Sub-section (b) (3) was intended to prevent remission to a claimant who had failed to inquire when he should have done so, to one chargeable with willful negligence or purpose of fraud. It would be excessively harsh, unreasonable indeed, to say that one dealing in entire good faith must, at his peril, first discover and then make inquiry concerning somebody of whose existence he has no knowledge or suspicion. We cannot think Congress intended thus to burden dealing in all vehicles capable of transporting liquor.

It should be observed that the following things are possible subjects of seizure and forfeiture because of liquor law violations: "Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment, etc." "Vehicle" is thus defined—"That in or on which a person or thing is or may be carried from one place to another." A wheelbarrow, a covered wagon, a "Rolls-Royce," the patient mule, a "Man of War," and possibly a Pullman car or Ocean Liner is a vehicle. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *United States* v. *Two Bay Mules, supra; United States* v. *One Bay Horse, supra.*

Sub-section (b) (3) applies not only to transactions by financial concerns like respondent but to those of individuals and corporations great or small. It contemplates an investigation and this presupposes some reason at least to suspect the existence of the subject of investigation. Congress took away from executive officers the power to mitigate forfeitures where the property exceeds $500 in value, and gave this to the court familiar with the circumstances; but it left with the Secretary of the Treasury discretion to remit when the value was below $500. The intent was to require the courts to exact

proof of inquiries like those demanded by the Treasury Department practice, and disclosed by its representative before the Senate Committee. The petitioner's view, if adopted, would sanction one standard of remission for a vehicle worth $500, another when appraised at a dollar more.

The challenged decrees must be

Affirmed.

MR. JUSTICE BUTLER and MR. JUSTICE STONE took no part in the consideration or decision of these causes.

MR. JUSTICE DOUGLAS, dissenting:

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and I think that the judgments below should be reversed.

The problem here involved raises the question of the duty of automobile finance companies to investigate those who purchase cars from dealers, financed by those companies, in order to determine whether the ostensible purchasers are in reality straw men for bootleggers. Here the dealers knew that the named purchasers were only nominal purchasers; and they also knew the identity of the real purchasers. But the finance companies made no inquiry whatsoever of the dealers to ascertain if those purchasers were straw men. They made no inquiry in spite of the fact that the use of straw men by bootleggers was not novel. They made no inquiry in spite of the intimate business relations which exist between them and the dealers and the presumption of availability of such information which that relationship creates. And they now seek the benefit of an Act which the Congress passed to ameliorate some of the risks of confiscation and forfeiture. We do not think they have satisfied the burden which the Congress has placed upon them.

Sec. 204 (a) gives the District Court "exclusive jurisdiction to remit or mitigate" forfeitures. Sec. 204 (b)

sets forth three conditions precedent which the claimant must satisfy before the court may remit or mitigate a forfeiture. To satisfy the third of these conditions claimant must prove under certain circumstances that he made inquiry of designated law enforcement agencies concerning any person for whom a straw man purchaser was acting and that he was informed on such inquiry that such person had no record or reputation for violating the liquor laws. The circumstances under which claimant must make that inquiry exist "if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, . . ."

To be sure, the phrasing of § 204 (b) (3) is difficult. But it means to us that a claimant must prove, in order to satisfy that condition, that he made a reasonable investigation to ascertain if the purchaser was a mere straw man acting for another or was a legitimate purchaser in his own right. The words "if it appears" carry that connotation. A contrary construction defeats the purpose of the Congress by placing an enormous premium on lack of diligence. That construction opens wide the doors to defraud the revenue, for finance companies need lift no finger nor make any effort to ascertain the existence of a straw man purchaser. Ignorance now is surely bliss. By failure to make inquiry they can effectively insulate themselves even from the knowledge which their business intimates—the dealers—have. Unless informed by disclosures, in the written contract or otherwise, they can contentedly assume that the purchaser is not a straw man for a bootlegger. That they will thus be voluntarily informed by the parties or by others seems unlikely. Since the function of the straw

man is to conceal the bootlegger, neither the straw man nor the bootlegger can be expected to step forward with the information. And the automobile salesman is not likely to volunteer the information for his desire is to sell automobiles not to defeat sales. On the other hand, the interpretation which we urge would give the statute real meaning and significance in terms of this specific bootleg hazard which concerned the Congress on its enactment.[1]

Furthermore, the requirement for reasonable investigation cannot possibly place such a burden on finance companies as to force us to resolve an ambiguity in statutory language against forfeiture. In the cases before us a single question put the dealer or the purchaser might alone have disclosed the existence of a straw man. But no such simple inquiry was made. An investigation in each case was made to ascertain whether the named purchaser had a reputation or record for liquor violations. But the existence of a straw man was never probed. Certainly on such a matter investigational techniques are not novel, involved or unique. The responsibility for a

[1] Precisely the investigation here urged seems to have been intended, for the Report of the Senate Committee on the Judiciary said as respects § 204 (b) (3): "This last requirement is predicated upon the recognition of the 'bootleg hazard' as an element to be considered in investigating a person as a credit risk. As a matter of sound business practice, automobile dealers, finance companies, and prospective lienholders on automobiles examine records, and make inquiry of references and credit rating agencies as to the owner's or prospective purchaser's reputation for paying his debts and his ability to do so. This subsection merely requires that in the making of such inquiry, the 'bootleg hazard' also be examined as one aspect of the credit risk." Sen. Rep. No. 1330, 74th Cong., 1st Sess., p. 6. To investigate the "bootleg hazard" as "one aspect of the credit risk" when inquiry is made of the "prospective purchaser's reputation for paying his debts" seems clearly to entail inquiry as to whether or not the prospective purchaser is a straw man for a bootlegger.

reasonable investigation would add but imperceptibly if at all to the cost of doing business. In this field such investigation entails a burden which any legitimate enterprise should be prepared to carry. We need not conjure up hypothetical cases of extended inquiry which disclosed no straw man, for they would meet the test of reasonable investigation here proposed.

For these reasons, the judgments should be reversed.

ELECTRICAL FITTINGS CORP. ET AL. *v.* THOMAS & BETTS CO. ET AL.

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

No. 582. Argued April 19, 1939.—Decided May 22, 1939.

A defendant in a patent suit is entitled to appeal from so much of a decree adjudging him not guilty of infringement as purports to adjudge the patent valid. P. 242.

100 F. 2d 403, reversed.

CERTIORARI, 306 U. S. 624, to review the dismissal of an appeal from a decree of the District Court, 23 F. Supp. 920, in a suit for alleged patent infringement.

Mr. Samuel E. Darby, Jr., with whom *Mr. Lloyd H. Crews* was on the brief, for petitioners.

Mr. George Whitefield Betts, Jr., with whom *Messrs. William Bohleber* and *Francis H. Fassett* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This was a suit in equity by the respondents for alleged infringement of a patent. The District Court held claim

1 valid but not infringed and claim 2 invalid.[1] Instead of dismissing the bill without more, it entered a decree adjudging claim 1 valid but dismissing the bill for failure to prove infringement.

The respondents did not appeal, but filed in the Patent Office a disclaimer of claim 2. The petitioners appealed to the Circuit Court of Appeals from so much of the decree as adjudicated claim 1 valid. The appeal was dismissed on the ground that the petitioners had been awarded all the relief to which they were entitled, the litigation having finally terminated in their favor.[2] The court was of opinion that the decree would not bind the petitioners in subsequent suits on the issue of the validity of claim 1.

We granted certiorari because of an alleged conflict of decision.[3] A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.[4] But here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction,[5] as we have held this court has,[6] to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree.

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[1] 23 F. Supp. 920.

[2] 100 F. 2d 403.

[3] See *Oliver-Sherwood Co.* v. *Patterson-Ballagh Corp.*, 95 F. 2d 70, 71.

[4] *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 176.

[5] See 28 U. S. C. § 225.

[6] *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *William Jameson & Co.* v. *Morgenthau, ante*, p. 171.

The judgment is reversed, and the cause is remanded to the Circuit Court of Appeals with instructions to entertain the appeal and direct the District Court to reform its decree in accordance with the views herein expressed.

Reversed.

MAYTAG COMPANY *v.* HURLEY MACHINE CO. ET AL.*

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

No. 76. Argued April 19, 20, 1939.—Decided May 22, 1939.

Unreasonable neglect and delay of a patentee in suing upon or disclaiming a claim not definitely distinguishable from another adjudged invalid for anticipation and disclaimed, avoids the entire patent. R. S. §§ 4917 and 4922. P. 245.

Snyder patent No. 1,866,779, issued to Maytag Company, assignee, embracing claims for a washing machine and a method of washing fabrics, *held* invalidated.

96 F. 2d 87, affirmed.

100 F. 2d 218, reversed.

CERTIORARI, 306 U. S. 666, to review decrees in the Second Circuit denying relief in two infringement suits upon the ground that the claims sued upon had been anticipated; and (306 U. S. 626) to review a decree in the Eighth Circuit upholding the same claims as valid. The claims sued upon were three of thirty-six apparatus claims, for a washing machine, embraced in the patent. The same patent included also three claims for a method of washing fabrics, two of which had been disclaimed; the third furnished the basis for the present decision.

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* Together with No. 77, *Maytag Co.* v. *Easy Washing Machine Co.*, also on writ of certiorari to the Circuit Court of Appeals for the Second Circuit; and No. 661, *General Electric Supply Corp.* v. *Maytag Co.*, on writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Mr. Wallace R. Lane, with whom *Messrs. Thomas G. Haight, Nelson E. Johnson,* and *Oscar W. Jeffery* were on the brief, for the Maytag Company.

Mr. William H. Davis, with whom *Messrs. Dean S. Edmonds* and *George E. Faithfull* were on the brief, for respondents in Nos. 76 and 77, and petitioner in No. 661.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These are patent infringement suits in which certiorari was granted because of a conflict of decision.[1] Apparatus claims 23, 26, and 29 of the Snyder patent, No. 1,866,779, which are here involved, have been held invalid in the Second Circuit by reason of anticipation; and have been adjudged valid in the Eighth Circuit. We need not resolve the conflict, since we are of opinion the patent is void for failure to disclaim claim 39.

The patent, issued July 12, 1932, to the Maytag Company as assignee, contains thirty-nine claims, thirty-six of which are for a washing machine and three (Nos. 1, 38 and 39) for a method of washing fabrics. In 1935 the company obtained a decree in a suit against the Brooklyn Edison Company for infringement of apparatus claims 23 and 26 and method claim 38.[2] The Circuit Court of Appeals for the Second Circuit reversed as to all three claims, holding they did not disclose novelty.[3] This court refused certiorari and the company promptly disclaimed two of the method claims, 1 and 38, but did not disclaim 39. In the instant cases infringement of apparatus claims 23, 26, and 29, is charged, but claim 39

[1] *Maytag Co.* v. *Brooklyn Edison Co.,* 86 F. 2d 625; *Maytag Co.* v. *Easy Washing Mach. Corp.,* 96 F. 2d 87; *General Electric Supply Corp.* v. *Maytag Co.,* 100 F. 2d 218.

[2] 11 F. Supp. 743.

[3] *Maytag Co.* v. *Brooklyn Edison Co., supra.*

is not in suit, nor has it been made the basis of any other suit.

There has been unreasonable neglect or delay in entering a disclaimer of claim 39 within the meaning of R. S. 4917, and R. S. 4922,[4] unless that claim is "definitely distinguishable from the parts claimed without right,"—that is, the disclaimed method claims 1 and 38. This must be so, for the company, by disclaiming those claims, has confessed that the patentee therein claimed "more than that of which he was the original or first inventor or discoverer" and that the company, as assignee of the patent, therefore, "did not choose to claim or to hold" the method therein disclosed "by virtue of the patent or assignment."

Thus the company elected the course it would pursue with knowledge of the options open to it. Claim 38, which had been adjudged invalid, need not have been disclaimed, but, alone or with other claims, might have been made the basis of another suit against a different party,—the petitioner in No. 661, for example.[5] If the claims were held invalid in such later suit the court might find the patent wholly void, for failure seasonably to disclaim.[6] To avoid the risk of such a possible outcome, the company chose the other alternative of disclaiming 38, and relying on other claims.[7] In the *Brooklyn Edison* case the district court said concerning claim 1, "The quoted verbiage is different from that of Claim 38, but the same method or process is thought to be equally embodied in both."[8] This expression presumably caused the company also to disclaim claim 1 as not "definitely distinguishable" from claim 38.

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[4] 35 U. S. C. §§ 65 and 71.

[5] *Triplett* v. *Lowell*, 297 U. S. 638, 642.

[6] *Ibid.* 645.

[7] Compare *Ensten* v. *Simon, Ascher & Co.*, 282 U. S. 445.

[8] 11 F. Supp. 758.

If claim 39 describes the same method as claim 38, it follows that failure either to sue on 39 or to disclaim it along with 38 invalidates the patent.

The two are copied in the margin.[9] We think they describe but a single method. The company insists that the crucial difference lies in the fact that in 38 the moving fluid in the tub is said substantially to suspend the fabrics, whereas in 39 the same agency is said to cause the fabrics to be freely moved about. But the difference

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[9] The difference in verbiage relied on to distinguish the claims is italicized.

"38. The method of washing fabrics by forcing cleansing liquid through and around them while substantially suspended by the action of the fluid, as distinguished from pulling fabrics through the fluid against scrubbing corrugations, or otherwise scrubbing them by mechanical means, comprising immersing the fabrics in a washing fluid in a container, then vigorously and rapidly impelling the washing fluid in one and then in an opposite outward circulatory direction away from the plane of the source of impulsion and through the fabrics and circumferentially along the interior of the container in rapid succession, and causing these violently opposed currents of fluid to meet and flow inwardly and toward *the central portion of the container,* and toward the source of *impulsion thereby substantially suspending the fabrics in the fluid and cleansing them while thus suspended.*"

"39. The method of washing fabrics by forcing cleansing fluid through them while substantially suspended by the action of the fluid, as distinguished from pulling fabrics through the fluid against scrubbing corrugations, or otherwise scrubbing them by mechanical means, comprising immersing the fabrics in a washing fluid in a container, then vigorously agitating the washing fluid and rapidly forcing it toward the fabrics and away from the plane of the source of agitation vertically along the interior surface of the container first in one and then in an opposite circumferential direction, back and forth through and around the fabrics, and causing the violently moving opposed currents of liquid to meet and flow *inwardly and vertically toward the source* of *agitation* whereby *the fabrics are caused to be freely moved about by the action of the fluid and cleansed while thus moved.*"

in verbiage describes no difference in operation or result. We conclude that, when read in their entirety, they describe the same method.

The decrees in Nos. 76 and 77 are affirmed; that in No. 661 is reversed.

Nos. 76 and 77, affirmed.
No. 661, reversed.

GUARANTY TRUST CO., TRUSTEE, *v.* HENWOOD, TRUSTEE, ET AL.*

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

No. 384. Argued February 8, 9, 1939.—Decided May 22, 1939.

Railroad bonds, secured by trust mortgage, which were sold in this country for dollars in 1912, were expressed to be payable here in gold coin of the United States equal to the then standard of weight and fineness or, at the option of the holder, to be payable in several foreign countries, including Holland, in specified amounts of the moneys there current, which amounts were the 1912 exchange equivalents of American dollar value per bond. In a bankruptcy reorganization proceeding, holders of the bonds asserted their option of payment abroad in Dutch guilders, and asked that their claims be allowed at their guilder value, greater in dollars than the face of their bonds. *Held:*

1. In determining the nature of the obligation, bonds and mortgage must be construed together. P. 253.

2. The bonds and mortgage are domestic obligations, to be interpreted and enforced according to the law of this country. P. 254.

3. The bonds are obligations "payable in money of the United States," within the meaning of the Joint Resolution of June 5, 1933, and under that Resolution, are payable dollar for dollar in present legal tender. P. 256.

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* Together with No. 495, *Chemical Bank & Trust Co., Trustee,* v. *Henwood, Trustee,* also on writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

The promises of payment, with interest, in alternative currencies were not in barter for commodities. Interest is not paid on commodities but on monetary obligations. These promises are not separate and independent contracts or obligations, but parts of one and the same monetary obligation of the debtor. P. 255.

4. The proposition that the obligation was never payable in United States money because the option to receive payment in dollars had never been exercised, is rejected. P. 256.

5. The proposition that the Resolution, if construed to forbid enforcement of the option to demand payment in guilders, nullifies contractual rights in violation of the Fifth Amendment, is rejected. P. 258.

Domestic contracts between private parties can not create vested rights restricting the exercise of a power of Congress.

98 F. 2d 160, 179, affirmed.

CERTIORARI, 305 U. S. 588, 594, to review decrees of the court below which affirmed orders of the District Court fixing allowances to holders of railroad bonds in a reorganization case.

Mr. John W. Davis on the reargument, and with *Mr. Ralph M. Carson* on the original argument, for petitioner in No. 384. *Messrs. Edwin S. S. Sunderland, Malcolm Fooshee,* and *J. Paschall Davis* were with them on the briefs.

Messrs. A. H. Kiskaddon and *Carleton S. Hadley* for Henwood, Trustee, and *Mr. George L. Buland,* with whom *Mr. Ben C. Dey* was on the brief, for the Southern Pacific Co., respondents in No. 384,—on the reargument and the original argument.

Mr. Alfred H. Phillips, on the reargument and on the original argument, for petitioner in No. 495.

Mr. Carleton S. Hadley, with whom *Mr. A. H. Kiskaddon* was on the briefs, on the reargument and on the original argument, for respondents in No. 495.

By leave of Court, briefs of *amici curiae* were filed by *Solicitor General Jackson, Messrs. Paul A. Freund, Ed-*

ward H. Foley, Jr., Bernard Bernstein, John W. Pehle, and *Joseph B. Friedman,* on behalf of the United States, urging applicability of the Joint Resolution to the obligations involved; and by *Messrs. Harry Hoffman* and *Clifford R. Schuman,* on behalf of Anglo-Continentale Treuhand, A. G., et al., bondholders.

MR. JUSTICE BLACK delivered the opinion of the Court.

In the bankruptcy reorganization of the St. Louis Southwestern Railway Company, a Missouri Corporation, petitioners filed claims for bondholders. They asserted a right under the bonds to be paid in Dutch guilders, and asked that their claims—based upon guilder value—be allowed for $37,335,525.12. The trustee in bankruptcy contended, and the courts below held that the Joint Resolution of June 5, 1933,[1] made the bonds dischargeable by payment of current legal tender United States money,[2] and petitioners' claims were accordingly allowed for $21,638,000.00, the face amount of their bonds in dollars.

These bonds, secured by a trust mortgage, were issued and sold in the United States in 1912. Purchasers paid and the railroad received United States dollars, and until 1936 interest was regularly paid in dollars.

The asserted right to guilder payment rests upon a provision of the bonds concededly granting holders an

[1] 48 Stat. 112, 31 U. S. C. 463.

[2] 98 F. 2d 160, 179. The Court of Appeals for the Second Circuit previously held to the contrary, *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Ry. Co.,* 81 F. 2d 11, cert. den. 298 U. S. 655, and the Court of Appeals of New York did likewise in *Zurich General & A. L. Ins. Co.* v. *Bethlehem Steel Co.,* and *Anglo-Continentale Treuhand* v. *Bethlehem Steel Co.,* 279 N. Y. 495, 790; 18 N. E. 2d 673; 19 N. E. 2d 89; *post,* p. 265. Because of the divergence of views on this important question, we granted certiorari, 305 U. S. 588.

option to elect payment in dollars, guilders, pounds, marks, or francs. This multiple currency provision was authorized by the following terms of the mortgage securing the bonds:

". . . the . . . Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of $1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D. R. W., or in Paris, France, 5180 francs; . . ."

The bonds themselves provide:

"St. Louis Southwestern Railway Company, . . . for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually . . ."

Since the parties agree that the terms of the bonds granted holders an option to elect payment in guilders, we must determine whether, despite this option, the Joint Resolution operated to make the bonds dischargeable in current United States legal tender—a dollar of legal tender to be repaid for every dollar borrowed.

Analysis of the terms of the Resolution [3] discloses, first, that Congress declared certain types of contractual provisions against public policy in terms so broad as to include then existing contracts, as well as those thereafter to be

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[3] "JOINT RESOLUTION

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United

made. In addition, future use of such proscribed provisions was expressly prohibited, whether actually contained in an obligation payable in money of the United States or separately "made with respect thereto." This proscription embraced "every provision" purporting to give an obligee a right to require payment in (1) gold; (2) a particular kind of coin or currency of the United States; or (3) in an amount of United States money measured by gold or a particular kind of United States coin or currency.

Having thus unmistakably stamped illegality upon both outstanding and future contractual provisions designed to require payment by debtors in a frozen money value rather than in a dollar of legal tender current at date of payment, Congress—apparently to obviate any possible misunderstanding as to the breadth of its objective—added, with studied precision, a catchall second sentence sweeping in "every obligation," existing or future, "payable in money of the United States," irrespec-

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States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes', approved May 12, 1933, is amended to read as follows:

"'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4.40 p. m."

tive of "whether or not any such provision is contained therein or made with respect thereto." The obligations hit at by Congress were those "payable in money of the United States." All such obligations were declared dischargeable "upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts." It results that if petitioners' claims rest upon "obligation[s] . . . payable in money of the United States," by the terms of the Resolution they shall be discharged upon payment of current legal tender dollars equal to the number of dollars promised in gold or a particular kind of money. Decision must therefore turn upon the nature of the "obligation[s] . . . incurred" by the railroad in its bond contracts of 1912.

These bonds provide that, "For a description of the property and franchises mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same and the terms and conditions upon which such bonds are issued and secured, reference is made to the . . . Mortgage." In determining the nature of the railroad's obligation, we, accordingly, look both to the mortgage and the bonds.

It appears that—

The railroad executed the mortgage in 1912 to the Guaranty Trust Company of New York as trustee, to secure forty-year mortgage bonds "limited to an aggregate principal amount of One Hundred Million Dollars ($100,000,000.00) at any one time outstanding . . . to be payable on the first day of January, 1952, with interest at the rate of five per cent per annum payable semi-annually . . ."; the bonds are payable optionally in foreign currencies as indicated above; registration in New York is required of bonds subjected to registration; to be valid all bonds must be authenticated by the Guaranty Trust Company in New York; non-coupon bonds and

coupon bonds are interchangeable upon request, but non-coupon bonds contain no option for payment in foreign currencies; the New York trustee is granted broad supervisory powers (for the benefit of the bondholders) over finances and operations of the railroad; the railroad is required to keep an office in New York where bonds and coupons can be presented for payment, but is not required to keep any foreign offices; in the event of default in payment of bonds or coupons, the New York trustee is authorized, through its agents or attorneys, to take charge of the mortgaged property, to sell under foreclosure proceedings in the United States, and to protect bondholders' interests by employment of attorneys and institution of judicial proceedings either in law or equity, "for the equal benefit of all holders of . . . outstanding bonds and coupons"; should the Guaranty Trust Company resign as Trustee, the bondholders may designate another which, however, "must always be a trust company having an office in the Borough of Manhattan, in the City of New York, N. Y."

The mortgaged property is located in the United States; the trustee was required to be a New York trust company; enforcement of the trust security, collection of bonds and interest, employment of attorneys, institution of legal proceedings and distribution of assembled assets, were all responsibilities placed upon the trustee located in New York, and obviously contemplated that any necessary judicial proceedings would be had in this country under the governing law of the United States. Both the mortgage and bonds are domestic obligations, and the law of this country must determine their interpretation, their nature, and the obligations enforceable under them.[4] The Joint Resolution thus must govern if the

[4] *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 453, 459; *United States* v. *North Carolina*, 136 U. S. 211, 222; *R.* v. *International Trustee*, [1937] 2 All E. R. 164; *Mount Albert Borough Council* v.

bonds are, within its terms, "obligation[s] . . . payable in money of the United States."

In their construction of the bonds, petitioners urge that each of the alternative promises to pay in a foreign currency is a separate and independent "obligation" to pay. From this, they argue that the only "obligation" for which enforcement is here sought is one "payable" in guilders which must be treated as though it were an entirely separate and independent promise of the railroad. But the railroad undertook only a single obligation to repay the money it borrowed. Repayment of that money might be called for in any one, but only one, of the five different types of money. This, however, did not divide the railroad's undertaking to repay into five separate and independent obligations to repay the same loan. Payment under the contract in any one of the currencies selected by the bondholder would discharge the entire single obligation of the debtor. Payment in guilders, after payment in guilders was elected, would nonetheless discharge an obligation which prior to such election and payment was an obligation also payable in United States dollars. The language of the Joint Resolution was intended to refer to a monetary obligation in its entirety. That which the Joint Resolution made dischargeable was the debt—the monetary obligation to pay. This debtor's obligation was a monetary obligation. The foreign currencies promised were not bartered for as commodities, but their function was that of money to be paid in countries in which they were legal tender and upon them interest was to be paid.[5] Interest is not paid on commodities but on monetary obligations. And these

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Australasian, T. & G. S. Life Assurance Soc., [1938] A. C. 224; Judgment of the Supreme Court of Sweden, (Jan. 30, 1937), reported in Bulletin de L'Institut Juridique International, April, 1937, pp. 327, 334.

[5] *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324, 335–336; *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, 302.

promises in alternative currencies were not separate and independent contracts or obligations, but were parts of one and the same monetary obligation of the debtor.

The point is made, however, that this obligation of the railroad was never payable in United States money because the option to receive payment in dollars has never been exercised. Conceding that one meaning of "payable" is "capable of being paid," petitioners nevertheless urge that the use of this meaning should not be attributed to Congress, but that instead we must narrow and restrict "payable" to mean an absolute and unconditional obligation. But the railroad, since the day its bonds were issued, was under obligation to hold itself prepared to pay United States money—or any one of the optional currencies. And, on the date the Resolution went into effect, no election had been made so that the railroad was, at that time, still under obligation to pay dollars. If prior to election by the holders the railroad was under no obligation to pay United States money, it was likewise under no obligation to pay any money, United States or otherwise, although it then had outstanding a $100,000,000.00 mortgage on all of its properties. Neither in logic nor law can it be said that the railroad's promise, secured by a $100,000,000.00 mortgage, to pay in any one of five currencies was not an obligation payable in any currency until express election of payment in a particular currency was made. Legal rights and obligations came into existence when the contracts for purchase of the bonds were completed. Since the words "obligation[s] . . . payable in money of the United States" are clearly broad enough to require inclusion of these multiple currency obligations, there is no justification here for restricting the meaning of these words of the Resolution. Consideration of the evils aimed at leaves no doubt but that such restriction would do violence to the intention of the Congress.

The report of the Senate Committee on the Resolution opens with words revealing its purpose. It is there stated

that "Certain questions of interpretation have arisen with respect to the legislation empowering the President to prevent the withdrawal and hoarding of gold and the provision of the Thomas amendment [6] *making all coins and currencies legal tender for all debts.* Additional and immediate legislation is necessary to remove the disturbing effect of this uncertainty and to insure the success of the policy by closing possible *legal loopholes* and removing inconsistencies." [7] (Italics supplied.) The comprehensive language of the Resolution was intended—as by its terms it did—to close "legal loopholes" contributing to "dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency." [8] Here, the admitted purpose of the multiple currency provision supplementing the gold clause was the same as that of the gold clause itself, that is, to afford creditors of United States debtors on domestic money obligations contractual protection against possible depreciation of United States money. It was a plan, wholly legal when contrived, specifically designed to require debtors to pay 1912 gold dollars or fixed amounts in foreign currencies which were the exact equivalents of gold dollars in 1912. In purpose, pattern and, as shown here, in result, the multiple currency provision is identical with the practice Congress declared to be against public policy, and it furthers a mischief which the Resolution was enacted to end.

The mischief Congress intended to end will not end if the multiple currency provision of these bonds is held to

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[6] 48 Stat. 51, § 43.

[7] Sen. Rep. No. 99, 73d Cong., 1st Sess.

[8] *Norman* v. *Baltimore & O. R. Co., supra,* 315–16.

be unaffected by the Resolution. Congress sought to outlaw all contractual provisions which require debtors, who have bound themselves to pay United States dollars, to pay a greater number of dollars than promised. The Resolution intended that debtors under obligation to pay dollars should not have their debts tied to any fixed value of particular money, but that their entire obligations should be measured by and tied to the actual number of dollars promised, dollar for dollar. A multiple currency provision was inserted in these bonds in order to tie this debtor to a fixed value of particular money, and, relying upon this provision, petitioners demand more dollars than promised in the bonds. The provision is thus clearly at cross purposes with the Resolution. By a simple mathematical calculation translating guilder value into dollar value, petitioners will, if the Resolution is not applied to them, enforce the obligations of this debtor, not dollar for dollar as the Resolution provides, but more than a dollar and a half for every dollar borrowed, and the purpose of Congress, that no such premium need be paid, will be completely defeated.

When the Joint Resolution was enacted the railroad had by its promise assumed obligations to pay its bonds in dollars; its obligations were therefore "payable in money of the United States" and so fall squarely within the letter, as well as the spirit of the Resolution making obligations dischargeable by payment of current United States legal tender money.

There remains the argument of petitioners that the Resolution, if construed to forbid enforcement of the option to demand payment in guilders, nullifies contractual rights in violation of the Fifth Amendment to the Constitution. But, as has already been pointed out, the contracts on which the claims for guilders rest are domestic obligations, controlled by and to be interpreted under the law of the United States. And contracts be-

tween private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress.[9] These bonds and their securing mortgage were created subject not only to the exercise by Congress of its constitutional power "to coin money, regulate the value thereof, and of foreign coin," but also to "the full authority of the Congress in relation to the currency." The extent of that authority of Congress has been recently pointed out: "The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers." [10]

Under these powers, Congress was authorized—as it did in the Resolution—to establish, regulate and control the national currency and to make that currency legal tender money for all purposes, including payment of domestic dollar obligations with options for payment in foreign currencies. Whether it was "wise and expedient" to do so was, under the Constitution, a determination to be made by the Congress.[11] The Resolution that made these creditors' bonds dischargeable in the same United States legal tender which other creditors in this country must accept, does not contravene the Fifth Amendment.

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[9] *Norman* v. *Baltimore & O. R. Co.*, *supra*, 306–311; cf., *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 435.

[10] *Norman* v. *Baltimore & O. R. Co.*, *supra*, 303.

[11] *Juilliard* v. *Greenman* (Legal Tender Case), 110 U. S. 421, 448, 450.

Our conclusion that the Joint Resolution makes petitioners' claims in bankruptcy allowable dollar for dollar renders consideration of subsidiary questions unnecessary.

The judgments are

Affirmed.

MR. JUSTICE STONE, dissenting.

Without considering the question whether the bondholders in these cases have properly exercised their options, I cannot agree that the Joint Resolution of Congress of June 5, 1933, has set at naught the promise of the bonds to pay guilders to the holders at their election.

In each case the bonds contain alternative and mutually exclusive undertakings. The holder could if he wished demand payment in United States gold dollars of a fixed standard or their equivalent in United States currency. The alternative promise is for payment abroad of specified amounts of any one of several foreign currencies, without reference to their gold value at the time of payment. Its performance is as independent of gold or gold value as if it had called for the delivery of a specified amount of wheat, sugar or coffee, or the performance of specified services.

Any construction of the gold clause resolution which would in the circumstances of the present case preclude payment in foreign money would equally forbid performance of an alternative promise calling for the delivery of a commodity or the rendition of services. Hence the decisive question is whether the resolution admits of a construction which would compel one whose contract stipulates for delivery at his option of a cargo of sugar to accept instead payment of a specified amount in legal tender dollars, merely because by the terms of his contract he might have demanded, though he did not, an equal number of gold dollars.

When the Joint Resolution was adopted there were many obligations of American citizens payable abroad exclusively in foreign currency, and the attendant devaluation of the dollar greatly increased the burden of performance of such contracts through the necessity of purchasing with depreciated dollars the foreign exchange required for their fulfillment. But it must be conceded that Congress did not undertake to relieve any American citizen of that burden, and it is not contended that the Joint Resolution provided for the discharge of any obligations payable in foreign currency, not measured in gold, except in the case where the promise to pay in foreign money is an alternative for the promise to pay in dollars. After devaluation of the dollar the burden on American citizens of meeting obligations abroad by payment in foreign currencies may well have been as great whether the undertaking was unconditional or to pay upon a condition which had happened, or whether the obligation was to pay in a foreign currency or to supply goods which must be acquired by the expenditure of depreciated dollars.

We can find nothing in the legislative history of the Joint Resolution or its language to suggest any Congressional policy to relieve from the one form of obligation more than another, or to indicate that the resolution was aimed at anything other than provisions calling for payment in gold value or gold dollars or their equivalent, which Congress explicitly named and described as the evil to be remedied, both in the Joint Resolution itself and in the committee reports attending its adoption. See Sen. Rep. No. 99, 73d Cong., 1st Sess.; H. R. Rep. No. 169, 73d Cong., 1st Sess.

The Joint Resolution of Congress and the committee reports make no mention of obligations dischargeable in foreign currencies or by delivery of commodities or performance of services. If it was the purpose of Congress

to control such obligations through the exercise of its power to regulate the value of money, that fact must be discoverable from the language of the resolution or from some underlying public policy, to which its words and the records of Congress give no clue. Shortly before the adoption of the resolution, Congress had authorized the President to devalue the dollar. By appropriate legislation and executive action, gold payments by the Treasury had been suspended, the hoarding of gold and its exportation had been prohibited, and all persons had been required to deliver gold owned by them to the Treasury. See *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 295 *et seq.* It was obvious that these measures, aimed at the suppression of the use of gold as a standard of currency value, would fail of their purpose unless all payments in gold of the established standard or its equivalent were outlawed. The reports of the Congressional committees recommending the adoption of the resolution indicate clearly enough that such was its purpose. They give no hint that more was intended. See Sen. Rep. No. 99, 73d Cong., 1st Sess.; H. R. Rep. No. 169, 73d Cong., 1st Sess.

The recitals of the Joint Resolution declare that it is aimed at "the holding of or dealing in gold" and the "provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby." No other purpose is suggested. The enacting part of the resolution proscribes "every provision . . . which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby," and declares "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be

discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender . . ." "Obligation," it states, "means an obligation . . . payable in money of the United States." Thus the resolution proclaims that it is aimed at gold clauses and declares, if language is to be taken in its plain and most obvious sense, that provisions requiring payment in gold dollars or measured by gold are illegal and that every promise or obligation "payable in money of the United States" (not in guilders) shall be discharged "dollar for dollar" in legal tender currency.

To arrive at the conclusion that the resolution compels the present bondholders to accept dollars instead of the guilders for which they have contracted, it is necessary to say that "obligation," which the Joint Resolution defines as obligation "payable in money of the United States" and requires to be discharged "dollar for dollar" in legal tender, includes the obligation payable in guilders. This difficulty is bridged by recourse to a major operation of statutory reconstruction. It is said that "obligation" means, not the obligation or promise which is defined by the resolution as that "payable in money of the United States" and in which the gold clause provision is "contained" and "with respect" to which the provision is "made," but includes all obligations, although not dischargeable in money of the United States or in gold, which may be written into the instrument or document containing alternative promises, one of which is to pay in dollars. The "obligation" of the resolution "with respect" to which the gold clause is "made" is thus treated as synonymous with the instrument containing the multiple obligations, and all the provisions in it (not alone the promise to pay dollars) are now held to be dischargeable in dollars merely because one of the alternative promises "contained" a provision payable in "money of the United States," although the bondholder is entitled by his contract to demand performance of a promise to pay guild-

ers not measured by gold. Thus, starting with a resolution avowedly directed at gold clauses, we are brought to the extraordinary conclusion that a promise to pay foreign currency is void if expressed in an instrument containing an alternative promise to pay in money of the United States whether of gold standard or not.

The argument is not persuasive, because it rests both upon a strained and unnatural construction of the resolution and upon an assumption that there was a Congressional policy to strike down provisions for the alternative discharge of dollar obligations by payment in foreign currency not tied to gold, which finds no support in the language of the Joint Resolution or its legislative history. It seems fair to suppose that if Congress proposed to end all possibility of creating an international market for bonds payable in dollars or alternatively abroad in foreign currencies, both without gold value, it would have given some more explicit indication of that purpose than is exhibited by the Joint Resolution. Even if we assume that Congress would have struck down such alternative currency clauses had it considered the matter, we are not free to do what Congress might have done but did not, or what we may think it ought to have done to lessen the rigors of our own currency devaluation for those who had made contracts for payment abroad in foreign currency without gold value.

In any case it seems plain that if Congress had made the attempt it would not have chosen to do so in terms which, if the Court's construction of the Joint Resolution be accepted, are broad enough to strike down every conceivable provision for payment in foreign currency, delivery of commodities, or performance of services as an alternative for a promise to pay dollars, whether of gold standard or not.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in this opinion.

BETHLEHEM STEEL CO. *v.* ZURICH GENERAL ACCIDENT & LIABILITY INS. CO.*

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 590. Argued February 9, 10, 1939. Reargued April 27, 1939.—Decided May 22, 1939.

Bonds of American corporations, payable in money of the United States or in fixed amounts of foreign currencies, which originally were sold in this country to bankers, but are now held by foreign corporations which purchased them abroad after the effective date of the Joint Resolution of June 5, 1933, and elected to demand payment in foreign currencies,—*held* subject to the Joint Resolution and payable dollar for dollar in United States legal tender. So decided upon the authority of the case last preceding.

279 N. Y. 495, 790; 18 N. E. 2d 673; 19 N. E. 2d 89, reversed.

CERTIORARI, 305 U. S. 594, to review judgments, entered on remittitur from the Court of Appeals of the State of New York, reversing judgments of the Supreme Court, Appellate Division. Both suits were brought to collect interest coupons from bonds of an American corporation payable alternatively in dollars or in fixed amounts of certain foreign currencies. In the first case, judgment was rendered by the New York Supreme Court, Special Term, for the exchange value of Swiss francs, and was reversed by the Appellate Division. In the second case, judgment at Special Term held against the right to recover exchange value of Dutch guilders, and was affirmed by the Appellate Division. For opinion at Special Term in the first case, see 254 App. Div. 839; 164 Misc. 498; 299 N. Y. S. 862.

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* Together with No. 591, *Bethlehem Steel Co.* v. *Anglo-Continentale Treuhand, A. G., et al.*, also on writ of certiorari to the Supreme Court of New York.

Mr. Frederick H. Wood, with whom *Mr. Wm. D. Whitney* was on the briefs, on the reargument and on the original argument, for petitioner.

Mr. Nathan L. Miller, with whom *Messrs. W. W. Miller* and *Redmond F. Kernan, Jr.* were on the briefs, on the reargument and on the original argument, for respondent in No. 590.

Mr. Harry Hoffman, with whom *Mr. Clifford R. Schuman* was on the briefs, on the reargument and on the original argument, for respondents in No. 591.

By leave of Court, briefs of *amici curiae* were filed by *Solicitor General Jackson, Messrs. Paul A. Freund, Edward H. Foley, Jr., Bernard Bernstein, John W. Pehle,* and *Joseph B. Friedman,* on behalf of the United States, urging applicability of the Joint Resolution to the obligations involved; and by *Messrs. Arthur B. Weiss* and *Abraham L. Pomerantz,* urging affirmance in No. 590.

Mr. Justice Black delivered the opinion of the Court.

As did Nos. 384 and 495, this day decided, *ante,* p. 247, these cases involve efforts to enforce foreign currency provisions of bond obligations payable in money of the United States and optional fixed amounts of foreign currencies. The obligations are essentially similar to those in Nos. 384 and 495, but differ in two respects: (1) the bonds, originally sold in this country to a group of bankers,[1] were offered by that group not only in this country, but also abroad, and (2) the present holders are foreign corporations, some of whose bonds were bought in foreign countries. These distinctions do not remove

[1] Some bonds were originally issued to stockholders in No. 590.

foreign holders from the operation of the Joint Resolution of June 5, 1933.

Respondents did not purchase their bonds or elect to demand payment in foreign currency until after the effective date of the Resolution. The court below held the Resolution was not applicable.[2]

It is respondents' contention that their bonds represent a form of private international obligation, in no wise subject to the laws of the United States. However, they seek to enforce that obligation in this country and Congress has, as it constitutionally may, provided that multiple currency provisions of dollar obligations are against public policy here and, thus, unenforceable. The Constitution provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Courts in this country, State and Federal, can no longer enforce the contractual provisions which respondents have proceeded on, irrespective of their place of making.

In the absence of any claim of international rights based upon the treaty provision of the Constitution, it is enough that respondents' bonds are "obligations payable in the money of the United States," as we have this day held.

Under the governing principles announced in Nos. 384 and 495, the multiple currency provisions of respondents' bonds are within the operation of the Resolution, and their coupons are dischargeable dollar for dollar in current legal tender money of the United States.

Reversed.

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[2] 279 N. Y. 495, 790; 18 N. E. 2d 673; 19 N. E. 2d 89.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE STONE think the judgments in these cases should be affirmed, for reasons stated in the opinion of MR. JUSTICE STONE in No. 384, *Guaranty Trust Co.* v. *Henwood,* and No. 495, *Chemical Bank & Trust Co.* v. *Henwood, ante,* p. 247.

LANE *v.* WILSON ET AL.

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

No. 460. Argued March 3, 1939.—Decided May 22, 1939.

1. A negro who is denied by state registration officials the right of registration, prerequisite to the right to vote, under color of a state registration statute which, in violation of the Fifteenth Amendment, works discrimination against the colored race, has a right of action in the federal court for damages against such officials under R. S. 1979; 8 U. S. C. § 43. *Giles* v. *Harris,* 189 U. S. 475, distinguished. P. 274.
2. This resort to the federal court may be had without first exhausting the judicial (distinguished from administrative) remedies of the state courts. P. 274.
3. Oklahoma statutes made registration prerequisite to voting, and provided generally that all citizens qualified to vote in 1916 who failed to register between April 30 and May 11, 1916, should be perpetually disfranchised, excepting those who voted in 1914. The effect was that white people who were on the lists in 1914 in virtue of the provision of the Oklahoma Constitution called the "Grandfather Clause" which this Court in 1915 adjudged unconstitutional, *Guinn* v. *United States,* 238 U. S. 347, were entitled to vote; whereas colored people kept from registering and voting by that clause would remain forever disfranchised unless they applied for registration during the limited period of not more than 12 days. *Held* repugnant to the Fifteenth Amendment. P. 275.

98 F. 2d 980, reversed.

CERTIORARI, 305 U. S. 591, to review the affirmance of a judgment, on a verdict directed for defendants in an action for damages, under R. S. 1979.

Messrs. Charles A. Chandler and *James M. Nabrit, Jr.* for petitioner.

Messrs. Charles G. Watts and *Joseph C. Stone,* with whom *Mr. Charles A. Moon* was on the brief, for respondents.

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit affirming that of the United States District Court for the Eastern District of Oklahoma, entered upon a directed verdict in favor of the defendants. The action was one for $5,000 damages brought under § 1979 of the Revised Statutes (8 U. S. C. § 43), by a colored citizen claiming discriminatory treatment resulting from electoral legislation of Oklahoma, in violation of the Fifteenth Amendment. *Certiorari* was granted, 305 U. S. 591, because of the importance of the question and an asserted conflict with the decision in *Guinn* v. *United States,* 238 U. S. 347.

The constitution under which Oklahoma was admitted into the Union regulated the suffrage by Article III, whereby its "qualified electors" were to be "citizens of the State . . . who are over the age of twenty-one years" with disqualifications in the case of felons, paupers and lunatics. Soon after its admission the suffrage provisions of the Oklahoma Constitution were radically amended by the addition of a literacy test from which white voters were in effect relieved through the operation of a "grandfather clause." The clause was stricken down by this Court as violative of the prohibition against discrimination "on account of race, color or previous condition of servitude" of the Fifteenth Amendment. This outlawry occurred on June 21, 1915. In the meantime the Oklahoma general election of 1914 had been based on the

offending "grandfather clause." After the invalidation of that clause a special session of the Oklahoma legislature enacted a new scheme for registration as a prerequisite to voting. Oklahoma Laws of 1916, Act of February 26, 1916, c. 24. Section 4 of this statute (now § 5654, Oklahoma Statutes 1931, 26 Okla. St. Ann. 74) [1] was obviously

[1] "It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as hereinbefore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state; and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county

directed towards the consequences of the decision in *Guinn* v. *United States, supra.* Those who had voted in the general election of 1914, automatically remained qualified voters. The new registration requirements affected only others. These had to apply for registration between April 30, 1916 and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those "absent from the county . . . during such period of time, or . . . prevented by sickness or unavoidable misfortune from registering . . . within such time." The crux of the present controversy is the validity of this registration scheme, with its dividing line between white citizens who had voted under the "grandfather clause" immunity prior to *Guinn* v. *United States, supra,* and citizens who were outside it, and the not more than 12 days as the normal period of registration for the theretofore proscribed class.

The petitioner, a colored citizen of Oklahoma, who was the plaintiff below and will hereafter be referred to as such, sued three county election officials for declining to register him on October 17, 1934. He was qualified for registration in 1916 but did not then get on the registration list. The evidence is in conflict whether he presented himself in that year for registration and, if so, under what circumstances registration was denied him. The fact is that plaintiff did not get on the register in 1916. Under the terms of the statute he thereby permanently lost the right to register and hence the right to vote. The central claim of plaintiff is that of the unconstitutionality of § 5654. The defendants joined issue on this claim and further insisted that if there had been illegality

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election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote."

in a denial of the plaintiff's right to registration, his proper recourse was to the courts of Oklahoma. The District Court took the case from the jury and its action was affirmed by the Circuit Court of Appeals. It found no proof of discrimination against negroes in the administration of § 5654 and denied that the legislation was in conflict with the Fifteenth Amendment. 98 F. 2d 980.

The defendants urge two bars to the plaintiff's recovery, apart from the constitutional validity of § 5654. They say that on the plaintiff's own assumption of its invalidity, there is no Oklahoma statute under which he could register and therefore no right to registration has been denied. Secondly, they argue that the state procedure for determining claims of discrimination must be employed before invoking the federal judiciary. These contentions will be considered first, for the disposition of a constitutional question must be reserved to the last.

The first objection derives from a misapplication of *Giles* v. *Harris*, 189 U. S. 475. In that case a bill in equity was brought by a colored man on behalf of himself "and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated" which in effect asked the federal court "to supervise the voting in that State by officers of the court." What this Court called a "new and extraordinary situation" was found "strikingly" to reinforce "the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights." See 189 U. S. at 487.[2] Apart from this traditional restriction upon the exercise of equitable jurisdiction there was another difficulty in *Giles* v. *Harris*. The plaintiff there was in effect asking for specific performance of his right under

[2] See also, *In re Sawyer*, 124 U. S. 200; *Walton* v. *House of Rep.*, 265 U. S. 487; 4 POMEROY, EQUITY § 1743 *et seq.*; Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARV. L. REV. 640, 681.

Alabama electoral legislation. This presupposed the validity of the legislation under which he was claiming. But the whole theory of his bill was the invalidity of this legislation. Naturally enough, this Court took his claim at its face value and found no legislation on the basis of which specific performance could be decreed.[3]

This case is very different from *Giles* v. *Harris*—the difference having been explicitly foreshadowed by *Giles* v. *Harris* itself. In that case this Court declared "we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill." 189 U. S. at 485. That is precisely the basis of the present action, brought under the following "appropriate legislation" of Congress to enforce the Fifteenth Amendment:

"Every person who, under color of any statute, . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ." [4]

[3] "If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured." 189 U. S. at 487. Recognition of the difference between an action for damages and the equitable relief prayed for in *Giles* v. *Harris* was repeated at the close of the opinion. See 189 U. S. at 488. Justices Harlan, Brewer, and Brown were of the opinion that it was competent for a federal court to grant even the equitable relief asked for in *Giles* v. *Harris*.

[4] The Act of April 20, 1871, c. 22, 17 Stat. 13, which became § 1979 of the Revised Statutes, and is now 8 U. S. C. § 43.

The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise. Whosoever "under color of any statute" subjects another to such discrimination thereby deprives him of what the Fifteenth Amendment secures and, under § 1979 becomes "liable to the party injured in an action at law." The theory of the plaintiff's action is that the defendants, acting under color of § 5654, did discriminate against him because that Section inherently operates discriminatorily. If this claim is sustained his right to sue under R. S. § 1979 follows. The basis of this action is inequality of treatment though under color of law, not denial of the right to vote. Compare *Nixon* v. *Herndon,* 273 U. S. 536.

The other preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210. But the state procedure open for one in the plaintiff's situation (§ 5654) has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. See Section 1 of Article IV of the Oklahoma Constitution; *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243; 51 P. 2d 327. Barring only exceptional circumstances, see *e. g. Gilchrist* v. *Interborough Rapid Transit Co.,* 279 U. S. 159, or explicit statutory requirements, *e. g.* 48 Stat. 775; 50 Stat. 738; 28 U. S. C. § 41 (1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. *Bacon* v. *Rut-*

land R. Co., 232 U. S. 134; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196.

We therefore cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. *Guinn* v. *United States*, 238 U. S. 347; *Myers* v. *Anderson*, 238 U. S. 368. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in *Guinn* v. *United States, supra*, the Oklahoma "grandfather clause" was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legislation of 1916 partakes too much of the infirmity of the "grandfather clause" to be able to survive.

Section 5652 of the Oklahoma statutes makes registration a prerequisite to voting.[5] By §§ 5654 and 5659[6] all

[5] "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member." § 2, Oklahoma Laws of 1916, c. 24.

[6] "Any person who may become a qualified elector in any precinct in this State after the tenth day of May, 1916, or after the closing of any other registration period, may register as an elector by making application to the registrar of the precinct in which he is a qualified

citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were perpetually disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the *Guinn* case. Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional "grandfather clause" had sheltered while subjecting colored citizens to a new burden. The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined. The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. To be sure, in exceptional cases a supple-

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voter, not more than twenty nor less than ten days before the day of holding any election and upon complying with all the terms and provisions of this Act, and it shall be the duty of precinct registrars to register such qualified electors in their precinct under the terms and provisions of this Act, beginning twenty days before the date of holding any election and continuing for a period of ten days. Precinct registrars shall have no authority to register electors at any other time except as provided in this Act and no registration certificate issued by any precinct registrar at any other time except as herein provided shall be valid." § 9, Oklahoma Laws of 1916, c. 24.

mental period was available. But the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated "grandfather clause" were themselves invalid under the Fifteenth Amendment. They operated unfairly against the very class on whose behalf the protection of the Constitution was here successfully invoked.

The judgment of the Circuit Court of Appeals must, therefore, be reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER think that the court below reached the right conclusion and that its judgment should be affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or disposition of this case.

O'MALLEY, COLLECTOR OF INTERNAL REVENUE, *v.* WOODROUGH ET UX.

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

No. 810. Argued April 28, 1939.—Decided May 22, 1939.

1. The provision of § 22 (a) of the Revenue Act of 1936, requiring that there be included in gross income, for the purpose of computing the federal income tax, the compensation of "judges of courts of the United States taking office after June 6, 1932"—which provision was a reënactment of a similar provision contained in the Revenue Act of June 6, 1932, and part of a taxing measure of general, nondiscriminatory application to all earners of income,—*held* constitutional as applied to a judge who was appointed to

the Circuit Court of Appeals subsequently to June 6, 1932. P. 281.

2. The provision in question can not be regarded as effecting a diminution of the compensation of the judge in violation of the Constitution, Art. III, § 1, nor as an encroachment on the independence of the judiciary. P. 282.

   Congress did not exceed its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected.

3. The fact that at the time of the judge's appointment to the Circuit Court of Appeals he held the office of federal district judge, to which he had been appointed prior to June 6, 1932, is irrelevant to the matter in issue. P. 279.

Reversed.

APPEAL under § 2 of the Act of Aug. 24, 1937, from a judgment of the District Court denying the Government's motion to dismiss a suit for a refund of income taxes collected under an allegedly unconstitutional Act.

Solicitor General Jackson, with whom *Assistant Attorney General Morris,* and *Messrs. Sewall Key, Arnold Raum,* and *Joseph T. Votava* were on the brief, for appellant.

Messrs. J. A. C. Kennedy and *George L. DeLacy,* with whom *Messrs. Edward J. Svoboda* and *Ralph E. Svoboda* were on the brief, for appellees.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here under § 2 of the Act of August 24, 1937 (50 Stat. 751), as a direct appeal from a judgment of a district court whose "decision was against the constitutionality" of an Act of Congress. The suit below, an action at law to recover a tax on income claimed to have been illegally exacted, was disposed of upon the pleadings and turned on the single question now before us, to wit: Is the provision of § 22 of the Revenue Act of 1932

(47 Stat. 169, 178), re-enacted by § 22 (a) of the Revenue Act of 1936 (49 Stat. 1648, 1657), constitutional insofar as it included in the "gross income," on the basis of which taxes were to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932."

That this is the sole issue will emerge from a simple statement of the facts and of the governing legislation. Joseph W. Woodrough was appointed a United States circuit judge on April 12, 1933, and qualified as such on May 1, 1933. For the calendar year of 1936 a joint income tax return of Judge Woodrough and his wife disclosed his judicial salary of $12,500, but claimed it to be constitutionally immune from taxation. Since it was not included in "gross income" no tax was payable. Subsequently a deficiency of $631.60 was assessed on the basis of that item, which, with interest, was paid under protest. Claim for refund having been rejected, the present suit was brought, and judgment went against the Collector. The assessment of the present tax was technically under the Act of 1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of "judges of courts of the United States, taking office after June 6, 1932" which had been similarly incorporated in the Revenue Act of 1934 (48 Stat. 680, 686–687). Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his "gross income" must be judged on the basis of the validity of § 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes. The fact that Judge Woodrough before he became a circuit judge and prior to June 6, 1932, had been a district judge

is wholly irrelevant to the matter in issue. The two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar.

By means of § 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of *Evans* v. *Gore,* 253 U. S. 245. That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the "gross income" from which the net income is to be computed, although merely part of a taxing measure of general, non-discriminatory application to all earners of incomes, is contrary to Article III, § 1, of the Constitution which provides that the "Compensation" of the "Judges" "shall not be diminished during their Continuance in Office." See also the separate opinion of Mr. Justice Field in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 586, 604 *et seq.* To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views.[1] In doing so, he merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated.[2] Chief Justice Taney's vigorous views were shared by Attorney General Hoar.[3] Thereafter, both the Treasury Department [4] and Con-

[1] The letter was written on February 16, 1863, and will be found in 157 U. S. 701.

[2] " . . . I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it." 157 U. S. at 702.

[3] 13 Op. A. G. 161; but see the opinion of Attorney General Palmer, 31 Op. A. G. 475.

[4] See Mr. Justice Field, concurring, in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 588, 606–07.

gress[5] acted upon this construction of the Constitution. However, the meaning which *Evans* v. *Gore* imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other English-speaking courts.[6] The decision met wide and steadily growing disfavor from legal scholarship and professional opinion.[7] *Evans* v. *Gore* itself was rejected by most of the courts before whom the matter came after that decision.[8]

Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges

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[5] See *Wayne* v. *United States,* 26 Ct. Cl. 274; Act of July 28, 1892, c. 311, 27 Stat. 306.

[6] See Judgments in *Cooper* v. *Commissioner of Income Tax,* 4 Comm. L. R. 1304, construing § 17 of the Queensland Constitution Act of 1867 which prohibited "any reduction or diminution of the salary of a Judge during his Term of office"; also, *Judges* v. *Attorney-General for Saskatchewan* [1937] 2 D. L. R. 209, construing § 96 of the British North America Act, 1867, that "The Salaries . . . of the Judges . . . shall be fixed and provided by the Parliament of Canada" in connection with the Income Tax Act, 1932, of Saskatchewan.

[7] See Clark, *Further Limitations Upon Federal Income Taxation,* 30 Yale L. J. 75; Corwin, *Constitutional Law in 1919–1920,* 15 Am. Pol. Sci. Rev. 635, 641–644; Fellman, *Diminution of Judicial Salaries,* 24 Iowa L. Rev. 89; Lowndes, *Taxing Income of Federal Judiciary,* 19 Va. L. Rev. 153; Powell, *Constitutional Law in 1919–1920,* 19 Mich. L. Rev. 117–118; Powell, *The Sixteenth Amendment and Income from State Securities,* National Income Tax Magazine (July 1923) 5–6; 20 Col. L. Rev. 794; 43 Harv. L. Rev. 318; 20 Ill. L. Rev. 376; 45 L. Q. Rev. 291; 7 Va. L. Rev. 69; 3 U. of Chi. L. Rev. 141.

[8] The cases, *pro* and *con,* are collected in the recent dissenting opinion by Chief Judge Bond of the Court of Appeals of Maryland in *Gordy* v. *Dennis,* 5 A. 2d 69, 82. Particular attention should be called to the decision of the Supreme Court of South Africa, *Krause* v. *Commissioner for Inland Revenue,* [1929] So. Afr. R. (A. D.) 286, construing § 100 of the South Africa Act, which had taken over the identical clause from Article III, § 1, of our Constitution.

appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1.[9] To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by § 3 of the Public Salary Tax Act of 1939, amended § 22 (a) so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932."[10] That section, however, is not now before us. But to the extent

[9] The provisions regarding security of salary had their source in the Act of Settlement of 1700, 12 & 13 Will. III, c. 2, § III, and the Act of 1760, 1 Geo. III, c. 23. See Holdsworth, *The Constitutional Position of the Judges,* 48 L. Q. Rev. 25; 2 Holdsworth, The History of English Law, 559–64; 6 *id.* 234, 514.

[10] Public No. 32, 76th Cong., 1st Sess., c. 59. Section 209 of the same statute, however, provides that "In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

that what the Court now says is inconsistent with what was said in *Miles* v. *Graham,* 268 U. S. 501, the latter cannot survive.

Judgment reversed.

MR. JUSTICE MCREYNOLDS did not hear the argument in this cause and took no part in its consideration or decision.

MR. JUSTICE BUTLER, dissenting.

Concretely, the question is whether, by exacting from United States circuit judge Joseph W. Woodrough and his wife $631.60 in the form of income tax on his salary of $12,500 for 1936, the Government diminished the compensation for his services theretofore fixed by Congress. That item excluded, they had no taxable income. The judge's monthly pay was $1041.66. The tax took at the monthly rate of $52.63.

The material details may be given briefly.

April 12, 1933, Judge Woodrough was appointed judge of the United States circuit court of appeals for the eighth circuit. He qualified May 1, 1933. Congress had by the Act of December 13, 1926,[1] enacted that "To each of the circuit judges the sum of $12,500 per year" shall be paid as compensation. Since May 1, 1933, appellee has received the specified pay. The Revenue Act of June 6, 1932, applicable only to taxable years beginning after December 31, 1931, contained a provision declaring that in the case of judges taking office after that date "the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such . . . judges are hereby amended accordingly."[2] The Revenue Act of 1934,[3] applicable only to taxable

[1] c. 6, 44 Stat. 919.

[2] § 22 (a), c. 209, 47 Stat. 169.

[3] § 22 (a), c. 277, 48 Stat. 680.

years beginning after December 31, 1933, and that of 1936,[4] applicable only to taxable years beginning after December 31, 1935, contain the same language as that just quoted from the Act of 1932.

Judge Woodrough and his wife made a joint income tax return for 1936; it disclosed his salary but claimed it was not subject to the tax. The commissioner held the item taxable and made a deficiency assessment of $631.60. Plaintiffs paid under protest and filed claim for refund; it was denied. Claiming the tax that they were so compelled to pay diminished the judge's compensation and that therefore § 22 (a) of the Act of 1936 violates § 1, Art. III, of the Constitution, plaintiffs sued to recover the amount of the tax. The collector moved to dismiss. The court held the Act unconstitutional, overruled the motion and, defendant having elected not to plead further, gave plaintiffs judgment as prayed. Defendant appealed.[5]

Article III, § 1, declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

It safeguards the independence of the judiciary. The abuse against which it was intended to be a barrier is included in the list of reasons for our Declaration of Independence. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States . . . He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.—He has made Judges dependent on his Will alone, for the

[4] § 22 (a), c. 690, 49 Stat. 1648.

[5] Act of August 24, 1937, § 2, c. 754, 50 Stat. 752.

tenure of their offices, and the amount and payment of their salaries."

Alexander Hamilton, explaining the reasons for and the purpose of § 1 of Art. III, said:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will,* but merely judgment . . .

"This simple view of the matter . . . proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks . . .

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing . . ." (The Federalist, No. 78.)

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, *a power over a man's subsistence amounts*

to a power over his will . . . The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges, but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges." (The Federalist, No. 79.)

Mr. Justice Story declared that "Without this provision, the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery . . ." 2 Story, § 1628. Chancellor Kent said: "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions." 1 Kent Com. 294.

The first judicial construction of the clause was by the circuit court of the District of Columbia in 1803 in the case of *United States* v. *More*.[6] The opinion was written by Judge Cranch. The court sustained a demurrer to an

[6] The opinion is set forth in a footnote at p. 160 *et seq.*, 3 Cranch.

indictment charging that More, a justice of the peace, under color of his office, exacted an illegal fee, 12 cents, for giving judgment upon a warrant for a small debt. The issue was whether an Act of Congress abolishing fees of justices of the peace in the District of Columbia could affect those who accepted their commissions while the fees were legally annexed to the office. The court said: "The 3d article of the constitution provides for the independence of the judges of the courts of the United States, by certain regulations; one of which is, that they shall receive, at stated times, a compensation for their services, *which shall not be diminished during their continuance in office.* The act of congress of 27th of February, 1801, which constitutes the office of justices of the peace . . . ascertains the compensation which they shall have for their services in holding their courts . . . This compensation is given in the form of fees, payable when the services are rendered . . . That his [the justice's] compensation shall not be diminished during his continuance in office, seems to follow as a necessary consequence from the provisions of the constitution . . . If his compensation has once been fixed by law, a subsequent law for diminishing that compensation (*a fortiori* for *abolishing* it) cannot affect that justice of the peace during his continuance in office; . . ."

The first attempt to tax compensation of federal judges was during the Civil War. Section 86 of the Act of July 1, 1862,[7] levied "on all salaries of officers, or payments to persons in the . . . service of the United States . . . when exceeding the rate of six hundred dollars per annum, a duty of three per centum on the excess above the said six hundred dollars," and directed disbursing officers to deduct and withhold the duty. These general provisions were construed by the revenue

[7] c. 119, 12 Stat. 472.

officers to comprehend the compensation of the President and the judges of the United States. By letter of February 16, 1863, Mr. Chief Justice Taney protested to the Secretary of the Treasury. In the course of his letter,[8] he said:

"The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

"The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments. . . .

"Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent posi-

[8] Printed in 157 U. S. at p. 701.

tion assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference, I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it."

The letter of the Chief Justice was not answered and, at his request, the Court, May 10, 1863, ordered the letter entered on its records. In 1869, the Secretary of the Treasury requested the opinion of Attorney General Ebenezer Rockwood Hoar as to the constitutionality of the Act construed to extend to judges' salaries. He rendered an opinion in substantial accord with the views expressed in Chief Justice Taney's protest. 13 Op. A. G. 161. Accordingly, the tax on the compensation of the President and of judges was discontinued and the amounts theretofore collected from them were refunded—some through administrative channels; others through action of the court of claims and ensuing appropriations by Congress. See *Wayne* v. *United States,* 26 C. Cls. 274, 290; 27 Stat. 306.

In 1889, Mr. Justice Miller, a member of the Court since 1862, said: [9]

"The Constitution of the United States has placed several limitations upon the general power [of taxation], and . . . some of them are implied. One of its provisions is that neither the President of the United States (Art. II, sec. 1, par 6), nor a judge of the Supreme or inferior courts (Art III, sec. 1), shall have his salary diminished during the period for which he shall have been elected, or during his continuance in office. It is very clear that

[9] Miller on the Constitution of the United States p. 247.

when Congress, during the late [Civil] war, levied an income tax, and placed it as well upon the salaries of the President and the judges of the courts as those of other people, that it was a diminution of them to just that extent."

Although the Income Tax Act of 1894 said nothing about the compensation of the judges, Mr. Justice Field construed § 33 [10] to tax that compensation and assigned that ground among others for joining in the decision that the Act was unconstitutional. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 604–606. Mr. Justice Field, who was confirmed the day this Court ordered Chief Justice Taney's letter entered on its records, had taken his place upon this bench at the beginning of the following term. His opinion recited the facts of that incident and quoted extensively from the letter, which was printed as an appendix to the volume of the reports containing the opinions in the *Pollock* case. 157 U. S. 701. The Justice ended his discussion of the matter by stating his belief, based on information, that the opinion of Attorney General Hoar had been followed ever since without question by the Treasury. And, upon reargument of the cause, Attorney General Olney said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar that the salaries of the President and judges were exempt."

The Revenue Acts of 1913 [11] and 1916,[12] being the first two after adoption of the Sixteenth Amendment, ex-

[10] Section 33, 28 Stat. 557, in terms was much like § 86 of the Act of 1862; it levied "on all salaries of officers, or payments . . . to persons in the . . . service of the United States, . . . when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars" and made it the duty of disbursing officers to deduct and withhold the tax.

[11] § 2B, 38 Stat. 168.

[12] § 4, 39 Stat. 759.

pressly excluded from gross income the compensation of judges then in office. But after this country engaged in the World War, the Revenue Act of 1918, approved February 24, 1919, defined gross income to include "in the case of the President . . . [and] the judges of the Supreme and inferior courts . . . the compensation received as such." [13] The reports of the congressional committees having the measure in charge indicate that the Congress was in doubt as to the constitutional validity of that provision and intended to have the question decided by the courts.[14] The question was raised and presented for decision in *Evans* v. *Gore,* 253 U. S. 245. The Collector included the salary for 1918 of Judge Evans, appointed before enactment of the taxing statute, in gross income. Had it been excluded, he would have had no taxable income. He paid the tax and brought suit to recover the amount so exacted. The United States district court for the western district of Kentucky held him not entitled to recover. But, after argument by eminent counsel including the Solicitor General, this Court held that the clause declaring that compensation of judges "shall not be diminished during their continuance in office" prevents diminution by taxation and that it has been so construed in the actual practice of the government.

For the purpose of disclosing the reasons for and true meaning of the clause forbidding diminution of compensation of judges, the opinion of the Court, written by Mr. Justice Van Devanter, brought forward statements of Alexander Hamilton, Chief Justice Marshall, Justice Story, Chancellor Kent, Chief Justice Taney, Justice Field, Attorneys General Hoar and Olney and others.

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[13] § 213 (a), 40 Stat. 1062.

[14] H. Rept. No. 767, 65th Cong., 2d sess., p. 29; Sen. Rept. No. 617, 65th Cong., 3d sess., p. 6; 56 Cong. Rec., p. 10370.

Speaking for the Court, he said:

"With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

". . . The primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

"Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by

law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished . . .

"The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries. . . .

"When we consider . . . what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forebear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. [Citing.] Is it not therefore morally certain that the discern-

ing statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and in our opinion due regard for its spirit and principle requires that it be taken as directed against them all."

Mr. Justice Holmes wrote a dissenting opinion, in which Mr. Justice Brandeis joined. With that expression his opposition to the decision ended. Two years later, in *Gillespie* v. *Oklahoma,* 257 U. S. 501, writing for the Court, invalidating a state tax upon net income of a lessee from sales of his share of oil and gas received under leases of restricted Indian land, he said (p. 505): "In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601; a rule lately illustrated by *Evans* v. *Gore* . . ." And in that case he relied on the truth, as put by Chief Justice Marshall in *M'Culloch* v. *Maryland,* 4 Wheat. 316, 431, that "the power to tax involves the power to destroy." He quoted (p. 505) with approval from *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522, the statement of the opinion (p. 530) that "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." [15]

[15] *Gillespie* v. *Oklahoma* is one of the decisions subjected to condemnatory comment in the concurring opinion in *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466. It is there said: "A succession of

Miles v. *Graham* (1925), 268 U. S. 501, held invalid § 213 (a), Revenue Act of 1918, (condemned in *Evans* v. *Gore*) when applied to compensation of Judge Graham,

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decisions [*Gillespie* v. *Oklahoma* is the first cited] thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."

At another place in that concurrence, the writer stated: "The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. . . . The arguments upon which *McCulloch* v. *Maryland,* 4 Wheat. 316, rested . . . have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* v. *Maryland.* Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' . . . The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits'. *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 223 (dissent)."

But, in the *Gillespie* case, Mr. Justice Holmes, speaking for the Court, had definitely applied the doctrine that the power to tax does involve the power to destroy.

In the *Panhandle* case neither the Court, nor indeed another justice dissenting, was impressed by "The power to tax is not the power to destroy while this Court sits." The statement is vague and may be read to imply a power that this Court never possessed. If taken to mean that we are empowered to regulate or to limit the exertion by Congress of its power of taxation, it justly may be regarded as hyperbole; if taken to mean that this Court has power to prevent imposition by Congress of taxes laid to discourage, to destroy, or to protect, then it is in the teeth of the law. See, e. g., *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *McCray* v. *United States,* 195 U. S. 27, 53 *et seq.; Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44 *et seq.; Cincinnati Soap Co.* v. *United States,* 301 U. S. 308.

appointed after its enactment. Mr. Justice Holmes joined in the decision. Mr. Justice Brandeis merely noted dissent.

In the course of the opinion, we said:

"Does the circumstance that defendant in error's appointment came after the taxing Act require a different view concerning his right to exemption? The answer depends upon the import of the word 'compensation' in the constitutional provision.

"The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.

". . . The compensation fixed by law when defendant in error assumed his official duties was $7,500 per annum, and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*.

"The taxing Act became a law [February 24, 1919] prior to the statute prescribing salaries for judges of the Court of Claims [approved February 25, 1919], but if the dates were reversed it would be impossible to construe the former as an amendment which reduced salaries by the amount of the tax imposed. No judge is required to pay a definite percentage of his salary, but all are commanded to return, as a part of 'gross income,' 'the compensation received as such' from the United States. From the 'gross income' various deductions and credits are allowed, as for interest paid, contributions or gifts made, personal exemptions varying with family relations, etc., and upon the net result assessment is made. The plain purpose was to require all judges to return their compensation as an item of 'gross income,' and to tax this as other salaries. This is forbidden by the Constitution.

"The power of Congress definitely to fix the compensation to be received at stated intervals by judges thereafter appointed is clear. It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law."

In *O'Donoghue* v. *United States* (1933), 289 U. S. 516, we construed the Act of June 30, 1932 [16] reducing the salaries of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." We there held that the supreme court and court of appeals of the District of Columbia were constitutional courts and therefore that the judges of those courts were excepted from the salary reduction. We cited the authorities, adopted the reasoning, and reaffirmed the conclusions on which rest the Court's judgments in *Evans* v. *Gore* and *Miles* v. *Graham*. And see *Booth* v. *United States*, 291 U. S. 339.

Evidently the Court intends to destroy the decision in *Evans* v. *Gore*. Without suggesting that there is any distinction between that case and *Miles* v. *Graham*, it declares that the latter "cannot survive." But the decision of today fails to deal with, much less to detract from the reasoning of those cases. The opinion would imply that the letter of Chief Justice Taney to the Secretary of the Treasury, and the separate opinion of Mr. Justice Field in the *Pollock* case were treated as having weight as judicial decisions. But nowhere has that ever been suggested. However, all who are familiar with our judicial history know that entitled to great respect are the reasoned conclusions of these eminent American jurists as to the true intent and meaning of the Constitution of the United States. And similarly worthy of attention are the opinions of the Attorneys General and other public officials following the reasoning of Chief Justice Taney.

[16] §§ 106, 107, 47 Stat. 401, 402.

Now the Court cites, as if entitled to prevail against those well-sustained opinions and the deliberate judgments of this Court, opposing views—if indeed upon examination they reasonably may be so deemed—of English speaking judges in foreign countries.

It refers, footnote 6, to the decision of the Privy Council in *Judges* v. *Attorney-General of Saskatchewan* (1937), 2 D. L. R. 209, construing income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legislative enactments and subject to authoritative interpretation or change by the local or British parliament. They shed no light upon the issue in this case.

The opinion claims no support from any state court decision. The one it cites, footnote 8, that of the Maryland Court of Appeals in *Gordy* v. *Dennis,* 5 A. 2d 69, held that under a clause in the Constitution of Maryland like that in Art. III, § 1, the compensation of state judges may not be taxed.

The opinion also cites, footnote 7, selected gainsaying writings of professors,—some are lawyers and some are not—but without specification of or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students.

The suggestion that, as citizens, judges are not immune from taxation begs the question here presented. The Constitution itself puts judges in a separate class, declaring that at stated times they shall receive for their services compensation which "shall not be diminished." And so their salaries are distinguished from income of

others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved.

Admittedly the Court now repudiates its earlier decisions upon the point here in issue. The provision defining tenure and providing for undiminishable compensation was adopted with unusual accord. There has been unanimity of opinion that, because in comparison with the legislative and executive the judicial department is weak, its independence is essential to our system of government. These safeguards go far to insure that independence. And, from the beginning, statesmen and jurists have agreed that the clause forbids diminution of judges' compensation by any form of legislation. The clause in question is plain: no exception is expressed; none may be implied. Its unqualified command should be given effect.

For one convinced that the judgment now given is wrong, it is impossible to acquiesce or merely to note dissent. And so this opinion is written to indicate the grounds of opposition and to evidence regret that another landmark has been removed.

I am of opinion that the judgment of the district court should be affirmed.

RORICK *v.* DEVON SYNDICATE, LTD.

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

No. 676. Argued April 24, 1939.—Decided May 22, 1939.

1. Review is confined to the questions urged in the petition for certiorari. P. 303.
2. The fact that he is an employee of a corporation of which the plaintiff in the case is president does not disqualify a notary public under § 11532, General Code of Ohio, from taking an affidavit in attachment or garnishment. P. 303.

3. Under the General Code of Ohio, §§ 11279, 11819, when a civil action for money has been begun by filing the petition and issuing summons, an attachment or garnishment is not premature because obtained prior to personal service or before commencement of service by publication. P. 306.
4. Under R. S. §§ 646 and 915, where an action has been removed to the federal court after the state court had acquired jurisdiction *in rem* by attachment or garnishment, the federal court, without prior personal service of summons, has the same jurisdiction to extend the attachment or garnishment to other property as the state court would have had under the state law if the case had not been removed. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31, limited. P. 312.

100 F. 2d 844, reversed.

CERTIORARI, 306 U. S. 626, to review the affirmance of a judgment discharging an attachment and garnishment and dismissing the petition, in an action removed from a state court on the ground of diverse citizenship.

Mr. George R. Effler, with whom *Messrs. H. W. Fraser* and *R. B. Swartzbaugh* were on the brief, for petitioner.

Mr. George D. Welles, with whom *Mr. Fred E. Fuller* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The case is here on a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. We granted the writ because the court below had decided an important question of local law in a way probably in conflict with applicable local decisions and probably had misconstrued certain federal statutes and a decision of this Court thereunder.

The basic question here involved is whether a federal district court, in the absence of jurisdiction *in personam* and after removal of a cause from a state court where jurisdiction *in rem* over certain property of a defendant

has already been acquired, can issue an order of attachment or garnishment against other property of the same defendant.

Petitioner, a resident of Ohio, brought suit on June 19, 1930, in a state court in Ohio against respondent, a nonresident corporation organized under Canadian law, on a contract claim for personal services rendered.[1] Summons was concurrently issued, but personal service was never had; and simultaneously, an affidavit in attachment and garnishment was filed. A second affidavit in attachment and garnishment was filed on June 27, 1930, naming additional persons; and shortly thereafter certain funds and property of respondent were garnisheed. Subsequently, service by publication was completed; and soon afterwards, and before judgment, respondent appeared specially and obtained a removal of the cause to the District Court of the United States for the Northern District of Ohio, Western Division. In the District Court respondent also appeared specially and moved to quash the service by publication and to dismiss the attachment and garnishment. Nothing further was done in the cause for over five years. Then, on February 17, 1936, petitioner, with leave of the District Court, filed a supplemental and amended petition repeating in substance the allegations of the original petition; and a supplemental affidavit in garnishment which named as garnishees the same persons designated in the original affidavits of June 1930 in the state court. On the same day, the District Court issued an order of attachment and notices to garnishees. Under the latter additional funds in the hands of one of the garnishees were reached. And on April 11, 1936, respondents again appeared specially in the District

[1] Paris E. Singer was also named a defendant in the original petition but died pending the action. Since subsequent proceedings were continued against respondent alone, the cause is treated as if Devon Syndicate, Limited, were the sole defendant.

Court, and moved, *inter alia,* to dismiss the attachment and garnishment under the supplemental affidavit of February 17, 1936. After removal to the District Court there was neither personal service, nor, so far as appears, service by publication.

By its motions of January 26, 1931, and April 11, 1936, respondent asserted that the affidavits in attachment and garnishment were defective and void under Ohio law; that there was no property of respondent within the jurisdiction of the District Court or the state court on which any valid attachment could be or was levied; that there was no property of respondent in the possession of any of the garnishees; that the attachment and garnishment and the service of summons were void by reason of incorrect designation of respondent; that there was no lawful service of summons under the supplemental and amended petition made on respondent; that the supplemental attachment and garnishment under the amended petition were also void for lack of personal service; and that the District Court had no jurisdiction over either the respondent or its property appropriate for the maintenance of this action.

After oral argument on respondent's motions, the District Court entered an order discharging the attachment and garnishment and striking the petition from the files of the court, on the grounds that the affidavits in attachment and garnishment, dated June 19 and June 27, 1930, were defective and void, and that the supplemental affidavit in attachment and garnishment was also void and ineffective, since no personal service had been made on respondent. On appeal to the Circuit Court of Appeals the judgment was affirmed on the grounds that the original attachment or garnishment in the state court was premature and void; that on removal the federal District Court could not validate an attachment not perfected in the state court proceeding; and that attachment may not

issue in a federal District Court until the defendant has been personally served or has voluntarily appeared.

Of the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review. *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175; *Connecticut Railway & Lighting Co.* v. *Palmer,* 305 U. S. 493.

Before coming to the basic question here involved, namely, whether the garnishment secured in the District Court under the supplemental affidavit of February 17, 1936, was void, there are two preliminary questions. These are (1) whether the notary public before whom the affidavits in attachment and garnishment of June 19 and June 27, 1930, were taken was disqualified, thus rendering the garnishment proceedings void and of no effect; and (2) whether the garnishments obtained in the state court were premature and void because they were secured without personal service and prior to the first publication of notice of constructive service.

First. The Ohio General Code provided that an affidavit might be used to obtain a provisional remedy such as attachment or garnishment (§ 11523), and that an affidavit might be made before any person authorized to take depositions (§ 11524). Sec. 11532 provided that "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." The notary in question was D. W. Drennan, a member of the Ohio bar and of the bar of the District Court. Although Drennan had some private practice of his own, he was in the employ of a corporation, of which petitioner was president, and previously in the employ of a predecessor partnership, of which petitioner was a member. But he did not represent petitioner in this case; nor had he ever represented him as personal counsel; nor was he consulted

by petitioner with reference to this case; nor was he related to petitioner; nor did he have any financial stake in the outcome of this suit. His sole connection with the case was that he acted as notary on a few papers. Furthermore, the petition in this case alleged a cause of action personal to petitioner, not one on behalf of the corporation by which Drennan was employed or on behalf of its predecessor partnership.

Since Drennan was not a "relative or attorney" of petitioner, he was not disqualified to take the affidavit unless within the meaning of the Ohio statute he was "otherwise interested in the event of the action or proceeding." The District Court held that he was so interested. We do not so interpret the Ohio law. Absent some legal or material interest, it seems to us, on the basis of the Ohio authorities which we have found, that there must be some immediate interest in the action akin to that of a relative in order for the notary to run afoul of the statutory prohibition. Disability thus depends on the particular circumstances of each case—the degree of intimacy in relationship between petitioner and notary. In *Rhinelander Co.* v. *Pittsburgh Co.*, 15 Ohio C. C. (N. S.) 286, an Ohio court held that a young man working as a salaried employee for a firm of attorneys retained in the case was not disqualified by the foregoing section from taking an affidavit in the case as notary. The interest which disqualifies under the Ohio statute, said that Court, is "some legal, certain and immediate interest such as formerly disqualified a witness from testifying." *Id.*, p. 286. Certainly, if an employee of one who himself is disqualified to act as notary is qualified so to act, an employee of a corporation whose officer is suing not on behalf of the corporation but for himself would seem to be similarly qualified under Ohio law. This seems to us especially persuasive, since the notary in question was in fact taking not a deposition but an affidavit and since

the affidavit was not for use as evidence.[2] Accordingly, we conclude that the affidavits of June 19 and June 27, 1930, were not defective because they were sworn to before D. W. Drennan.[3]

[2] There is Ohio authority for the view that § 11532 of the Ohio General Code under which the notary's disqualification is asserted was intended only to define and regulate the taking of affidavits to be used as testimony in a judicial proceeding. *City Commission of Gallipolis* v. *State,* 36 Oh. App. 258. On the other hand, *Leavitt & Milroy Co.* v. *Rosenberg Bros. & Co.,* 83 Oh. St. 230; 93 N. E. 904, squarely held that an attachment was defective because the affidavit was made before a notary who was the attorney for the plaintiff in violation of § 11532—then § 5271 Rev. Stat. And though that case, so far as appears, has never been overruled, its holding and § 11532 were nevertheless before the court in *Evans* v. *Lawyer,* 123 Oh. St. 62; 173 N. E. 735. There the Court referred to certain sections of the General Code (including § 11532) which relate to execution of affidavits and said "The sections of the Code referred to relate to the mode of taking testimony, and are found under Part Third, Title IV, Division III, relating to procedure in common pleas court, in Chapter 3 in regard to evidence. We think these sections of the Code relate to affidavits to be used in the sense of evidence." *Id.,* p. 66. Though we are not justified on these authorities in concluding that the prohibitions contained in § 11532 are inapplicable to notaries before whom affidavits in attachment and garnishment are taken, nevertheless they lend support to the view that in considering whether or not a notary is "otherwise interested" in the event of the action within the meaning of the section, it is appropriate to give some weight to the function which the affidavit in question is to perform, in the absence of a contrary ruling by the Ohio courts.

[3] Another reason urged by respondent for the invalidity of the affidavits in question is that the notary was disqualified by § 121 of the Ohio General Code which provides: "No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested." Respondent claims that the corporation of which petitioner was an officer and by which the notary was employed, as well as the predecessor partnership, was a municipal bond broker; that petitioner, being an

Second. Sec. 11279 of the Ohio General Code provides that "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Sec. 11819 provides that "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant" upon various enumerated grounds. In this case the petition was filed, summons was issued, and an affidavit in attachment and garnishment was filed—all on June 19, 1930. It would seem, therefore, that § 11819 was satisfied. But the Circuit Court of Appeals held that an attachment which issued before personal service was obtained, or before the beginning of publication for substituted service, was premature and void. Under that test the attachments and garnishments sought in the state court on June 19 and June 27, 1930, were defective since personal service was never had and since service by publication was not commenced until several months later.

The Circuit Court of Appeals reached this conclusion in reliance upon its earlier decision in *Doherty* v. *Cremering,* 83 F. 2d 388, and upon the decision of the Supreme Court of Ohio in *Seibert* v. *Switzer,* 35 Ohio St. 661.

We think the Circuit Court of Appeals erred. The chronology of events in the *Doherty* case is the same as the chronology here—attachment was issued on the day the petition was filed and substantially in advance of commencement of service by publication. Personal service was not had. The court relied upon § 11230 of the Ohio General Code and upon *Seibert* v. *Switzer, supra.* Sec. 11230 is contained in Chapter 2 of Division 1 of

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officer of the corporation, was himself a broker; and that therefore the notary was a "clerk of" or "other person holding an official relation to" a "broker." Suffice it to note (1) that the notary was not in the employ of petitioner; and (2) that neither the corporation nor its predecessor partnership appears to be "interested" in the action. As alleged, the action seems to be personal to petitioner.

Title IV of the Ohio General Code. Title IV is entitled "Procedure in Common Pleas Court." Chapter 2 of Division 1 is entitled "Limitation of Actions." Sec. 11230 provides: "An action shall be deemed to be commenced *within the meaning of this chapter,* as to each defendant, at the date of the summons which is served on him or on a codefendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics added.)

It seems clear to us that the words "An action shall be deemed to be commenced within the meaning of this chapter" confine the operation of the section to matters concerning the limitation of actions, the subject to which the chapter is expressly devoted. The Supreme Court Commission of Ohio in *Bacher* v. *Shawhan*, 41 Ohio St. 271, so interpreted § 4988 Rev. Stats. (now § 11231 of the Ohio General Code) which provided: "An attempt to commence an action shall be deemed to be equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure service; but such attempt must be followed by service within sixty days." The court held that the trial court did not lose jurisdiction because service by publication was not commenced, personal service not being had, until some seven months after suit was brought and an order of attachment was issued and levied. The court said: "It will be observed that the restrictive words 'within the meaning of this chapter,' confine the operation of the section to matters concerning the limitations of actions. It seems to us that the legislative intent was to prevent parties from indefinitely prolonging a suspension of the statute by a mere attempt to sue." *Id.,* p. 272.

On that authority we conclude that "at or after its commencement" as used in § 11819 means the commence-

ment described in § 11279, not the commencement described in § 11230. Additional support for this conclusion is found in *Seibert* v. *Switzer,* 35 Ohio St. 661, on which the Circuit Court of Appeals relied for the contrary conclusion. There the validity of an order of attachment which had been issued and served prior to the filing of the petition was in issue. At that time § 11279 (then Civil Code, § 55) was identically the same as at present. Sec. 11819 (then Civil Code, § 191) was, so far as material here, substantially the same as it is now; *i. e.,* it allowed the plaintiff in a civil action for the recovery of money to have an attachment "at or after the commencement" of the action. Sec. 11820 (then Civil Code, § 192) at that time, as now, provided that the order of attachment should be made "by the clerk of the court in which the action is brought." And § 11821 (then Civil Code, § 193) required in case of attachment, as it does now, a bond by the "plaintiff" to the "defendant" except in case defendant was a non-resident or a foreign corporation. The court in *Seibert* v. *Switzer, supra,* held that the order of attachment was unauthorized and void,[4] and said: "No action was, in fact, commenced by the filing of a petition, until some three or four hours after the order of attachment was served and returned."

"The statute does not authorize an attachment except in an action, and the clerk of the court has no authority to issue the order of attachment until an action is brought and the relation of plaintiff and defendant is established in the case.

"An action is commenced or brought, within the meaning of sections 192 and 193, by the filing of a petition and

[4] It should also be noted that § 11230 (Civil Code, § 20) was substantially the same then as now. Though that section provided that "within the meaning of this section" an action where service by publication was proper should "be deemed commenced at the date of the first publication," the court determined the date of commencement by § 11279 without mentioning § 11230.

causing a summons to issue thereon. Code, § 55 . . ." *Id.*, p. 665.

The *Seibert* case and the *Bacher* case thus seem to be wholly consistent. An order of attachment issued prior to the filing of a petition and issuance of summons is void; an order of attachment issued after filing of the petition and the issuance of summons but prior to the commencement of service by publication is valid, though personal service is not had.

In view of these Ohio authorities, we conclude that the attachments or garnishments secured in the state court were not premature or void because obtained prior to personal service or before commencement of service by publication. See also, *St. John* v. *Parsons*, 54 Ohio App. 420; 7 N. E. 2d 1013. Those liens, having been obtained in the state court prior to removal, are preserved intact after removal. § 646 of the Revised Statutes (28 U. S. C. § 79).[5]

Third. This brings us to the main issue in the case—whether a federal District Court has the power to issue an order of attachment or garnishment in a removed cause if jurisdiction *in rem* has been obtained prior to removal. The Circuit Court of Appeals relied upon the rule laid down in *Big Vein Coal Co.* v. *Read*, 229 U. S. 31, that an attachment may not issue in a federal District Court

[5] Sec. 646 provides: "When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

where no personal service has been had upon defendant or where defendant has made no personal appearance. One of the earliest antecedents of the *Big Vein Coal Co.* case, *supra,* was *Toland* v. *Sprague,* 12 Pet. 300. In that case a citizen of Pennsylvania brought suit in the Circuit Court of the United States for the District of Pennsylvania against a citizen of Massachusetts who was domiciled abroad. No personal service was had, but an attachment was levied upon defendant's property in Pennsylvania. Sec. 739 of the Revised Statutes then provided that no civil suit should be brought in either the circuit or district court against any inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he was found at the time of the serving of the writ. This Court by a divided vote concluded that an attachment could not be issued except as a part of, or together with, process served upon defendant personally. And in *Ex parte Railway Co.,* 103 U. S. 794, this Court concluded that since the defendant was an inhabitant of a state outside the jurisdiction of the federal court and was not found or served with process in that jurisdiction, no attachment could issue from that court against his property. It was on the basis of those two precedents that this Court later made its decision in *Big Vein Coal Co.* v. *Read, supra.* In that case, plaintiff instituted suit in the federal court. A summons was issued and returned not found. Thereafter an order of attachment was issued. It was held that unless jurisdiction *in personam* is obtained over the defendant, his estate may not be attached in the federal court, an attachment being but "an incident to a suit" and not a means of acquiring jurisdiction. *Id.,* p. 38. This conclusion was reached in spite of the fact that § 739 had been changed since *Ex parte Railway Co., supra,* by addition of a diversity of citizenship clause permitting suit "in the district of the residence of either the defendant or plain-

tiff," and in spite of § 915 of the Revised Statutes (28 U. S. C. § 726), discussed hereafter. Nevertheless, this Court held that since Congress had not explicitly provided for service by publication in such cases, attachment could be obtained only in cases where service was adequate for a judgment *in personam.*

The argument for extension or application of the rule followed from *Toland* v. *Sprague* to *Big Vein Coal Co.* v. *Read, supra,* to cases such as the instant one loses its persuasiveness. Ingrained in those decisions is the feeling that it would be unjust for a person to have his rights passed upon in the absence of the notice afforded by personal service, so that he might appear and defend himself. That philosophy was perhaps best expressed by Mr. Justice Miller sitting in circuit in *Nazoro* v. *Cragin,* 3 Dill. 474, 476, where he said, in 1873, that a contrary doctrine would "compel citizens of the Pacific Coast to go to New York to defend their property which happened to be there and would give the great central cities vast power." But that viewpoint had not been expressed by the Congress in § 646. That section gave validity in the federal court to attachments obtained in the state court prior to removal, by its provision that any attachment in the state court suit "shall hold the goods or estate so attached" to answer the final judgment or decree. And this Court has solicitously protected attachments obtained prior to removal, even though jurisdiction *in rem* had not been perfected in the state court by service by publication. *Clark* v. *Wells,* 203 U. S. 164. So to a considerable degree, this Court in pursuance of the policy of the Congress as expressed in § 646, has not adhered rigorously to the philosophy underlying the antecedents of the *Big Vein Coal Company* case. For most assuredly a defendant whose property is attached in a state court prior to removal may not have been given notice of the kind which personal service would provide, since the state pro-

cedure as in this case commonly permits attachment or garnishment where only service by publication can be made.

But we need not rely merely on inferences drawn from statutory construction, since the Congress has provided plaintiffs in federal courts with procedural remedies available in state courts. Sec. 915 of the Revised Statutes provides:

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which were, on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

This section when read with § 646, indicates to us that where jurisdiction *in rem* has been acquired prior to removal, plaintiff may obtain in the federal court after removal such orders of attachment or garnishment as would have been available to him had he been permitted to remain in the state court. Such interpretation merely makes it possible for a lien obtained in a state court prior to removal to be extended by the federal court to other property of the same defendant. It introduces no new element in the statutory scheme for, as we have said, the lien which § 646 protects may often have been obtained without personal service. The policy which recognizes the validity of a lien preserved by virtue of § 646, though personal service is lacking, permits extension of that lien by a federal District Court under like circumstances to other property of the same defendant by reason of § 915.

This holding can be brought within the rule of the *Big Vein Coal Company* case, *supra,* if that decision is narrowly limited. For in one sense it can be said that attachment or garnishment is here used only as an "auxiliary remedy." *Id.,* p. 37. The garnishment effected under the affidavit of February 17, 1936, if valid under Ohio law, would merely extend the proceedings *in rem* to reach other property of the same defendant. Accordingly, if that extension is permissible under § 915, it is not defective merely because jurisdiction *in personam* is absent. Whether or not such extension is permissible is a matter of state law on which we do not pass. Since the case will be remanded, that question and other questions raised by the respondent can be more appropriately disposed of by the District Court.

The judgment of the Circuit Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Judgment reversed.

NEWARK FIRE INSURANCE CO. *v.* STATE BOARD OF TAX APPEALS ET AL.*

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 449. Argued April 18, 19, 1939.—Decided May 29, 1939.

A tax assessed under a statute of New Jersey against an insurance company incorporated under the laws of that State, upon the full amount of its capital stock paid in and accumulated surplus, less certain deductions for liabilities and statutory exemptions—re-

*Together with No. 456, *Universal Insurance Co. et al.* v. *State Board of Tax Appeals et al.,* also on appeal from the Court of Errors and Appeals of New Jersey.

sisted as violative of the due process clause of the Fourteenth Amendment on the ground that the business situs of its intangibles and the tax domicile of the corporation were in New York—*sustained.*

By REED, J., with whom the CHIEF JUSTICE and BUTLER and ROBERTS, JJ., concurred.

1. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court. P. 319.

2. The facts presented by this record are insufficient to establish that the corporation's intangibles had a business situs in New York and to overcome the presumption of a taxable situs solely in New Jersey. P. 321.

By FRANKFURTER, J., with whom STONE, BLACK, and DOUGLAS, JJ., concurred.

The tax as applied is a clearly constitutional exertion of the taxing power of a State over a corporation of its own creation; and *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, and the cases which have followed it, afford a wholly adequate basis for sustaining it. Questions affecting the fictional "situs" of intangibles are irrelevant here. P. 324.

120 N. J. L. 185; *id.* 224; 198 A. 836, 837, affirmed.

APPEALS from affirmances of judgments sustaining the validity of a state tax, 118 N. J. L. 525, 538; 193 A. 912, 915.

Mr. Arthur T. Vanderbilt for appellant in No. 449. *Mr. John G. Jackson,* with whom *Messrs J. G. Shipman* and *Paul B. Barringer, Jr.* were on the brief, for appellants in No. 456.

Mr. Donald R. Richberg, with whom *Messrs. John A. Matthews, Andrew B. Crummy,* and *Raymond C. Cushwa* were on the brief, for appellees.

The CHIEF JUSTICE announced the judgments of the Court, viz., that the judgments are affirmed with costs. MR. JUSTICE MCREYNOLDS dissenting.

MR. JUSTICE REED announced an opinion in which the CHIEF JUSTICE, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS concurred.

The controversy in No. 449 relates to the jurisdiction of New Jersey to tax the appellant upon the full amount of its capital stock paid in and accumulated surplus. The case is here by appeal under § 237 (a) of the Judicial Code.[1]

Chapter 236 of the Laws of 1918 [2] is a general act for the assessment and collection of taxes. Section 202 subjects all real and personal property within the jurisdiction of New Jersey to taxation annually at its true value. By § 301 the tax on other than tangible personal property is assessed on each inhabitant in the taxing district of his residence on the first day of October in each year. Section 305 deals with domestic corporations as residents of the district in which their chief office is located and renders their personal property taxable in the same manner as that of individuals, except as otherwise provided. Section 307, the most vital in the case, provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

[1] 28 U. S. C. § 344 (a).

[2] N. J. Laws 1918, p. 847; also in N. J. Rev. Stats. 1937, § 54: 4.

The appellant is a stock fire insurance corporation organized under the laws of New Jersey which at the time of this assessment required it to locate its principal office and to conduct its general business in the state.[3] It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law requires to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's "executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of $6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago." No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums.

The Board of Assessment of the City of Newark made an assessment, as of October 1, 1934, upon the capital stock paid in and accumulated surplus of the appellant, with deductions for debts and exemptions allowed by law. The assessment was sustained, in succession, by the

[3] N. J. Laws 1902, c. 134, § 3, second, 408; N. J. Laws 1929, c. 6, § 3, second, p. 18, and c. 47, § 1, p. 82. By c. 164 of N. J. Laws 1937, this was amended to read that the certificate of incorporation must set forth "the place where the principal office of the said company in this State is to be located."

Essex County Board of Taxation, by the New Jersey State Board of Tax Appeals, now an appellee, by the Supreme Court,[4] and by the Court of Errors and Appeals, the highest court in the state.[5] Throughout the proceedings below the appellant resisted the jurisdiction of New Jersey to tax on the ground that its intangibles had acquired a business situs and the corporation a tax domicile in New York. Throughout, the state tribunals treated the assessment as upon personal property with a business situs in the sister state. The Supreme Court characterized the exaction as a personal property tax and discussed its validity "in the light of the proofs . . . upon the inescapable premise that . . . the securities, the personalty involved, have become an integral part of [appellant's] business *situs* in New York . . ." [6] It held that the state of domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state and added that, in the absence of a New York personal property tax, multiple taxation was impossible. The Court of Errors and Appeals of New Jersey, per curiam, affirmed the judgment for the reasons expressed in the opinion of the Supreme Court.[7]

Appellant urges error in sustaining the assessment in the face of the conclusion that the tax is a property tax upon intangibles with a business situs in New York, the commercial domicile of the corporation. Such approval, it is claimed, violates the due process clause of the 14th Amendment.

The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from

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[4] 118 N. J. L. 525; 193 A. 912.

[5] 120 N. J. L. 185; 198 A. 836.

[6] 118 N. J. L. at 526; 193 A. 912.

[7] 120 N. J. L. 185; 198 A. 836.

the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets.[8] The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax.

When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator.[9] There it must dwell.[10] The dominion of the state over its creature is complete.[11] In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty,[12] the presumption is that such property is taxable by the state of the corporation's origin.[13] This power of New Jersey to tax is made effective by § 307 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type, as the franchise tax, at one time levied,[14] was repealed by the Act of April 8, 1903.[15]

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[8] *Fidelity Trust Co.* v. *Board of Equalization,* 77 N. J. L. 128, 130; 71 A. 61.

[9] *Lafayette Insurance Co.* v. *French,* 18 How. 404; *St. Louis* v. *Wiggins Ferry Co.,* 11 Wall. 423, 429; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 363, 366; *Fairbanks Steam Shovel Co.* v. *Wills,* 240 U. S. 642. Cf. *International Milling Co.* v. *Columbian Transp. Co.,* 292 U. S. 511, 519.

[10] *Bank of Augusta* v. *Earle,* 13 Pet. 519, 588.

[11] *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257, 259; *Canada Southern Ry.* v. *Gebhard,* 109 U. S. 527, 537–38.

[12] *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92; *Blodgett* v. *Silberman,* 277 U. S. 1, 9.

[13] *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 329; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15, 19; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237. Cf. *Johnson Oil Co.* v. *Oklahoma,* 290 U. S. 158, 161.

[14] Act of April 18, 1884, N. J. Laws 1884, c. 159, p. 232.

[15] N. J. Laws 1903, c. 208, p. 394.

There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state.[16] The carrying on of the business of the corporation in New York, it is urged, has withdrawn its intangibles completely from the tax jurisdiction of New Jersey. With the assumption of a business situs and commercial domicile in New York, that state, under the authorities cited, would have the right to tax intangibles with this relation to its sovereignty. Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been heretofore reserved.[17] We do not find it necessary to answer it in this case.

Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a federal right, the duty of inquiring into the

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[16] *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board* v. *Comptoir National D'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Co.* v. *Board of Assessors,* 221 U. S. 346; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234.

[17] *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237, 241. Cf. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 213; *First National Bank* v. *Maine,* 284 U. S. 312, 331.

evidence which establishes such business situs rests upon this Court.[18]

In the *Stempel, Bristol, Comptoir National, Metropolitan* and *Liverpool* cases, cited in note 16, *supra,* the integration of the foreign-owned intangibles with local activities was evident from the continued course of business. The presence or absence of the evidences of the credits from the jurisdiction was immaterial.[19] The non-resident individuals and corporations carried on continuously a course of lending money or granting credits within the taxing states. The taxed intangibles grew out of these transactions. They were, in fact, a part of them. In the *Wheeling Steel* case, the same type of amalgamation occurred. West Virginia sought to tax a Delaware corporation on accounts receivable and bank deposits. The opinion points out, pages 212 and 213, that these choses in action were the indebtedness for or the proceeds of sales confirmed in West Virginia, attributable "to the place where they arise in the course of the business of making contracts of sale." In *First Bank Stock Corp.* v. *Minnesota* another Delaware corporation was found to have established a commercial domicile for itself and given a business situs to certain of its intangibles. The intangibles in question were stocks of Montana and North Dakota state banks, purchased and held as part of the corporation's assets in its Minnesota business of holding the shares and managing, through stock ownership, the business of numerous banks, trust companies and other financial institutions of the Ninth Federal Reserve District. As this business was localized in Minnesota, the stocks of these banks were an essential factor of that business and therefore had a taxable situs in Minnesota.

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[18] *Beidler v. South Carolina Tax Comm'n,* 282 U. S. 1, 8, and cases cited.

[19] *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, 402.

The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement.

The tax is upon "the full amount of capital stock and surplus" less certain allowed deductions of real estate and exempt securities. The evidence gives no explanation of the amount or source of the assets making up the amount $3,370,080.66 which balances with the capital stock and surplus less these deductions. The stipulation shows "agreed" figures, $8,107,901.83 presumably of capital and surplus, as shown below.[20] Agreed deductions are

[20] "(a) The following figures have been agreed upon. In the first column appears the designation of what the fund represents; opposite each designation appearing the amount of the fund in question:

1. Capital stock	$2,000,000.00
2. Surplus (as set forth in the books of the company)	2,982,940.29
3. Reserve for unearned premiums	3,001,623.46
4. Reserve for taxes	71,765.65
5. Reserve for contingencies	68,915.35
6. Reserve for reinsurance	4,228.36
7. Agency balances over 90 days old	119,109.72
8. Furniture and fixtures (in Newark office)	1,500.00
Total	$8,250,082.83"

Reserves for unearned premiums and for reinsurance are a taxable asset in New Jersey. *City of Trenton* v. *Standard Fire Ins. Co.*, 77 N. J. L. 757, 764–765; 73 A. 606. The Board of Tax Appeals held the

$4,737,821.17. But the assessment is $1,069,000. From the stipulation, we learn the "general accounts" are kept in New York City and all cash except $6,425.32 and all securities are located at the New York office or in banks outside of New Jersey. If we assume that the "general accounts" mentioned are the company's claims against agents, other insurance companies, and similar bills receivable, no progress is made towards their identification with New York business. Nothing is shown as to the volume of New York business in comparison with New Jersey or the other states. We are not told where business is accepted, moneys collected or insurance contracts made. The securities may represent local loans or investments in New Jersey or elsewhere made from funds derived from similar insurance contracts with a business situs at those points.[21] They may be the result of insurance activities of many kinds, taking place far from New York. If we were to assume that the intangibles of a corporation may have only one taxable situs, the mere fact that general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles does not destroy the taxability of a part of these intangibles by the state of the corporation's legal domicile. The presumption of a taxable situs solely in New Jersey is not overturned.

Universal Insurance Company and Universal Indemnity Insurance Company have appeals involving the same questions. By stipulation these cases were consolidated for review below and appeal here.

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agency balances an asset, and the reserve for taxes a liability which is deductible. Nothing was said about the reserve for contingencies. Addition of the items known to constitute assets—capital stock, surplus, reserve for unearned premiums, reserve for reinsurance, agency balances—equals $8,107,901.83.

[21] *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

These appellants are New Jersey insurance corporations, assessed by the City of Newark in the same way, under the same statute and with the same result in the state courts as the appellant in No. 449.

There are no significant distinctions between the cases. A management corporation handles these companies at a New York office, where accounts are payable. Seven per cent of the business of Universal Insurance Company originates in New Jersey. The corresponding percentage for the other company is not shown. As in No. 449, the record is silent as to the character, source and use of the securities and credits.

MR. JUSTICE FRANKFURTER announced the following opinion, concurred in by MR. JUSTICE STONE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS.

Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government [1] which should not be constrained by rigid

[1] Compare *Anderson* v. *Dunn*, 6 Wheat. 204, 226: "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."

and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended.

Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, affirming 41 N. Dak. 330; 170 N. W. 863. During all the vicissitudes which the so-called "jurisdiction-to-tax" doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval.[2] Questions affecting the fictional "situs" of intangibles, which received full consideration in *Curry* v. *McCanless, post,* p. 357, do not concern the present controversies. *Cream of Wheat Co.* v. *Grand Forks, supra,* and the cases that have followed it, afford a wholly adequate basis for affirming the judgments below.

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[2] See *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109; *Schwab* v. *Richardson,* 263 U. S. 88, 92; *Baker* v. *Druesedow,* 263 U. S. 137, 141; *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413; *Hellmich* v. *Hellman,* 276 U. S. 233, 238; *Montgomery Ward & Co.* v. *Emmerson,* 277 U. S. 573; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391; *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh,* 282 U. S. 799, 800; *First Bank Stock Corp* v. *Minnesota,* 301 U. S. 234, 237.

Syllabus.

PERKINS, SECRETARY OF LABOR, ET AL. *v.* ELG.*

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

No. 454. Argued February 3, 1939.—Decided May 29, 1939.

1. A child born here of alien parentage becomes a citizen of the United States. P. 328.
2. As municipal law determines how citizenship may be acquired, the same person may possess a dual nationality. P. 329.
3. A citizen by birth retains his United States citizenship unless deprived of it through the operation of a treaty or congressional enactment or by his voluntary action in conformity with applicable legal principles. P. 329.
4. It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties. P. 329.

   Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. P. 334.
5. This right of election is consistent with the naturalization treaty with Sweden of 1869 and its accompanying protocol. P. 335.
6. The Act of March 2, 1907, in providing "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, . . ." was aimed at voluntary expatriation and was not intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose, even though he may be deemed to have been naturalized under the foreign law by derivation from the citizenship of his parents before he came of age. P. 342.

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* Together with No. 455, *Elg* v. *Perkins, Secretary of Labor, et al.*, also on writ of certiorari to the Court of Appeals for the District of Columbia.

This is true not only where the parents were foreign nationals at the time of the birth of the child and remained such, but also where they became foreign nationals after the birth and removal of the child.

7. Recent private Acts of Congress for the relief of native citizens who have been the subject of administrative action denying their rights of citizenship, can not be regarded as the equivalent of an Act of Congress providing that persons in the situation of the respondent here have lost the American citizenship which they acquired at birth and have since duly elected to retain. P. 349.
8. Threats of deportation by the Secretary of Labor and immigration officials, and refusal by the Secretary of State to issue a passport, upon the disputed ground that the person affected has lost his native citizenship and become an alien wrongfully in the country, involve an actual controversy affording basis for a suit for a declaratory judgment that he is a citizen and for an injunction. P. 349.
9. In such a suit, the Secretary of State is properly included in the declaratory provision of the decree, that he may be precluded from refusing to issue the passport solely upon the ground that the citizenship has been lost. *Id.*

69 App. D. C. 175; 99 F. 2d 408, modified and affirmed.

CERTIORARI, 305 U. S. 591, to review the affirmance of a decree sustaining, as to the Secretary of State, and overruling, as to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization, a bill brought by Marie Elizabeth Elg for a declaratory decree establishing her status as an American citizen, and for injunctive relief against the respondents. There were cross appeals to the court below.

Mr. Henry F. Butler for Elg.

Solicitor General Jackson, with whom *Assistant Attorney General McMahon,* and *Messrs. William W. Barron, William J. Connor,* and *Green H. Hackworth* were on the brief, for Perkins, Secretary of Labor, et al.

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

The question is whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States.

Miss Elg was born in Brooklyn, New York, on October 2, 1907. Her parents, who were natives of Sweden, emigrated to the United States sometime prior to 1906 and her father was naturalized here in that year. In 1911, her mother took her to Sweden where she continued to reside until September 7, 1929. Her father went to Sweden in 1922 and has not since returned to the United States. In November, 1934, he made a statement before an American consul in Sweden that he had voluntarily expatriated himself for the reason that he did not desire to retain the status of an American citizen and wished to preserve his allegiance to Sweden.

In 1928, shortly before Miss Elg became twenty-one years of age, she inquired of an American consul in Sweden about returning to the United States and was informed that if she returned after attaining majority she should seek an American passport. In 1929, within eight months after attaining majority, she obtained an American passport which was issued on the instructions of the Secretary of State. She then returned to the United States, was admitted as a citizen and has resided in this country ever since.

In April, 1935, Miss Elg was notified by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. Proceedings to effect her deportation have been postponed from time to time. In July, 1936, she applied for an American passport but it was refused by the Secretary of State upon the sole ground that he was without authority to issue it because she was not a citizen of the United States.

Thereupon she began this suit against the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State to obtain (1) a declaratory judgment that she is a citizen of the United States and entitled to all the rights and privileges of citizenship, and (2) an injunction against the Secretary of Labor and the Commissioner of Immigration restraining them from prosecuting proceedings for her deportation, and (3) an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she is not a citizen.

The defendants moved to dismiss the complaint, asserting that plaintiff was not a citizen of the United States by virtue of the Naturalization Convention and Protocol of 1869 (proclaimed in 1872) between the United States and Sweden (17 Stat. 809) and the Swedish Nationality Law, and § 2 of the Act of Congress of March 2, 1907, 8 U. S. C. 17. The District Court overruled the motion as to the Secretary of Labor and the Commissioner of Immigration and entered a decree declaring that the plaintiff is a native citizen of the United States but directing that the complaint be dismissed as to the Secretary of State because of his official discretion in the issue of passports. On cross appeals, the Court of Appeals affirmed the decree. 69 App. D. C. 175; 99 F. 2d 408. Certiorari was granted, December 5, 1938.

First. On her birth in New York, the plaintiff became a citizen of the United States. Civil Rights Act of 1866,

14 Stat. 27; Fourteenth Amendment, § 1; *United States* v. *Wong Kim Ark,* 169 U. S. 649. In a comprehensive review of the principles and authorities governing the decision in that case—that a child born here of alien parentage becomes a citizen of the United States—the Court adverted to the "inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship." *United States* v. *Wong Kim Ark, supra,* p. 668. As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality.[1] And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

Second. It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.[2]

[1] Oppenheim's International Law, Vol. 1, § 308; Moore, International Law Digest, Vol. III, p. 518; Hyde, International Law, Vol. I, § 372; Flournoy, Dual Nationality and Election, 30 Yale Law Journal, 546; Borchard, Diplomatic Protection of Citizens Abroad, § 253; Van Dyne, Citizenship of the United States, p. 25; Fenwick, International Law, p. 165.

[2] Hyde, *op. cit.,* §§ 374, 375; Borchard, *op. cit.,* § 259; Van Dyne, *op. cit.,* pp. 25–31; Moore, Int. Law Dig., Vol. III, pp. 532–551.

This principle was clearly stated by Attorney General Edwards Pierrepont in his letter of advice to the Secretary of State, Hamilton Fish, in *Steinkauler's Case,* 15 Op. Attys. Gen'l, 15 (1875). The facts were these: One Steinkauler, a Prussian subject by birth, emigrated to the United States in 1848, was naturalized in 1854, and in the following year had a son who was born in St. Louis. Four years later Steinkauler returned to Germany taking this child and became domiciled at Wiesbaden where they continuously resided. When the son reached the age of twenty years the German Government called upon him to report for military duty and his father then invoked the intervention of the American Legation on the ground that his son was a native citizen of the United States. To an inquiry by our Minister, the father declined to give an assurance that the son would return to this country within a reasonable time. On reviewing the pertinent points in the case, including the Naturalization Treaty of 1868 with North Germany, the Attorney General reached the following conclusion:

"Young Steinkauler is a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States; but the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance and has acquired for himself and his son German citizenship and the rights which it carries, and he must take the burdens as well as the advantages. The son being domiciled with the father and subject to him under the law during his minority, and receiving the German protection where he has acquired nationality and declining to give any assurance of ever returning to the United States and claiming his American nationality by residence here, I am of opinion that he cannot rightly invoke the aid of

the Government of the United States to relieve him from military duty in Germany during his minority. But I am of opinion that when he reaches the age of twenty-one years he can then elect whether he will return and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father. This seems to me to be 'right reason', and I think it is law."

Secretary William M. Evarts, in 1879, in an instruction to our Minister to Germany with respect to the status of the brothers Boisseliers who were born in the United States of German parentage said: [3]

"Their rights rest on the organic law of the United States. . . . Their father, it is true, took them to Schleswig when they were quite young, the one four and the other two years old. They lived there many years, but during all those years they were minors, and during their minority they returned to the United States; and now, when both have attained their majority, they declare for their native allegiance and submit themselves to the jurisdiction of the country where they were born and of which they are native citizens. Under these circumstances this Government cannot recognize any claim to their allegiance, or their liability to military service, put forth on the part of Germany, whatever may be the municipal law of Germany under which such claim may be asserted by that Government."

Secretary Evarts gave a similar instruction in 1880 with respect to a native citizen of Danish parentage who having been taken abroad at an early age claimed American citizenship on attaining his majority, saying: [4]

"He lost no time, when he attained the age of majority, in declaring that he claimed the United States as his country, and that he considered himself a citizen of

[3] Moore, Int. Law Dig., Vol. III, p. 543.

[4] Moore, Int. Law. Dig., Vol. III, p. 544.

the United States. He appears to have adhered to this choice ever since, and now declares it to be his intention to return to this country and reside here permanently. His father's political status (whether a citizen of the United States or a Danish subject) has no legal or otherwise material effect on the younger P———s' rights of citizenship."

Secretary Thomas F. Bayard, in answer to an inquiry by the Netherlands Legation whether one born in the United States, of Dutch parents, who during minority had been taken back to the Netherlands by his father, on the latter's resumption of permanent residence there, was an American citizen, answered: [5]

"But the general view held by this Department is that a naturalized American citizen by abandonment of his allegiance and residence in this country and a return to the country of his birth, *animo manendi,* ceases to be a citizen of the United States; and that the minor son of a party described as aforesaid, who was born in the United States during the citizenship there of his father, partakes during his legal infancy of his father's domicile, but upon becoming *sui juris* has the right to elect his American citizenship, which will be best evidenced by an early return to this country.

"This right so to elect to return to the land of his birth and assume his American citizenship could not, with the acquiescence of this Government, be impaired or interfered with."

In 1906, a memorandum, prepared in the Department of State by its law officer, was sent by the Acting Secretary of State, Robert Bacon, to the German Ambassador

[5] Foreign Relations, 1888, Pt. 2, p. 1341. See, also, Mr. Bayard, Secretary of State to Mr. McLane (1888), to Count Sponneck, Danish Minister (1888); Moore, Int. Law Dig., Vol. III, p. 548; Mr. Olney, Secretary of State, to Mr. Materne, 1896; Moore, Int. Law Dig., Vol. III, p. 542; *United States ex rel. Scimeca* v. *Husband,* 6 F. 2d 957, 958.

as covering "the principles" upon which the Department had acted. In this memorandum it was said: [6]

"Assuming that Alexander Bohn [the father] never became a citizen of the United States, Jacob Bohn [the son] was born of German parents in the United States. According to the Constitution and laws of the United States as interpreted by the courts, a child born to alien parents in the United States is an American citizen, although such child may also be a citizen of the country of his parents according to the law of that country.

"Although there is no express provision in the law of the United States giving election of citizenship in such cases, this department has always held in such circumstances that if a child is born of foreign parents in the United States, and is taken during minority to the country of his parents, such child upon arriving of age, or within a reasonable time thereafter, must make election between the citizenship which is his by birth and the citizenship which is his by parentage. In case a person so circumstanced elects American citizenship he must, unless in extraordinary circumstances, in order to render his election effective, manifest an intention in good faith to return with all convenient speed to the United States and assume the duties of citizenship." [7]

We have quoted liberally from these rulings—and many others might be cited—in view of the contention now urged by the petitioners in resisting Miss Elg's claim to citizenship. We think that they leave no doubt of the controlling principle long recognized by this Government.

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[6] Foreign Relations, 1906, p. 657. See, also, "Compilation of Certain Departmental Circulars" relating to citizenship, etc., issued by Department of State, 1925, containing instructions to Diplomatic and Consular Officers under date of November 24, 1923, pp. 118, 121, 122; *United States ex rel. Baglivo* v. *Day,* 28 F. 2d 44.

[7] See also, Mr. Uhl, Acting Secretary of State to Mr. Rudolph, May 22, 1895, 202 MS. Dom. Let. 298; Moore, Int. Law Dig., Vol. III, p. 534.

That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.

Petitioners stress the American doctrine relating to expatriation. By the Act of July 27, 1868,[8] Congress declared that "the right of expatriation is a natural and inherent right of all people." Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.[9] It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it.

The question then is whether this well recognized right of election has been destroyed by treaty or statute.

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[8] 15 Stat. 223.

[9] Van Dyne, *op. cit.*, p. 269; Borchard, *op. cit.*, § 315; Hyde, *op. cit.*, § 376.

Third. Petitioners invoke our treaty with Sweden of 1869.[10] This treaty was one of a series of naturalization treaties with similar terms, which were negotiated with various countries between 1868 and 1872.[11] The relevant portions of the text of the treaty with Sweden, and of the accompanying protocol, are set forth in the margin.[12]

[10] 17 Stat. 809.

[11] North German Confederation, 1868, 15 Stat. 615; Bavaria, 1868, 15 Stat. 661; Baden, 1868, 16 Stat. 731; Württemberg, 1868, 16 Stat. 735; Hesse, 1868, 16 Stat. 743; Belgium, 1868, 16 Stat. 747; Great Britain, 1870, 16 Stat. 775; Austria-Hungary, 1870, 17 Stat. 833; Denmark, 1872, 17 Stat. 941. See Flournoy and Hudson, Nationality Laws, pp. 661–673; Moore, Int. Law Dig., Vol. III, p. 358.

[12] The treaty provides:

"The President of the United States of America and His Majesty the King of Sweden and Norway, led by the wish to regulate the citizenship of those persons who emigrate from the United States of America to Sweden and Norway and their dependencies and territories, and from Sweden and Norway to the United States of America, have resolved to treat on this subject, and have for that purpose appointed plenipotentiaries to conclude a convention, . . . who have agreed to and signed the following articles:

"Article I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

"Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired.

. . . . . .

"Article III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship,

The treaty manifestly deals with expatriation and the recognition of naturalization by the respective powers. The recital states its purpose; that is, "to regulate the citizenship of those persons who emigrate" to one country from the other. The terms of the treaty are directed to that purpose and are appropriate to the recognition of the status of those who voluntarily take up their residence for the prescribed period in the country to which they emigrate. Article I of the treaty provides:

"Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become

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the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper."

The protocol containing "the following observations, more exactly defining and explaining the contents" of the convention provides:

"I. Relating to the first article of the convention.

"It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

. . . . . .

"III. Relating to the third article of the convention.

"It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

"The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway."

and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

"Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired."

We think that this provision in its direct application clearly implies a voluntary residence and it would thus apply in the instant case to the father of respondent. There is no specific mention of minor children who have obtained citizenship by birth in the country which their parents have left. And if it be assumed that a child born in the United States would be deemed to acquire the Swedish citizenship of his parents through their return to Sweden and resumption of citizenship there,[13] still nothing is said in the treaty which in such a case would destroy the right of election which appropriately belongs to the child on attaining majority. If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity. Moreover, the provisions of Article III must be read in connection with Article I. Article III provides:

"If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named

[13] Compare Secretary Hay to Mr. Harris, Foreign Relations, 1900, p. 13.

country is authorized to receive him again as a citizen on such conditions as the said government may think proper."

If the first article could be taken to cover the case of a child through the derivation of citizenship from that of his emigrating parents, Article III by the same token would be applicable to the case of a child born here and taken to Sweden, who at majority elects to return to the United States and to assume the privileges and obligations of American citizenship. In that event, the Government of the United States is expressly authorized to receive one so returning "as a citizen on such conditions as the said government may think proper." And if this Government considers that a native citizen taken from the United States by his parents during minority is entitled to retain his American citizenship by electing at majority to return and reside here, there would appear to be nothing in the treaty which would gainsay the authority of the United States to recognize that privilege of election and to receive the returning native upon that basis. Thus, on the facts of the present case, the treaty does not purport to deny to the United States the right to treat respondent as a citizen of the United States, and it necessarily follows that, in the absence of such a denial, the treaty cannot be set up as a ground for refusing to accord to respondent the rights of citizenship in accordance with our Constitution and laws by virtue of her birth in the United States.

Nor do we find anything in the terms of the protocol, accompanying the treaty, which can be taken to override the right of election which respondent would otherwise possess. Article III of the protocol refers to the case of a Swede who has become a naturalized citizen of the United States and later renews his residence in Sweden "without the intent to return to America." And

it provides that the intent not to return may be held to exist when the person "so naturalized" resides more than two years in Sweden. This does not appear to be applicable to respondent, who was born in the United States, but, apart from that, the intent not to return could not properly be attributed to her during minority, and if it were so attributed, the presumption would be rebutted by the election to return to the United States at majority. Compare *United States* v. *Howe*, 231 F. 546, 549.[14]

The views we have expressed find support in the construction placed upon the naturalization treaties of 1868 to 1872[15] in the period following their ratification. The first of those treaties was made in 1868 with the North German Confederation[16] and contained provisions similar to those found in the treaty with Sweden. But it was under this German treaty that Steinkauler's case arose in 1875, to which we have already referred, where Attorney General Pierrepont upheld the right of election, saying:[17] "Under the treaty, and in harmony with the American doctrine, it is clear that Steinkauler, the father, abandoned his naturalization in America and became a German subject (his son being yet a minor), and that by virtue of German laws the son acquired German nationality. It is equally clear that the son by birth has American nationality; and hence he has two nationalities, one natural, the other acquired. . . . There is no law of

[14] While the nationality law of Sweden is not to be regarded as controlling unless the treaty makes it so—which we have found is not the case—it may be observed that it is not clear that the law of Sweden would operate so as to preclude recognition that respondent is a citizen of the United States. See the Swedish law of 7 May, 1909, Art. 8. That, however, is a question of foreign law which we find it unnecessary to attempt to determine.

[15] See Note 10.

[16] 15 Stat. 615. See *Terlinden* v. *Ames*, 184 U. S. 270, 283, 284.

[17] 15 Op. Attys. Gen'l. 15, 17, 18.

the United States under which his father or any other person can deprive him of his birthright." To the same effect, as to the right of election, was the ruling of Secretary Evarts in 1879 in his instruction, above quoted, to our minister to Germany with respect to the brothers Boisseliers.[18]

There were provisions similar to those in the treaty with Sweden in the naturalization treaty with Denmark of 1872,[19] but Secretary Evarts evidently did not regard those provisions as inconsistent with the claim, which he sustained, of one born here of Danish parentage who was taken abroad by his parents but insisted upon his American citizenship when he arrived at his majority.[20] These rulings, following closely upon the negotiation of these naturalization treaties, show beyond question that the treaties were not regarded as abrogating the right of election for which respondent here contends.

Later rulings were to the same effect. Thus, in 1890, in dealing with a native American citizen who, upon his own application, had been admitted to Danish citizenship during his minority, and who had not yet come of age, the Secretary of State, while recognizing that "when a citizen of the United States voluntarily becomes naturalized or renaturalized in a foreign country, he is to be regarded as having lost his rights as an American citizen," was careful to make the following qualifications in support of the right of election at majority, saying:

"As Mr. Anderson has not yet attained his majority, the Department is not prepared to admit that proceedings taken on his behalf in Denmark during his minority would deprive him of his right, upon reaching the age of twenty-one years, to elect to become an American

[18] Moore, Int. Law Dig., Vol. III, p. 543.

[19] 17 Stat. 941.

[20] Moore, Int. Law Dig., Vol. III, p. 544.

citizen by immediately returning to this country to resume his allegiance here." [21]

Petitioners refer to an instruction by Secretary Sherman in 1897 [22] in answer to a question as to the effect of a person's return to his native country for a visit on his rights as an American citizen which had been acquired through the naturalization of his father. While Secretary Sherman recognized "the acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes," the Secretary added the following:

"If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper. (Treaty of 1869, Article III.) Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship. (Protocol, May 26, 1869.) But this presumption, like all presumptions of intent, may be rebutted by proof. Until a person so circumstanced shall be held to have voluntarily abandoned his American citizenship, or shall have acquired another citizenship upon application to that end and by due process of law, this Government is entitled to claim his allegiance and constrained to protect him as a citizen so long as he shall be found bona fide entitled thereto."

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[21] Mr. Wharton, Acting Secretary of State, to Count Sponneck, Danish Minister (1890); Moore, Int. Law Dig., p. 715.

[22] Secretary Sherman to Mr. Grip, Swedish Minister, June 15, 1897; Moore, Int. Law Dig., Vol. III, p. 472; 8 MS., Notes to Sweden, 58.

We find nothing in that instruction which is inconsistent with the maintenance of respondent's right of election in the instant case. So far as the instruction in relation to a naturalized minor may be deemed to be pertinent, it confirms rather than opposes respondent's right to be considered an American citizen.

That the Department of State continued to maintain the right of election is further shown by the memorandum of applicable principles which it issued in 1906, above quoted, to the effect that the Department had "always held in such circumstances that if a child is born of foreign parents in the United States, and is taken during minority to the country of his parents, such child upon arriving of age, or within a reasonable time thereafter, must make election between the citizenship which is his by birth and the citizenship which is his by parentage." [23]

Fourth. We think that petitioners' contention under § 2 of the Act of March 2, 1907,[24] is equally untenable. That statutory provision is as follows:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as

[23] Foreign Relations, 1906, p. 657.

[24] 34 Stat. 1228; 8 U. S. C. 17.

the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war." [25]

Petitioners contend that respondent's acquisition of derivative Swedish citizenship makes her a person who has been "naturalized under Swedish law," and that therefore "she has lost her American citizenship" through the operation of this statute. We are unable to accept that view. We think that the statute was aimed at a voluntary expatriation and we find no evidence in its terms that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose. If by virtue of derivation from the citizenship of one's parents a child in that situation can be deemed to have been naturalized under the foreign law, still we think in the absence of any provision to the contrary that such naturalization would not destroy the right of election.

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[25] Sections 5 and 6 of this statute should also be noted as they contain provisions applicable to minor children. They are as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* That such naturalization or resumption takes place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

"Sec. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

It should also be noted that the Act of 1907 in §§ 5 and 6 [26] has specific reference to children born without the United States of alien parents but says nothing as to the loss of citizenship by minor children born in the United States.

That in the latter case the child was not deemed to have lost his American citizenship by virtue of the terms of the statute but might still with reasonable promptness on attaining majority manifest his election is shown by the views expressed in the instructions issued under date of November 24, 1923, by the Department of State to the American Diplomatic and Consular Officers.[27] These instructions dealt with the questions arising under the citizenship act of March 2, 1907, and cases of dual nationality. It was stated that it was deemed desirable "to inform diplomatic and consular officers of the department's conclusions, for their guidance in handling individual cases." Commenting on dual nationality the instructions said:

"The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles."

And after referring to the Fourteenth Amendment and the Act of February 2, 1855, R. S. 1993, the instructions continued:

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[26] See Note 25.

[27] "Compilation of Certain Departmental Circulars" relating to citizenship, etc., issued by Department of State, 1925, containing instructions to diplomatic and consular officers under date of November 24, 1923, pp. 118, 121, 122.

"It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States should respect its claim to allegiance. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim. The statutory law of the United States affords some guidance but not all that could be desired, because it fails to announce the circumstances when the child who resides abroad within the territory of a State reasonably claiming his allegiance forfeits completely the right to perfect his inchoate right to retain American citizenship. The department must, therefore, be reluctant to declare that particular conduct on the part of a person after reaching adult years in foreign territory produces a forfeiture or something equivalent to expatriation.

"The statute does, however, make a distinction between the burden imposed upon the person born in the United States of foreign parents and the person born abroad of American parents. With respect to the latter, section 6 of the Act of March 2, 1907, lays down the requirement

that, as a condition to the protection of the United States, the individual must, upon reaching the age of 18, record at an American consulate an intention to remain a citizen of the United States, and must also take an oath of allegiance to the United States upon attaining his majority.

"The child born of foreign parents in the United States who spends his minority in the foreign country of his parents' nationality is not expressly required by any statute of the United States to make the same election as he approaches or attains his majority. It is, nevertheless, believed that his retention of a right to demand the protection of the United States should, despite the absence of statute, be dependent upon his convincing the department within a reasonable period after the attaining of his majority of an election to return to the United States, there to assume the duties of citizenship. In the absence of a definite statutory requirement, it is impossible to prescribe a limited period within which such election should be made. On the other hand, it may be asserted negatively that one who has long manifested no indication of a will to make such an election should not receive the protection of the United States save under the express approval of the department."

It thus appears that as late as 1925, when the Department issued its "Compilation" including the circular instruction of November 24, 1923, it was the view of the Department of State that the Act of March 2, 1907, had not taken away the right of a native citizen on attaining majority to retain his American citizenship, where he was born in the United States of foreign parents. We do not think that it would be a proper construction of the Act to hold that while it leaves untouched the right of election on the part of a child born in the United States, in case his parents were foreign nationals at the time of his birth and have never lost their foreign nationality, still the statute should be treated as destroying that

right of election if his parents became foreign nationals through naturalization. That would not seem to be a sensible distinction. Having regard to the plain purpose of § 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority. And, on the facts of the instant case, this view apparently obtained when in July, 1929, on the instructions of the Secretary of State, the Department issued the passport to respondent as a citizen of the United States.

But although respondent promptly made her election and took up her residence in this country accordingly, and had continued to reside here, she was notified in April, 1935, that she was an alien and was threatened with deportation.

When, precisely, there occurred a change in the departmental attitude is not clear.[28] It seems to have resulted in a conflict with the opinion of the Solicitor of the Department of Labor in the case of Ingrid Therese Tobiassen, and the Secretary of Labor because of that conflict requested the opinion of the Attorney General, which was given on June 16, 1932.[29] It appeared that Miss Tobiassen, aged 20, was born in New York in 1911; that her father, a native of Norway, became a citizen of the United States by naturalization in 1912; that in 1919 Miss Tobiassen was taken by her parents to Norway where the latter had since resided; that at the age of 18 she returned to the United States and took up her permanent residence in New Jersey. The question arose

[28] That there had been a change is frankly stated in the communication (a copy of which is annexed to the complaint) addressed by the American Consul at Göteborg, Sweden, to the respondent's father under date of October 29, 1935.

[29] 36 Op. Attys. Gen'l, p. 535.

when she asked for a return permit to visit her parents. The Department of State refused to issue a passport on the ground that Miss Tobiassen had acquired Norwegian nationality and had ceased to be an American citizen. The Attorney General's opinion approved that action.

His opinion quoted the provisions of the treaty with Sweden and Norway of 1869 [30] and referred to the Norwegian Nationality Law of August 8, 1924, and to the provisions of the Act of Congress of March 2, 1907. The opinion noted that the claim that Miss Tobiassen had ceased to be an American citizen did "not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country, as a result of the renunciation by her father, a native of Norway, of his American citizenship, and the resumption of his Norwegian nationality in pursuance of the terms of that treaty." The law of Norway was deemed to be analogous to our statutes "by virtue of which foreign-born minor children of persons naturalized in the United States are declared to be citizens of this country"; and hence the conclusion that Miss Tobiassen having acquired Norwegian nationality had in consequence ceased to be an American citizen was said to be correct.

The opinion does not discuss the right of election of a native citizen of the United States when he becomes of age to retain American citizenship and does not refer to the repeated rulings of the Department of State in recognition of that right, the exercise of which, as we have pointed out, should not be deemed to be inconsistent with either treaty or statute. We are reluctant to disagree with the opinion of the Attorney General, and we are fully conscious of the problems incident to dual nationality and of the departmental desire to limit them,

[30] Cited as of June 14, 1871, the date of the exchange of ratifications.

but we are compelled to agree with the Court of Appeals in the instant case that the conclusions of that opinion are not adequately supported and are opposed to the established principles which should govern the disposition of this case.[31]

Nor do we think that recent private acts of Congress [32] for the relief of native citizens who have been the subject of administrative action denying their rights of citizenship, can be regarded as the equivalent of an Act of Congress providing that persons in the situation of the respondent here have lost the American citizenship which they acquired at birth and have since duly elected to retain. No such statute has been enacted.

We conclude that respondent has not lost her citizenship in the United States and is entitled to all the rights and privileges of that citizenship.

Fifth. The cross petition of Miss Elg, upon which certiorari was granted in No. 455, is addressed to the part of the decree below which dismissed the bill of complaint as against the Secretary of State. The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg "solely on the ground that she had lost her native born American citizenship." The court below, properly recognizing the existence of an actual controversy with the defendants

[31] The same may be said of the opinion of the Circuit Court of Appeals of the Ninth Circuit in *United States* v. *Reid,* 73 F. 2d 153 (certiorari denied upon the ground that the application was not made within the time provided by law, 299 U. S. 544), so far as it is urged by petitioners as applicable to the facts of the instant case.

[32] Act of July 13, 1937, 50 Stat. Pt. 2, p. 1030; Act of June 25, 1938 (Private No. 751, 75th Cong., 3d Sess.).

(*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), declared Miss Elg "to be a natural born citizen of the United States," and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.

The decree will be modified accordingly so as to strike out that portion which dismisses the bill of complaint as to the Secretary of State, and so as to include him in the declaratory provision of the decree, and as so modified the decree is affirmed.

Modified and affirmed.

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

TOLEDO PRESSED STEEL CO. *v.* STANDARD PARTS, INC.*

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

No. 166. Argued March 1, 1939.—Decided May 29, 1939.

1. Patent No. 1,732,708, Claims 1, 2, 5–7, 11–13, to Withrow and Close, relating to a burner for outdoor warning signals, diminishing liability of flame extinguishment by wind and rain, *held* invalid for want of invention. P. 356.
2. Aggregation of two old devices, productive of no new joint function, is not invention. P. 356.

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* Together with No. 167, *Toledo Pressed Steel Co.* v. *Huebner Supply Co.*, also on writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and No. 603, *Montgomery Ward & Co.* v. *Toledo Pressed Steel Co.*, on writ of certiorari to the Circuit Court of Appeals for the Second circuit.

3. Evidence of unsuccessful efforts upon the part of a few others, not familiar with the prior art, to attain the result achieved by the patented device; of acceptance of licenses by manufacturers not shown to have made wide or successful use of it; and evidence of its utility and commercial success,—*held* insufficient to establish novelty in this case. P. 356.

93 F. 2d 336, affirmed.

99 F. 2d 806, reversed.

CERTIORARI, 305 U. S. 667; 306 *id.* 623, to review three decrees in infringement suits. In the first two suits, which involved the same claims, relief was denied by the court below. In the third suit, which involved some of those claims and some others in addition, relief was granted.

Messrs. Samuel E. Darby, Jr. and *Wilber Owen* for petitioner in Nos. 166 and 167 and respondent in No. 603.

Mr. Carl V. Wisner, with whom *Messrs. Anthony William Deller* and *Carl V. Wisner, Jr.* were on the brief, for petitioner in No. 603.

Mr. W. P. Bair, with whom *Mr. Will Freeman* was on the brief, for respondents in Nos. 166 and 167.

MR. JUSTICE BUTLER delivered the opinion of the Court.

These are patent infringement suits brought by the Toledo Pressed Steel Company, owner of Withrow and Close Patent No. 1,732,708, issued October 22, 1929, for a burner for use in outdoor warning signals such as construction torches and truck flares. The first two suits were brought in the federal court for the northern district of Ohio. It filed an opinion indicating the facts that it deemed established by the evidence and without formal findings held the patent valid and infringed by the Bolser and Kari-Keen flares respectively sold by the defendants. The circuit court of appeals for the sixth circuit held the

patent invalid for want of invention and reversed. 93 F. 2d 336. The other suit was brought in the federal court for the eastern district of New York. It made findings as required by Rule 70½, held plaintiff's patent invalid, and dismissed the bill. The circuit court of appeals for the second circuit held the patent valid and infringed by the Anthes flare sold by the defendant, and reversed. 99 F. 2d 806.

In the interest of plaintiff, seeking to uphold the patent prima facie valid, and of the public, liable to exclusion from manufacture, use, or sale in virtue of the right it purports to confer, final adjudication as to validity is of primary importance. The patent in suit relates to torches for guarding street obstructions and to flares, which are large torches, for warning that vehicles are stopped on the road.

Formerly, red lanterns were much used. But, after general use of automobiles having red tail lights to some extent resembling them, they did not serve so satisfactorily as before. Open-flame torches came to be extensively employed. The motion of the luminescent flame distinguishes them from other signals. But there were complaints that they were sometimes extinguished by wind or rain.

Open-flame torches in use for some years before patentees' claimed invention, included those which were bomb-shaped, flat-bottomed, weighted for stability, and with an opening in the top for a wick. That type was well known, at least after the patent covering it, McCloskey No. 1,610,301, was issued December 14, 1926; in 1929 it was held invalid by the circuit court of appeals for the sixth circuit for lack of invention and because anticipated. *McCloskey* v. *Toledo Pressed Steel Co.*, 30 F. 2d 12. Plaintiff had a large business in the manufacture and sale of torches, including the McCloskey type. It advertised that they would burn in all kinds of weather;

having received many complaints of extinguishment by wind and rain, patentees, respectively plaintiff's president and vice president, set about producing something to make them dependable and to serve as represented. Within a year, but after experiments, trials, and failures, they brought forward the patented device.

The specification states that the claimed invention particularly relates to devices to increase efficiency and to prevent flame extinguishment. It declares that the objects of the invention are to provide a simple attachment to attain those ends and a burner so constructed that liability of extinguishment by wind or rain will be reduced to a minimum. It further says that with the described construction and arrangement consumption of oil and wick is materially decreased.

The claims involved are printed in the margin.[1] Considered together, unobscured by artificiality in their state-

[1] In all the cases, claims 2, 5, 11 and 12 are involved. In Nos. 166 and 167, claim 13 is also involved. In No. 167, claims 1, 6 and 7 are also involved.

"1. In a device of the class described, a torch body having an opening at its upper end, a wick-receiving tube extending into said opening, and a cap disposed on the outer side of said torch body to enclose the outer end of the wick, said cap having an imperforate upper wall, lateral flame openings, and air openings below the flame openings.

"2. In a device of the class described, a torch body having an opening for a wick, and a flame guard for said wick mounted on the outside of said torch body, said guard including a cap provided with an imperforate top wall and lateral flame openings adapted to emit a luminescent flame, and air ports.

"5. In a device of the class described, a construction torch having an opening in its upper end for a wick, means to hold the wick in place, and a guard fitting over the outer end of the wick but spaced from the sides thereof, said guard having an imperforate top wall and side flame and air openings.

"6. In a device of the class described, a torch body having a wick-opening, a tube for receiving the wick and adapted to extend inside of the torch body, an outwardly extending flange in the region of said

ment, it fairly may be said that they show that all that the patentees did was to put over the wick of a torch, well known in the art, an inverted metal cuplike cap having holes in its sides, some to let in air for combustion and others to let out flame. The cap was also well known and had been used as a part of other devices for the protection of kerosene and other flames.

A number of devices patented earlier than plaintiff's included the elements essential to its burner.

Billingham Patent, No. 191,031, issued August 15, 1876, related to torches for lighting street-lamps. It shows a

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wick-opening, and a cap connected to said flange and having an imperforate top wall, said cap having a flame opening adjacent its outer end and an air port beneath said flame opening.

"7. In a device of the class described, a torch body having a wick-opening, a cap for enclosing the outer end of the wick but spaced from the sides thereof, an imperforate end wall for said cap, said cap having a series of flame openings and a series of air ports beneath the flame openings, and a disc adapted to embrace the wick and having a flanged upper portion disposed in the region of said air ports.

"11. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a supporting and heat-receiving flange, and means enclosing a space above said flange and surrounding the wick, except for provision for lateral exit of flame and restricted entrance of air for combustion.

"12. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a lateral flange, and a cap enclosing and spaced from the end of the wick and having an imperforate top and provision for lateral exit of flame and entrance of air, and the bottom of the cap being in heat conducting relation to said flange.

"13. A burner for a construction torch adapted to emit a luminescent flame and comprising a wick holder having a portion in contact with the wick and a laterally extending flange and a cap over the wick, the cap having an imperforate, dome-shaped top wall, a lateral flame opening approximately even with the top of the wick and a smaller opening for the inlet of air lower than the flame opening and above the lower edge of the cap, said lower edge being in heat-transferring relation to said flange."

wick-type torch with a tube-like cap having holes, some to let in air, and others to let the flame come out. This cap, imperforate at the top, serves to prevent extinguishment of the flame by wind or rain. Almond Patent, No. 193,796, issued August 7, 1877, related to vapor burners for heating. The device, some parts detached, serves as an illuminating lamp consisting of a body, a wick holder, a cap, a flange having a rim supporting a tube closed at the top. Holes are in the rim to admit air; larger ones in the tube are to let the flames out. Rutz Patent, No. 1,101,146, issued June 23, 1914, covers a flash igniter for gas stove burners. It has a cap to guard the flame and adapted to emit flames extending from the igniter to the gas burners to be lighted. This cap, like plaintiff's, has a supporting and heat receiving flange, a means to enclose the space above the flange and a restricted entrance to admit air for combustion. The record shows that the Rutz hood has been used to achieve the identical results attained by plaintiff's device.

There are other patents, issued before patentees developed the structure in suit, that may be referred to as relevant to the issue of invention in this case. Examples of these are cited in the margin.[2]

The torch body was old in the art to which it belonged. The cap, as part of devices used in other fields, was old and useful to prevent extinguishment of flames by wind or rain and to permit flames to extend through holes to the open air. The problem patentees set for themselves was to prevent extinguishment while preserving usefulness of the flames as warning signals. They solved it by merely bringing together the torch and cap. As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion,

[2] Blake Patent, No. 453,335, June 2, 1891. Heston Patent, No. 270,587, January 16, 1883. Reekie Patent, No. 192,130, June 19, 1877. Kahn Patent, No. 1,175,527, March 14, 1916.

to protect the flame from wind and rain and to allow it to emerge as a warning signal. They performed no joint function. Each served as separately it had done. The patented device results from mere aggregation of two old devices, and not from invention or discovery. *Hailes* v. *Van Wormer,* 20 Wall. 353, 368. *Reckendorfer* v. *Faber,* 92 U. S. 347, 357. *Lincoln Co.* v. *Stewart-Warner Corp.,* 303 U. S. 545, 549–50. On the records before us, it is impossible to hold that production of the patented device required more than mechanical skill and originality attributable to those familiar with the art of protecting flames of kerosene and other burners. *Altoona Theatres* v. *Tri-Ergon Corp.,* 294 U. S. 477, 486; *Powers-Kennedy Co.* v. *Concrete Co.,* 282 U. S. 175, 186; *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 184, 185; *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59, 72–73.

As evidence in its favor on the question of invention, plaintiff cites efforts to find something useful to protect open-flame torches from extinguishment by wind or rain put forth by one engaged in operation of a street railway and by another employed by a manufacturer of lanterns. But it does not appear that either was familiar with the relevant prior art. Nor is there any evidence of general or widespread effort to solve the problem here involved. There is nothing that tends to raise what patentees did to the realm of invention. See *Paramount Corp.* v. *Tri-Ergon Corp.,* 294 U. S. 464, 476. Plaintiff also brings forward the fact that some manufacturers, including three substantial ones, have taken licenses under its patent. It does not appear that these licensees have made wide or successful use of the device. Lack of novelty being clearly shown, acceptance of license under the circumstances of this case, is without weight. *Thropp's Sons Co.* v. *Seiberling,* 264 U. S. 320, 330. *John T. Riddell* v. *Athletic Shoe Co.,* 75 F. 2d 93, 95. And similarly without significance on the question of novelty is the fact that, as plaintiff

claims, utility resulted and commercial success followed from what patentees did. *Firestone Tire & Rubber Co.* v. *U. S. Rubber Co.*, 79 F. 2d 948, 954.

It results that the decrees in Nos. 166 and 167 must be affirmed, and that in No. 603 must be reversed.

Nos. 166 and 167, affirmed.
No. 603, reversed.

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

CURRY, STATE TAX COMMISSIONER OF ALABAMA, ET AL. *v.* McCANLESS, COMMISSIONER OF FINANCE AND TAXATION OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 339. Argued January 9, 1939. Reargued April 28, 1939.—Decided May 29, 1939.

1. Decedent, domiciled in Tennessee, transferred to a trustee in Alabama certain stocks and bonds on specific trusts. The net income was to be paid to her during her lifetime; and upon her death the property was to be held in trust for specified beneficiaries. She reserved, however, certain powers over the trustee and the handling of the trust, and the power to dispose of the estate as she might direct by will. Until her death the trust was administered by the trustee in Alabama and the paper evidences of the intangible property were kept there. Upon her death, in Tennessee, she bequeathed the trust property to the same trustee to be held in trust for the same and other beneficiaries, in different amounts and by different estates from those provided for by the trust indenture. By the will she appointed a Tennessee executor "as to all property which I may own in the State of Tennessee at the time of my death," and an Alabama executor "as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state." It was probated and letters testamentary issued to the respective executors, in both States.

Held that each of the two States could constitutionally impose a

tax on the transfer of the intangibles held by the Alabama trustee but passing under the will of the decedent, domiciled in Tennessee. Pp. 360, 372–373.

2. The opinion considers the grounds for the doctrine that power to tax tangible property is confined to the State in which the property is located. P. 363.

   When we speak of the jurisdiction to tax land or chattels as being exclusively in the State where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the State in whose territory the physical property is located as to set practical limits to taxation by others. P. 364.

3. Rights in intangible property are but relationships between persons, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them can not be exerted through control of a physical thing, but can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. As sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they can not be dissociated from the persons from whose relationships they are derived. P. 366.

4. From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. P. 366.

5. In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam*. P. 367.

6. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not

even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each State concerned to tax. P. 367.

7. The State of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently there are many circumstances in which more than one State may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. P. 368.
8. Since Alabama may lawfully tax the property in the trustee's hands, the Court perceives no ground for saying that the Fourteenth Amendment forbids that State to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another State. P. 370.
9. Exercise of the decedent's power to dispose of the intangibles was a taxable event in Tennessee. P. 371.
10. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one State by selecting a trustee there and others within the control of the other State by making her domicile there. She necessarily invoked the aid of the law of both States; and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both. P. 372.
11. The prohibition of the Fourteenth Amendment against the taxation of property not within the taxing "jurisdiction" of a State is not to be extended by ascribing to intangibles in every case a locus for taxation in a single State despite the control over them or their transmission by any other State and its legitimate interest in taxing the one or the other. The Court can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either State, in the circumstances of this case, from laying the tax. Pp. 373, 372.

174 Tenn. 1; 118 S. W. 2d 228, reversed.

APPEAL taken by taxing officials of the State of Alabama from a decree of the Supreme Court of Tennessee declaring trust property in Alabama disposed of by a decedent's will to be subject to succession or transfer taxation in Tennessee but not in Alabama. This suit was brought by the executors in the two States, praying for a declaratory judgment.

Mr. Marion Rushton on the reargument, and with *Mr. Chas. C. Trabue, Jr.* on the original argument, for appellants. *Messrs. A. A. Carmichael,* Attorney General of Alabama, *Ray Rushton,* and *Walter Knabe* were with them on the brief.

Mr. Edwin F. Hunt on the reargument and on the original argument for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

The questions for decision are whether the States of Alabama and Tennessee may each constitutionally impose death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee; and which of the two states may tax in the event that it is determined that only one state may constitutionally impose the tax.

Decedent, a domiciled resident of Tennessee, by trust indenture transferred certain stocks and bonds upon specified trusts to Title Guarantee Loan & Trust Company, an Alabama corporation doing business in that state. So far as now material, the indenture provided that the net income of the trust property should be paid over to decedent during her lifetime. She reserved the power to remove the trustee and substitute another, which was never done; the power to direct the sale of the trust property and the investment of the proceeds; and the power to dispose of the trust estate by her last will and testament, in which event it was to be "handled and disposed of as directed" in her will. The indenture provided further that in default of disposition by will the property was to be held in trust for the benefit of her husband, son, and daughter. Until decedent's death the trust was administered by the trust company in Alabama and the

paper evidences of the intangibles held by the trustee were at all times located in Alabama.

By her last will and testament decedent bequeathed the trust property to the trust company in trust for the benefit of her husband, son, and daughter, in different amounts and by different estates from those provided for by the trust indenture, with remainder interests over to the children of the son and the daughter respectively, and to his wife and her husband. By her will testatrix appointed a Tennessee trust company executor "as to all property which I may own in the State of Tennessee at the time of my death," and an Alabama trust company executor "as to all property which I may own in the State of Alabama and also as to all property which I may have the right to dispose of by last will and testament in said state." The will has been probated in Tennessee and in Alabama, and letters testamentary have issued to the two trust companies named as executors in the will.

The present suit was brought by the two executors in a chancery court of Tennessee against appellants, comprising the State Tax Commission of Alabama, and appellee, Commissioner of Finance and Taxation of the State of Tennessee, who are charged with the duty of collecting inheritance or succession taxes in their respective states. The bill of complaint prayed a declaratory judgment pursuant to the Tennessee Declaratory Judgments Act, Tennessee Code, 1932, §§ 8835–8847, determining what portions of the estate of decedent are taxable by the State of Tennessee and what portions by the State of Alabama. Appellants and appellee appeared and by their answers and by stipulation recited in detail the facts already stated and admitted that the taxing officials of each state had imposed or asserted the right to impose an inheritance or death transfer tax on the trust property passing under decedent's will.

The chancery court of Tennessee decreed that the State of Alabama could lawfully impose the tax and that the inheritance tax law of Tennessee violated the Fourteenth Amendment in so far as it purported to impose a tax measured by the trust property disposed of by decedent's will. The Supreme Court of Tennessee reversed, and entered its decree declaring the trust property disposed of by decedent's will to be "taxable in Tennessee and not taxable in Alabama for purposes of death succession or transfer taxes." 174 Tenn. 1; 118 S. W. 2d 228. The case comes here on an appeal from this decree taken by the taxing officials of Alabama under § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a).

Alabama has assessed a state inheritance tax on the trust property pursuant to Article XII, c. 2, of its General Revenue Act. Alabama Acts, 1935, pp. 434 *et seq.* No transfer tax has been assessed upon the property by the Tennessee taxing officials, but they assert the right under the Tennessee statute to tax the transfer under decedent's will of the trust property. Sections 1259 and 1260 of the Tennessee Code of 1932 impose a tax upon the transfer at death by a resident of the state of his intangible property wherever located, including transfers under powers of appointment.

Both the court of chancery of Tennessee and the Supreme Court of Tennessee, conceiving that the Fourteenth Amendment requires the transmission at death of intangibles to be taxed at their "situs" and there only, considered that the primary question for determination was the situs or location to be attributed to the intangibles of the trust estate at the time of decedent's death. After considering all of the relevant factors, the one court concluded that the situs of the intangibles was in Alabama, the other that it was in Tennessee. Despite the impossibility in the circumstances of this case of attributing a single location to that which has no physical

characteristics and which is associated in numerous intimate ways with both states, both courts have agreed that the Fourteenth Amendment compels the attribution to be made and that, once it is established by judicial pronouncement that the intangibles are in one state rather than the other, the due proces clause forbids their taxation in any other.

The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *First National Bank* v. *Maine,* 284 U. S. 312. Still more recently this Court has declined to give it completely logical application.[1] It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case.

That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since.[2]

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[1] See, in the case of income taxation, *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308; *Guaranty Trust Co.* v. *Virginia,* 305 U. S. 19; cf. *Senior* v. *Braden,* 295 U. S. 422, 431–432. And in the case of taxation of shares of stock, see *Corry* v. *Baltimore,* 196 U. S. 466; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 239–240; *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, 514–516.

[2] *Green* v. *Van Buskirk,* 5 Wall. 307; 7 Wall. 139; *Pennoyer* v. *Neff,* 95 U. S. 714; *Arndt* v. *Griggs,* 134 U. S. 316; *Fall* v. *Eastin,* 215 U. S. 1; *Olmsted* v. *Olmsted,* 216 U. S. 386; *United States* v. *Guaranty Trust Co.,* 293 U. S. 340, 345–346; *Paddell* v. *City of New*

Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, Jurisprudence (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. *Green* v. *Van Buskirk,* 7 Wall. 139, 150; *Pennoyer* v. *Neff,* 95 U. S. 714; *Arndt* v. *Griggs,* 134 U. S. 316, 320–321. See *McDonald* v. *Mabee,* 243 U. S. 90, 91; cf. *Harris* v. *Balk,* 198 U. S. 215, 222; *Frick* v. *Pennsylvania, supra,* 497. The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the

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York, 211 U. S. 446; *St. Louis* v. *Ferry Co.,* 11 Wall. 423, 430; *Frick* v. *Pennsylvania,* 268 U. S. 473; see Story, Conflict of Laws (8th ed.), §§ 550, 551; Dicey, Conflict of Laws (5th ed.), pp. 418, *et seq.,* 583 *et seq.,* 606 *et seq.;* 1 Beale, Conflict of Laws, § 48.1 *et seq.;* American Law Institute, Restatement of Conflict of Laws, §§ 48, 49; 2 Cooley, Taxation (4th ed.), §§ 447, 451.

property in order to compel payment of the tax. See *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 202; *Frick* v. *Pennsylvania,* 268 U. S. 473, 489 *et seq.*[3]

Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such

[3] But there are many legal interests other than conventional ownership which may be created with respect to land of such a character that they may be constitutionally subjected to taxation in states other than that where the land is situated. No one has doubted the constitutional power of a state to tax its domiciled residents on their shares of stock in a foreign corporation whose only property is real estate located elsewhere, *Darnell* v. *Indiana,* 226 U. S. 390; *Hawley* v. *Malden,* 232 U. S. 1; cf. *Kidd* v. *Alabama,* 188 U. S. 730; *Corry* v. *Baltimore,* 196 U. S. 466; *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325, 329; *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506, 514–516, or to tax a valuable contract for the purchase of land or chattels located in another state, see *Citizens National Bank* v. *Durr,* 257 U. S. 99, 108; cf. *Gish* v. *Shaver,* 140 Ky. 647, 650; 131 S. W. 515; *Golden* v. *Munsinger,* 91 Kan. 820, 823; 139 P. 379; *Marquette* v. *Michigan Iron & Land Co.,* 132 Mich. 130; 92 N. W. 934, or to tax a mortgage of real estate located without the state, even though the land affords the only source of payment, see *Kirtland* v. *Hotchkiss,* 100 U. S. 491; cf. *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421; *Bristol* v. *Washington County,* 177 U. S. 133; *Paddell* v. *New York,* 211 U. S. 446. Each of these legal interests finds its only economic source in the value of the land, and the rights which are elsewhere subjected to the tax can be brought to their ultimate fruition only through some means of control of the land itself. But the means of control may be subjected to taxation in the state of its owner whether it be a share of stock or a contract or a mortgage. There is no want of jurisdiction to tax these interests where they are owned in the sense that the state lacks power to appropriate them to the payment of the tax. No court has condemned such action as so capricious, arbitrary or oppressive as to bring it within the prohibition of the Fourteenth Amendment, for it is universally recognized that these interests are of themselves in some measure clothed with the legal incidents of property enjoyed by their owner, in the state where he resides, through the benefit and protection of its laws.

rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. See *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U. S. 710, 716; *Harris* v. *Balk,* 198 U. S. 215, 222. Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.

The power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." *McCulloch* v. *Maryland,* 4 Wheat. 316, 429. But this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile

of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. *Carpenter* v. *Pennsylvania,* 17 How. 456; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Hawley* v. *Malden,* 232 U. S. 1; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325; *Blodgett* v. *Silberman,* 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota, supra; Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina,* 282 U. S. 1; *First National Bank* v. *Maine, supra; Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15; *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506.

In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313; *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 241, by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra,* which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland, supra,*

through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile.[4] Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Ins. Co.* v. *Board,* 221 U. S. 346; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193; cf. *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.* But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co.* v. *Grand Forks, supra,* 329;[5] see *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

The practical obstacles and unwarranted curtailments of state power which may be involved in attempting to

[4] See Footnote 1, *ante.*

[5] See also Footnote 2, *ante.*

prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.

Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. See *Paddell* v. *City of New York,* 211 U. S. 446, 448. If the "due process" of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is

entitled to its protection, *Burnet* v. *Brooks,* 288 U. S. 378; cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.

If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn* v. *Graves, supra,* 313; *First Bank Stock Corp.* v. *Minnesota, supra,* 241, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on it a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), § 602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state.

No more plausible ground is assigned for depriving Tennessee of the power to tax in the circumstances of this case. The decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obliga-

tion, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed. Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state. Taxation of it must be taken to be as much within the jurisdiction of the state as taxation of the transfer of a mortgage on land located in another state and there subject to taxation at its full value. See *Kirtland* v. *Hotchkiss, supra;* cf. *Paddell* v. *City of New York, supra.*

For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler* v. *Kelsey,* 205 U. S. 466; *Bullen* v. *Wisconsin, supra,* 630; *Chase National Bank* v. *United States,* 278 U. S. 327, 338; see Gray, Rule Against Perpetuities (3d ed. 1916), § 524.[6] Whether the appointee derives title from the donor, under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee. Cf. *Wachovia Trust Co.* v. *Doughton,* 272 U. S. 567. There is no conflict here between the laws of the two states affecting the transmission of the trust property. The title of the trustee under the original Alabama trust came to an end upon the exercise of the testatrix's power of appointment; and although the trustee after her death still had title to the securities, it was in by a new title as legatee under her will, and a new beneficial interest was created, both derived through the exercise of her power of disposition. The resulting situation was no different from what it would have been if she had bequeathed the

[6] No comparable right or power resided in the beneficiaries upon whom a tax was sought to be levied in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 91.

intangibles upon a new trust to a new and different trustee, either within or without the state of Alabama. So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substantial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another. See *Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra.*

It has hitherto been the accepted law of this Court that the state of domicile may constitutionally tax the exercise or non-exercise at death of a general power of appointment, by one who is both donor and donee of the power, relating to securities held in trust in another state. *Bullen* v. *Wisconsin, supra.* If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile which gives power over them and hence "jurisdiction to tax," and this is the reason underlying the maxim *mobilia sequuntur personam,* it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee. In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.

We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the

circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. *Bullen* v. *Wisconsin, supra,* 631; cf. *Keeney* v. *New York,* 222 U. S. 525, 537; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509. That has remained the law of this Court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. This is the case because in point of actuality those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid. See *Paddell* v. *New York, supra,* 448. The Fourteenth Amendment cannot be carried out with such mechanical nicety without infringing powers which we think have not yet been withdrawn from the states. We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state.[7] We think it cannot be pressed so far here.

If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the

[7] See Footnote 1, *ante.*

multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interest in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts. See *Bristol* v. *Washington County, supra,* 145; *Kidd* v. *Alabama,* 188 U. S. 730, 732, quoted with approval in *Hawley* v. *Malden, supra,* 13; *Bullen* v. *Wisconsin, supra,* 630; *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* 58; *Cream of Wheat Co.* v. *Grand Forks, supra,* 330.

So far as the decree of the Supreme Court of Tennessee denies the power of Alabama to tax, it is

Reversed.

MR. JUSTICE REED concurs in this opinion except as to the statement that "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." Upon this point he reserves his conclusion.

MR. JUSTICE BUTLER, dissenting.

The sole question is whether, on the facts about to be stated, the Tennessee inheritance tax law, consistently with the due process clause of the Fourteenth Amendment, may be extended to intangible personal property evidenced by certificates of stock and bonds held in Alabama.

The suit was brought in a chancery court of Tennessee under the declaratory judgments act of that State.[1] Com-

[1] Tennessee Code, 1932, §§ 8835–8847.

plainants were the Nashville Trust Company, a Tennessee corporation appointed by the will of Mrs. Grace C. Scales as executor for Tennessee, and the Title Guarantee Loan & Trust Company, which will be referred to as the Birmingham trust company, an Alabama corporation appointed as executor for that State. Defendants were the Commissioner of Finance and Taxation of Tennessee, and the members of the Alabama Tax Commission. The bill prayed that the court determine what portions of the estate are taxable by Tennessee and what portions are taxable by Alabama. The Tennessee commissioner filed answer praying declaration and decree that the securities held in Alabama are subject to the inheritance tax law of Tennessee.[2] The members of the Alabama commission filed their answer and a cross-bill praying decree in favor of that State and against the Birmingham trust company for the tax claimed under the laws of Alabama.[3]

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[2] Tennessee Code, 1932: "Section 1259. Subdivision 1. . . . A tax is imposed . . . upon transfers, in trust or otherwise, of the following property, or any interest therein or accrued income therefrom: (a) When the transfer is from a resident of this state . . . (3) All intangible personal property . . . Section 1260. Subdivision 2. . . . The transfers enumerated in subdivsion 1 . . . shall be taxable if made—(a) By a will . . ."

[3] Alabama General Revenue Act, approved July 10, 1935, Art. XII, c. 2 (Acts 1935, pp. 434 *et seq.*): Section 347.1: ". . . there is hereby levied and imposed upon all net estates passing by will, devise, or under the intestate laws of the State of Alabama, or otherwise, which are lawfully subject to the imposition of an estate tax by the State of Alabama, a tax equal to the full amount of State tax paid permissible when levied by and paid to the State of Alabama as a credit or deduction in computing any federal estate tax payable by such estate according to the Act of Congress in effect, on the date of the death of the decedent, taxing such estate, with respect to the items subject to taxation in Alabama. . . ." Section 347.7: ". . . all of the provisions of this Chapter shall be applicable to so much of the estates of non-resident decedents as is subject to estate tax under the Act of Congress in effect at the time of

The parties stipulated that the facts are as stated in the pleadings. In substance they are as follows:

At all times involved in this case, Mrs. Scales was a resident of and domiciled in Tennessee. Her brother, formerly living in Alabama, died in 1905 leaving a will that bequeathed to the Birmingham trust company stocks and bonds issued by Alabama corporations to be held in trust for the use and benefit of his widow and at her death to be delivered to Mrs. Scales. The widow died in 1917. Immediately, December 29, 1917, and without taking any of them from the possession of the trust company, Mrs. Scales executed jointly with it an indenture covering the stocks and bonds of which she had become owner under her brother's will.

By paragraph 1, she transferred 50 bonds to the trust company as trustee for the use and benefit of her son and directed that it hold and manage the property and pay net income to him during his life, and that, subject to his power of disposition by will, all property belonging to the trust at the time of his death should go to his children. By paragraph 2, she transferred to the same company 50 other bonds to be held in trust for the benefit of her daughter subject to trusts, conditions, and power of testamentary appointment by her daughter like those specified in the provisions creating the trust for her son.

By paragraph 3, she transferred to the same trustee the balance of the property by it to be held in trust and managed for specified uses and purposes and upon terms and conditions in substance as follows: (a) She directed the trustee to pay the income to her while she lived. (b) She reserved the right by will to dispose of all the trust property. (c) She directed that if she made no disposi-

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the death of decedent as consists of real estate or tangible personal property located within this State, or other item of property or interest therein lawfully subject to the imposition of an estate tax by the State of Alabama. . . ."

tion by will the trustee should pay $200 per month out of income to her husband during his life and the balance of income to her son and daughter during their lives; that the child or children of either, if dead, should receive the share of income which the parent would have received if living; that one-half of the property in the trust at the time of her death be transferred to the trust created for her son; and that the other half be transferred to the trust created for her daughter. (d) She reserved power at any time that she deemed income insufficient for her support to direct the trustee to sell a part of the trust property and to give her the amount received for it, and retained the right to direct transfer to her son or daughter of any portion of the trust property, and (e) the right to direct investments. She retained authority to remove the trustee and to appoint a successor. As to nearly all the property held in trust under paragraph 3, Mrs. Scales, her son, daughter, and the trustee, January 11, 1929, executed a writing releasing the power reserved to encroach on or dispose of corpus.

January 1, 1926, Mrs. Scales exerted the power by will to dispose of the trust property. Item two recites that she had reserved the right to dispose by will of property conveyed to the trustee under paragraph 3 of the trust agreement and provides: "Now, therefore, desiring to exercise the right to dispose of the said trust property, I do hereby give, devise, and bequeath all of the property in custody of said Title Guarantee Loan & Trust Company . . . at the time of my death to the said company, as trustee, the same to be held by it in trust upon the uses and trusts, terms, conditions, and limitations hereinafter set forth in this item of my will."

Section one of that item directs that from the trust estate there shall be set aside property of the value of $100,000 to be held in trust as there specified for her

daughter and her daughter's children. Section two makes like provision for her son and his children. Section three directs that, after the trust property shall be set aside as specified in sections one and two, the balance in the hands of the trustee shall be given in equal shares to her daughter and son to be theirs absolutely.

An amendment to the answer of the members of the Alabama Tax Commission alleges, and by stipulation the other parties admit, that from the trust indenture it fully appears that the title, possession and control of the securities passed completely to the Birmingham trust company and that such was the status of the securities at the time of the death of Mrs. Scales. That amendment also alleges, and the stipulation admits, that she never exercised the right reserved to her to remove the trustee and that the trust property could not have been removed from Alabama except upon an order of a circuit court and in compliance with the statutes of that State.[4]

The chancery court found that at the time of the death of Mrs. Scales the securities in question "had a legal situs analogous to the situs of tangible personal property in the State of Alabama." It decreed that Alabama may legally impose upon them a death transfer or succession tax and that in so far as the inheritance tax law of Tennessee attempts to impose the tax claimed by that State it violates the due process clause of the Fourteenth Amendment.

The state supreme court reversed the chancery court. It held that the securities were not so used in Alabama as to give them a situs there; that when Mrs. Scales died the situation was the same as though there never had been a trust; and that the property passed under the will as her absolute property. It entered a decree declaring the property taxable in Tennessee and not taxable in Alabama.

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[4] Alabama Code, 1928, §§ 10418–10421.

The Tennessee commissioner and the members of the Alabama commission respectively claim the right to impose an inheritance or death succession tax based upon the value of all the property held in the trust at the time of the death of Mrs. Scales. Rightly the parties agreed and the state courts assumed that, consistently with the due process clause of the Fourteenth Amendment, both States may not impose transfer taxes in respect of the same property. *Frick* v. *Pennsylvania,* 268 U. S. 473, 489–494. *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210–212. *Baldwin* v. *Missouri,* 281 U. S. 586, 591. *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 7–8. *First National Bank* v. *Maine,* 284 U. S. 312, 328. *City Bank Co.* v. *Schnader,* 293 U. S. 112, 116–117. See *Burnet* v. *Brooks,* 288 U. S. 378, 401–402; *Senior* v. *Braden,* 295 U. S. 422, 432; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 209–210; *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 314–315; *Worcester County Co.* v. *Riley,* 302 U. S. 292, 297, 298. No distinction is suggested between the securities covered by the relinquishment, January 11, 1929, of the right reserved to encroach upon and to direct transfer from the corpus and the small part to which the relinquishment did not extend. And, as the parties and the state courts have treated all alike, this Court may decide upon title and taxability as if the relinquishment covered all.

The parties agree that, upon execution of the indenture, title, possession, and control passed completely to the trustee and so continued until the death of Mrs. Scales. There being no provision authorizing revocation, the grant was irrevocable. Perry on Trusts and Trustees (7th ed.) § 104. Bogert, Trusts and Trustees, § 993. *Keyes* v. *Carleton,* 141 Mass. 45, 49; 6 N. E. 524. *Ewing* v. *Jones,* 130 Ind. 247, 254–255; 29 N. E. 1057. *Bath Savings Institution* v. *Hathorn,* 88 Me. 122, 128–129; 33 A. 836.

Wilson v. *Anderson,* 186 Pa. 531, 537; 40 A. 1096. *Hellman* v. *McWilliams,* 70 Cal. 449, 453; 11 P. 659. *Strong* v. *Weir,* 47 S. C. 307, 323; 25 S. E. 157. Unquestionably it presently vested full legal and equitable title in the trustee and beneficiaries, subject to be divested only by the exertion by Mrs. Scales of her power of appointment by will. *Coolidge* v. *Long,* 282 U. S. 582, 597. *Marvin* v. *Smith,* 46 N. Y. 571, 575. *Carroll* v. *Smith,* 99 Md. 653, 658 *et seq.;* 59 A. 131. *Boone* v. *Davis,* 64 Miss. 133, 140; 8 So. 202. That power did not amount to an estate or interest in the trust property. *United States* v. *Field,* 255 U. S. 257, 263. *Porter* v. *Commissioner,* 288 U. S. 436, 441. All doubt as to that is precluded by the clause of the indenture which provides that in the absence of disposition by her will the property shall continue to be held in trust for purposes there specified.

The reserved authority to direct investment contemplates action as trustee and not control as owner. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346–347. The authority to remove the trustee and to appoint a successor detracts nothing from the plenary grant of title. See *Bowditch* v. *Banuelos,* 1 Gray 220, 230. When read as it must be in connection with the provisions of the Alabama statute above referred to, that provision of the indenture does not reserve power to remove the trust securities from the State of Alabama.

As the death of Mrs. Scales and taking effect of her will were coincident, the legal title remained in the trustee. The purposes Mrs. Scales intended to effect by the trusts defined by her will are like those she intended to serve by the trusts created by the indenture which, in absence of will, were to continue after death. Stripped of mere legalism, and taken according to substance, the will operated to amend and continue the trusts created by the indenture. Questions of power to tax are governed by the substance of things rather than by technical rules,

concerning title. *Tyler* v. *United States,* 281 U. S. 497, 503.

It follows that, save her right to income, Mrs. Scales, after her relinquishment, January 11, 1929, and at the time of her death, had no estate or interest in the securities held by the trustee. There is no basis for application of the fiction *mobilia sequuntur personam. Wachovia Trust Co.* v. *Doughton,* 272 U. S. 567, 575. *Brooke* v. *Norfolk,* 277 U. S. 27, 29. *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83, 92, 94. *McMurtry* v. *State,* 111 Conn. 594. *Estate of Bowditch,* 189 Cal. 377. *Matter of Canda,* 197 App. Div. 597; 189 N. Y. S. 917. Cf. *Bullen* v. *Wisconsin,* 240 U. S. 625. Tennessee may not impose the inheritance tax claimed in this suit by its Commissioner of Finance and Taxation.

Moreover, if contrary to the indenture as above construed, it should be held that at the time of her death Mrs. Scales in addition to having power of appointment by will owned an interest in the trust property, Tennessee would nevertheless be without power to impose a tax on the transfer of that interest because the intangibles in question had no situs in that State.

Intangibles, like tangibles, may be so held and used outside the State of the domicil of the owner as to become taxable in the State where kept. See e. g. *New Orleans* v. *Stempel,* 175 U. S. 309. *Bristol* v. *Washington County,* 177 U. S. 133, 143 *et seq. State Board of Assessors* v. *Comptoir National,* 191 U. S. 388. *Scottish Union & Nat. Ins. Co.* v. *Bowland,* 196 U. S. 611, 619–620. *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, 402. *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 353. The general rule of *mobilia sequuntur personam* must yield to the established fact of legal ownership, actual presence and control in a State other than that of the domicil of the owner. The phrase "business situs" as used to support jurisdiction of a State

other than that of the domicil of the owner to impose taxes on intangible personal property is a metaphorical expression of vague signification; its meaning is not limited to investment or actual use as an integral part of a business or activity, but may extend to the execution of trusts such as those created by the indenture and imposed on the trustee in this case. *DeGanay* v. *Lederer,* 250 U. S. 376, 381–382. *New York ex rel. Whitney* v. *Graves, supra,* 372 *et seq. Wheeling Steel Corp.* v. *Fox, supra,* 211. *First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234.

The stock certificates, bonds or other documents evidencing the intangibles constituting the trust property were never held in Tennessee. Neither their issue or validity nor the enforcement or transfer, inter vivos or from the dead to the living, of any right attested or supported by them was at all dependent on the laws of that State.[5] From the beginning, the trust estate has been under the protection of, and necessarily the trusts have been and are being executed under, the laws of Alabama unaffected by those of any other State. See *Hutchison* v. *Ross,* 262 N. Y. 381, 394; 187 N. E. 65; *Sewall* v. *Wilmer,* 132 Mass. 131, 137.

At least since 1917, Mrs. Scales had no power to remove the trust or any of the trust property from Alabama. Exertion of any right or power reserved to her by the indenture was dependent on the laws of Alabama and not upon or subject to those of Tennessee, where she happened to have her domicil. *Wachovia Trust Co.* v. *Doughton, ubi supra.* Subject to the laws of Alabama, all transactions in which the trust properties were capable of being used were identified with that State. The securities, held there not only for safekeeping but as well for collection of income and principal, and subject to sale and reinvestment of proceeds, could not be more com-

[5] See footnote 4.

pletely localized anywhere. *DeGanay* v. *Lederer, ubi supra.*

The judgment of the Supreme Court of Tennessee should be reversed and the case remanded to that court for further proceedings in accordance with this opinion.

MR. CHIEF JUSTICE HUGHES, MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS join in this opinion.

GRAVES ET AL., COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK, *v.* ELLIOTT ET AL.

CERTIORARI TO THE SURROGATES' COURT OF THE COUNTY AND STATE OF NEW YORK.

No. 372, October Term, 1937. Argued January 9, 1939. Reargued April 28, 1939.—Decided May 29, 1939.

Decedent, while domiciled in Colorado, transferred to a Colorado bank certain bonds to be held upon certain specified trusts with specified powers in the trustee to administer, invest, reinvest, etc. The trust indenture provided that the trustee should pay over the income to decedent's daughter for life and afterward to the daughter's children until each had reached the age of twenty-five years, when a proportionate share of the principal of the trust fund was to be paid over to such child. In default of such children the principal was to revert to decedent and pass under her will. She reserved the right to remove the trustee, to change any beneficiary of the trust, and to revoke the trust and revest herself with the title to the property, the trustee in that event undertaking to assign and deliver to her all the securities then constituting the trust fund. After creating the trust decedent became and remained a domiciled resident of New York, where she died without appointing new beneficiaries of the trust or revoking it. Meanwhile, the trustee continued to administer the trust and held possession of the bonds evidencing the intangible property of the fund. Following her death the taxing authorities of Colorado assessed a tax on the transmission at death of the trust fund.

Held that the State of New York could constitutionally levy a

transfer tax upon the relinquishment at death of the power of revocation, measured by the value of the intangibles. *Curry* v. *McCanless, ante,* p. 357. P. 386.

274 N. Y. 10, 634; 8 N. E. 2d 42; 10 N. E. 2d 587, reversed.

CERTIORARI, 305 U. S. 667, to review a judgment, entered on remittitur from the Court of Appeals of New York, which reversed an order of the Surrogates' Court confirming a transfer tax assessment. 248 App. Div. 713; 153 Misc. 70.

Mr. Mortimer M. Kassell, with whom *Mr. Harry T. O'Brien, Jr.* was on the brief, on the reargument and on the original argument, for petitioners.

Mr. Frederick C. Bangs, on the reargument and on the original argument, for respondents.

By leave of Court, *Messrs. David T. Wilentz,* Attorney General of New Jersey, *William A. Moore,* Assistant Attorney General, *Paul A. Dever,* Attorney General of Massachusetts, and *Henry F. Long* filed a brief, as *amici curiae,* on behalf of those States, in support of petitioners.

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to say whether the State of New York may constitutionally tax the relinquishment at death, by a domiciled resident of the state, of a power to revoke a trust of intangibles held by a Colorado trustee.

Decedent in 1924, while a resident of Colorado, transferred and delivered to Denver National Bank of Denver, Colorado, certain bonds to be held upon specified trusts with specified powers in the trustee to administer the trust and to invest and reinvest the trust fund. So far as now material, the trust indenture provided that the trustee should pay over the income to decedent's daughter for life and afterward to the daughter's children until

each had reached the age of twenty-five years, when a proportionate share of the principal of the trust fund was to be paid over to such child. In default of such children the principal was to revert to decedent and pass under her will. She reserved the right to remove the trustee, to change any beneficiary of the trust, and to revoke the trust and revest herself with the title to the property, the trustee in that event undertaking to assign and deliver to her all the securities then constituting the trust fund.

After creating the trust decedent became and remained a domiciled resident of New York, where she died in 1931 without appointing new beneficiaries of the trust or revoking it. Until her death the trust was administered by the bank at its offices in Colorado, and the paper evidences of the intangibles—corporate bonds—comprising the trust fund remained in the possession of the trustee in Colorado.

Following her death the taxing authorities of Colorado assessed a tax on the transmission at death of the trust fund. Proceedings in New York for the assessment of estate taxes on the transfer of the trust fund at decedent's death resulted in an order of the Surrogate confirming the assessment under §§ 249–n, 249–r of the New York Tax Law. Consol. Laws, ch. 60.[1] On appeal the New York

[1] § 249–n imposes a tax at specified rates upon the net estate of every person dying a resident of the state. For the purpose of fixing the amount of the net estate, § 249–r includes in the value of the gross estate of the decedent the value of all property of the decedent "except real property situated and tangible personal property having an actual situs outside this state,"

"3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or

Court of Appeals reversed the order of the Surrogate, holding that so far as the provisions of the New York Tax Law purport to include the intangible trust property in the gross estate they infringe due process by imposing a tax on property whose situs is outside the state. 274 N. Y. 10. We granted certiorari November 14, 1938, the question involved being of public importance.

The essential elements of the question presented here are the same as those considered in *Curry* v. *McCanless, ante,* p. 357. As is there pointed out, the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85; cf. *Keeney* v. *New York,* 222 U. S. 525; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Chase National Bank* v. *United States,* 278 U. S. 327; *Tyler* v. *United States,* 281 U. S. 497; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Porter* v. *Commissioner,* 288 U. S. 436.

For reasons stated in our opinion in *Curry* v. *McCanless, supra,* we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so

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(b) the right to designate the persons who shall possess or enjoy the property or the income therefrom; . . .

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

dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death. *Curry* v. *McCanless, supra,* and cases cited.

Reversed.

MR. CHIEF JUSTICE HUGHES, dissenting.

I think that the decision in this case pushes the fiction of *mobilia sequuntur personam* to an unwarranted extreme and thus unnecessarily produces an unjust result.

The same property is subjected to an inheritance or transfer tax by two States. The decedent, in 1924, while a resident of Colorado, created a trust in certain securities, consisting of federal, state and other bonds. The trustee was a Denver bank. The income of the trust property was payable to the settlor's daughter during her life and thereafter to her children until they respectively arrived at the age of twenty-five years, when they were to have the principal in equal shares. If the daughter left no children, the trust estate was to revert to the settlor. The settlor reserved the right to change the beneficiaries, to revoke the trust, and to remove the trustee. The legal title to the securities was thus vested in the trustee, which entered upon its administration and continued it both

before and after the settlor's death. There was no revocation of the trust or change of beneficiary or trustee, or diversion of the income from the use of the daughter, and the beneficiaries were all living when the settlor died.

Prior to her death, the settlor removed to New York. The trust *res* continued to be in Colorado. An inheritance tax upon the decedent's property situated in Colorado, and including the bonds held there in trust, was imposed by that State. The New York Court of Appeals has held, and I think rightly, that this trust property was not subject to an estate tax in New York. 274 N. Y. 10.

It is true that the Constitution of the United States contains no specific provision against double taxation, but the Constitution does impose limitations upon the taxing power of a State which I think are applicable and should prevent a double exaction in this case.

The principle governing the application of the due process clause of the Fourteenth Amendment to the State's taxing power is well established. That principle, as repeatedly declared by this Court, and apparently not disputed now, is that it is "essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power." *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204. What is meant is that due process in taxation requires that the property shall be attributable to the domain of the State which imposes the tax. This rule has its most familiar illustration in the case of land which, to be taxable, must be within the limits of the taxing State. The fact that the owner is domiciled within a State, if the land is elsewhere, does not give the State of his domicile the authority to tax. In *Union Transit Co.* v. *Kentucky, supra,* we held that the principle against the taxability of land within another jurisdiction applies with equal cogency to tangible personal property having an actual situs outside the State's domain. True, the fiction expressed in the maxim *mobilia*

sequuntur personam might have seemed to justify such a tax on personal property by the State of the owner's domicile. But as said in *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22: "The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used."

The rule thus established that the State of the owner's domicile cannot tax tangible personal property which has an actual situs in another State was applied by this Court to an inheritance or transfer tax in the case of *Frick* v. *Pennsylvania,* 268 U. S. 473. There the Court held, without division, that to tax the transfer of tangible personal property having an actual situs in another State "contravenes the due process clause of the Fourteenth Amendment." The importance of this limitation of state power is obvious in view of the interrelation of the States under the bond of the Constitution, and of the opportunities for oppressive taxation if States attempt to tax property or transfers of property not properly attributable to their own domain. "The limits of State power are defined in view of the relation of the States to each other in the Federal Union." *Burnet* v. *Brooks,* 288 U. S. 378, 401.

But while the question was thus settled as to tangible personal property, the fiction of *mobilia sequuntur personam* still persists in a general sense as to intangibles, embracing securities, thus permitting taxation by the State of the owner's domicile although the owner may

keep the securities in another State. *Blodgett* v. *Silberman,* 277 U. S. 1, 9, 14, 16. This general rule proceeds in the view that intangibles, as such, are incapable of an actual physical location and that to attribute to them a "situs" is to indulge in a metaphor. Still, in certain circumstances the use of the metaphor is appropriate. *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372.

The fact that this rule of convenience may generally be applied does not justify the conclusion that intangibles can never be so effectively localized in another State as to withdraw them from the taxing power of the domiciliary State. The proper use of a legal fiction is to prevent injustice and it should not be unnecessarily extended so as to work an injury. *Union Transit Co.* v. *Kentucky, supra,* p. 208.

As we said in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92, the fiction of *mobilia sequuntur personam* "must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise." In that case, a resident of Virginia had transferred certain securities to the Safe Deposit & Trust Company of Baltimore in trust for his minor sons. The donor reserved to himself a power of revocation. He died without having exercised it. Virginia undertook to impose an *ad valorem* tax upon the entire corpus of the trust estate and this Court held that as the securities were subject to taxation in Maryland, where they were in the actual possession of the trustee, the holder of the legal title, they had no legal situs for taxation in Virginia "unless the legal fiction *mobilia sequuntur personam* was [is] applicable and controlling." The Virginia court had held that the two beneficiaries in conjunction with the administrator of the father's estate really owned the trust fund and that by reason of the fiction its taxable situs followed them.

This Court refused to accept that view and denied the right of taxation to Virginia, saying: "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

That was a case of an *ad valorem* property tax. But the power to impose an inheritance or transfer tax, as well as the power to impose an *ad valorem* property tax, depends upon the property being attributable to the domain of the taxing State. *Frick* v. *Pennsylvania, supra,* p. 492.

In the instant case, the legal title to the property in question is in the Colorado trustee, the trust was created under the Colorado law and its administration is subject to the control of Colorado. To say that these securities are not as effectively localized in Colorado, as were the furniture, pictures and other art treasures of Mr. Frick in New York and Massachusetts, where alone their transfer could be taxed, would be to ignore realities and to make important rights turn upon a verbal distinction.

Upon what ground then is it maintained that these securities are within the taxing power of New York? Solely, it appears, upon the ground that the indenture creating the trust in Colorado reserved to the settlor a power of revocation. This unexercised power is treated as carried by the settlor into New York and hence as bringing in its train the entire corpus of the trust property. That results, as already noted, in giving the fiction an oppressive operation. But, aside from that practical aspect, if through the trust in Colorado the securities have been effectively localized in that State, why should an unexercised power of revocation alter their status? Mr. Frick did not even need to revoke an instrument, for at

any time he could have removed his furniture and art treasures from New York and Massachusetts to his domicile in Pennsylvania. But that obvious control, while unexercised, did not detract from the taxing power of the States where the property was, or permit taxation by the domiciliary State.

It is said that the power of disposition is equivalent to ownership, and that its relinquishment at death is an appropriate subject of taxation. The case of federal taxation is not analogous as there are no state boundaries to be considered when the federal tax is laid. Nor are state cases relevant when there is no attempted extraterritorial application of a state statute, and it is not necessary again to review the authorities cited in the dissenting opinion in *Curry* v. *McCanless, ante,* p. 357. For the present purpose it is sufficient to note that under the principle established in *Frick* v. *Pennsylvania,* it is not enough to say that a power of disposition is equivalent to ownership, for ownership by a resident of a State gives that State no authority to tax property not attributable to its domain. Mr. Frick owned his property in New York and Massachusetts but still his own State of Pennsylvania could not tax its transfer.

The fundamental question is thus not one of a reserved but unexercised power of revocation or of an ultimate control in an owner, but whether securities, classed as intangibles, are necessarily and in all circumstances subject to a different rule from that obtaining in the case of tangible personal property. It is not perceived that there is a sound basis for such an invariable distinction, which is foreign to common thought and practical needs. When confronted with the question as to tangible personal property, we did not hesitate to limit the application of the fiction, and it is regrettable that we can not deal with the fiction in a similar fashion in such a case as this, where

we have an effective localization of securities through a trust created in a State other than that of the settlor's domicile at the time of death, and where in that other State the trustee holds title and possession and has been and is administering the trust subject to its laws.

I think that the judgment of the Court of Appeals of New York should be affirmed.

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

SOUTHERN PACIFIC CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 613. Argued March 29, 1939.—Decided May 29, 1939.

1. Where a land grant railroad, having an established route partly land-grant aided between two terminal points, developed an alternative route which in part was identical with the original route and to that extent land-grant aided, *held* that the Government was entitled, under its land-grant Act contract, to compensate the railroad for terminal-to-terminal service on the basis of the lower tariff available on the alternative route less the higher land grant percentage deduction applicable on the original route, irrespective of what route was actually used in shipment. Pp. 394, 401.
2. This conclusion is consistent with the long continued administrative construction given land grant contracts. P. 401.
3. Doubts in respect of the interpretation of public grants are to be resolved in favor of the Government. P. 401.

87 Ct. Cls. 442, affirmed.

CERTIORARI, 306 U. S. 625, to review a judgment dismissing the petition in a suit brought by the railroad company against the United States to recover sums claimed to be due on account of transportation charges.

Mr. James R. Bell for petitioner.

Assistant Attorney General Whitaker, with whom *Solicitor General Jackson,* and *Messrs. Paul A. Sweeney, Warner W. Gardner,* and *Aaron B. Holman* were on the brief, for the United States.

MR. JUSTICE REED delivered the opinion of the Court.

This case involves the right of the Government to deduct from the public terminal-to-terminal tariffs of a railroad over a route, partly of land-grant aided mileage, identical with part of the mileage of another earlier constructed route of the same road between the same terminals, sums based upon the higher proportion of land-grant aided mileage in this latter route. On account of the importance of the question in administration, certiorari was granted.[1]

The carrier owns and operates two lines of railroad between Portland, Oregon, and Roseville, California, and Davis, California, both southern points being on the Central Pacific, now the Southern Pacific, Railroad in California. From the California junctions, there is direct connection over the same Southern Pacific rails into San Francisco. The older line is called the Siskiyou, the newer the Cascade Route. For a considerable portion of the distance between Portland and San Francisco, the two routes are identical. There are two differences; one is between Eugene, Oregon, and Black Butte, California. On

[1] Cf. Schedule of Land Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922. This shows the land-grant mileage in the United States at the date of issue. In order to obtain a share of government traffic, non-land-grant roads have entered widely into freight land-grant equalization agreements by which they agree to carry freight, routed over their lines at "the lowest net rates lawfully available, as derived through deductions account of land grant distance. . . ." Cf. Circular 3, Feb. 6, 1935, Office of Quartermaster General, War Department, Freight Land Grant Equalization Agreements.

the west the Siskiyou Route passes through Grant's Pass and Siskiyou, a distance of 300 miles, to connect Eugene and Black Butte. The eastern, or Cascade Route, joins the same two points by a shorter (275 miles) line through Natron and Klamath Falls. The second deviation is between Tehama, California, and Davis and Roseville respectively. Here the Siskiyou Route is to the east, 104 miles long, and the Cascade Route to the west, 110 miles.

Where the routes are identical, some of the mileage is land-grant aided. Some is not. The mileage of the Siskiyou which is different from the Cascade is largely land-grant aided. None of the Cascade Route, except where it uses the same rails as the Siskiyou, has land grants. Based on the proportion of aided mileage and the percentage of deduction allowed to the Government from the tariffs charged private shippers, the United States, between San Francisco and Portland, is entitled to a land-grant deduction via the Siskiyou Route of 42.792 per cent. Via the Cascade Route, the deduction is 17.801 per cent. There are slight variations for East Portland.

During December, 1931, and January, 1932, the carrier transported, in both directions, certain property of the United States on Government bills of lading from Portland or East Portland to San Francisco. No directions were given by the Government as to the routes over which the shipments were to move. While before November 11, 1931, the terminal-to-terminal rates over the two routes were the same, after that date authorized revisions resulted in a rate competitive with water borne commerce over the Cascade and a higher rate over the Siskiyou. These public tariffs were so much lower over the Cascade than they were over the Siskiyou Route, that the net cost to the Government, after the deductions

deemed applicable by the railroad, was less over the Cascade than it was over the Siskiyou, despite the higher percentage of deduction allowed the latter route.

The Government was billed on the Cascade tariffs with deductions for land-grant mileage of about 17 per cent. It paid on the basis of the Cascade tariffs but deducted on the ratio of the land-grant to total miles between the terminals on the Siskiyou Route, or some 42 per cent. The Government claims that it is entitled to the lowest rate, between the terminals, less the percentage of deduction over the original land-grant aided route. The carrier protested and brought this action in the Court of Claims to recover the difference between the Cascade tariffs less the Cascade ratio of land-grant mileage and that paid by the Government, the Cascade tariffs less the Siskiyou ratio. The Court of Claims, after making special findings of fact, adjudged that the carrier was not entitled to recover and dismissed its petition.

The Government obtained concessions from the established tariffs by virtue of the acceptance by the carrier of grants of land, ten alternate sections per mile on each side of the line, to aid in the construction of a railroad as described in the statute authorizing the conveyance.[2] This statute was similar in form to the land grant construed in *Burke* v. *Southern Pacific R. Co.*[3] and upon compliance with its requirements became a contract, "obligatory on both" [4] the carrier and Government. The carrier agreed it should "be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge,

[2] Act of July 25, 1866, c. 242, 14 Stat. 239.

[3] 234 U. S. 669.

[4] *Id.* 680; cf. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238.

and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." The authorization was "to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, . . ." The road was located in accordance with these requirements.

In December, 1887, the Siskiyou Route was finished. The road running from its southern terminus at Roseville to San Francisco had been finished in 1870. This gave a through route from San Francisco to Portland, 774.16 miles long with 663.16 land-grant aided. The Cascade Route was built later in small sections primarily for local service or links in other projected distinct railroad undertakings. The California deviation from the Siskiyou between Tehama and Davis was finished in 1882. The Oregon section, forming with that portion of the Siskiyou an irregular ovoid figure, was put together between 1905 and 1926, being completed September first of the latter year. This route is 725.03 miles between Portland and San Francisco with 258.13 miles built with grants in aid. Each route is necessary for adequate transportation service to the areas traversed. At the time of the completion of the Cascade and until November 10, 1931, the tariffs over the two routes between the terminals were the same.

On May 23, 1928, there was enacted an act for the relief of the land-grant railroad operated between East Portland, Oregon, and Roseville, California.[5] As Rose-

[5] The Act of May 23, 1928, c. 720, 45 Stat. 722–723, provides:

"Chap. 720.—An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensa-

ville is the junction terminal of the Siskiyou and is not served by the Cascade, this description covers only the Siskiyou line built under the 1866 act. By its terms, the Government relinquished its privilege of free transportation and accepted in lieu thereof a right to the same rate as is paid to other land-grant roads. This is fifty per cent of the public tariff for land-grant aided mileage.[6]

The Act of 1866, granting the aid, specified, only generally, the route of the new road. It was to begin at some point on the Central Pacific Railroad in the Sacramento Valley and thence run northerly to Portland. By the grant of millions of acres of public lands, the Government prepaid for transportation [7] over the line, wherever it might be built. It was entitled to service for its property or troops without further cost from whosoever owned or operated the aided facility between the Central Pacific and Portland.[8] By the 1928 act, the Government agreed, for the "relief of the land-grant" road, to put it upon the same basis as other land-grant roads. By this concession, no change was made in the extent of the obligation to give land-grant service.

The two acts are quite clear in their requirement that the company which constructed the road or its successors in ownership or operation should transport the property

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tion for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided*, That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation."

[6] *Lake Superior & M. R. Co.* v. *United States*, 93 U. S. 442, 454, 455; *Louisville & N. R. Co.* v. *United States*, 273 U. S. 321, 323. Act of June 7, 1924, c. 291, 43 Stat. 477, 486. This act determined the proportion of the regular tariff to be paid for the transportation.

[7] *Louisville & N. R. Co.* v. *United States*, 267 U. S. 395, 402.

[8] § 5, Act of July 25, 1866, 14 Stat. 240.

or troops of the United States over the railroad at the rate fixed by their provisions. The uncertainty as to the meaning arises in the application of the right of transportation to the mileage. On completion of the original project between Portland and the Central Pacific, there was a definite right of way, the present Siskiyou Route, with every mile between East Portland and the Central Pacific aided by land grants. This same situation existed as to all or parts of other bond or land aided roads.[9]

[9] The laws relating to land-grant and bond-aided railroads contain several types of conditions. The most prevalent condition was that "the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." This was construed to require the railroad to furnish only free use of the rails and permanent structures. *Lake Superior & M. R. Co.* v. *United States,* 93 U. S. 442. It is to be found in the following acts: Act of Sept. 20, 1850, 9 Stat. 466 (Ill. Cent. R. R.; Mobile & O. R. R.); Act of June 10, 1852, 10 Stat. 8 (Chicago, B. & Q. R. R.; Missouri Pac. Ry.; St. Louis & S. F. Ry.); Act of Feb. 9, 1853, 10 Stat. 155 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.); Act of May 15, 1856, 11 Stat. 9 (Chicago & N. W. Ry.; Chicago, B. & Q. R. R.; Chicago, M. & St. P. Ry.; Chicago, R. I. & Pac. Ry.); Act of May 17, 1856, 11 Stat. 15 (Louisville & N. R. R.; Seaboard Air Line Ry.); Act of June 3, 1856, 11 Stat. 17, 18, 20, 21 (Ala. Great So. R. R.; Central of Ga. Ry.; Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Duluth, So. Shore & At. Ry.; Grand Rapids & Ind. R. R.; Grand Trunk R. R.; N. Y. Cent. R. R.; Louisville & N. R. R.; Mich. Cent. R. R.; Missouri, Kan. & Texas Ry.; Nashville, C. & St. L. Ry.; Pere Marquette R. R.; Southern Ry. Co.; Vicksburg, S. & Pac. R. R.); Act of Aug. 11, 1856, 11 Stat. 30 (Ala. & Vicksburg Ry.; Gulf & Ship Id. R. R.); Act of March 3, 1857, 11 Stat. 195 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Great No. Ry.; Northern Pac. Ry.); Act of March 3, 1863, 12 Stat. 772 (Atchison, T. & S. F. Ry.; Missouri, Kan. & Texas Ry.); Act of May 5, 1864, 13 Stat. 64 (Northern Pac. Ry.); Act of May 5, 1864, 13 Stat. 66 (Minneapolis, St. P. & S. Ste. Marie Ry.); Act of May 12, 1864, 13 Stat. 72 (Chicago, M. & St. P. Ry.); Act of March 3, 1865,

Soon there were changes and shortening of these lines. The Government was faced with the problem of the proper ratio of land-grant or bond-aided deductions or allocations to be applied where new non-aid mileage is used between terminals formerly served in a higher proportion by land-grant mileage. Cut-offs and the elimination of curves furnished occasion for these decisions. Thus in 1888 in a ruling as to transportation services rendered by the Central Pacific Railroad, where the Central had three lines from Sacramento to San Francisco, with varying bond-aided mileages, the Comptroller of the Treasury ruled, when the road sought to render statements for the line actually used, that all United States accounts should be stated in terms of the bond-aided mileage of the original route. As the amounts due to the carrier were applied to retirement of the bonds in aid, this ruling preserved the charges for this purpose. This ruling has been

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13 Stat. 526 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Great No. Ry., Northern Pac. Ry.). Some of the grants went further and required the railroad to furnish free transportation. Act of July 1, 1864, 13 Stat. 339 (Missouri, Kan. & Texas Ry.); Act of July 3, 1866, 14 Stat. 78 (N. Y. Cent. R. R.; Mich. Cent. R. R.); Act of July 4, 1866, 14 Stat. 87 (Chicago, M. & St. P. Ry.); Act of July 25, 1866, 14 Stat. 239 (Southern Pac. Co.); Act of July 26, 1866, 14 Stat. 289 (Missouri, Kans. & Texas Ry.); Act of July 28, 1866, 14 Stat. 338 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.). Others authorized the railroad to charge for Government transportation, subject to regulations which Congress might impose restricting such charges. Act of July 2, 1864, 13 Stat. 365 (Northern Pac. Ry.); Act of July 27, 1866, 14 Stat. 292 (Atchison, T. & S. F. Coast Lines; St. Louis & S. F. Ry.; Southern Pac. Co.); Act of March 3, 1871, 16 Stat. 573 (Southern Pac. Co.). The Act of July 1, 1862, 12 Stat. 489 (Missouri Pac. Ry.), provided for fair and reasonable rates for Government transportation, not to exceed the amounts paid by private parties for the same kind of service. See Schedule of Land-Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922.

followed in roads aided by land grants.[10] The long continued administrative interpretation has decided weight in reaching a conclusion upon the construction of this contract,[11] particularly when the Congress after such interpretation gives up a right for free transportation between the terminals. Any doubt must be resolved in favor of the Government.[12]

The construction adopted in the Court of Claims was reached in *United States* v. *Northern Pacific Ry. Co.*[13] where there was a shortening of 94.24 miles in the through route between St. Paul and Seattle by means of a cut-off. In that case, too, the old route was maintained for local use.

It is urged, however, that in this instance we have a new line, an addition, rather than a cut-off in or a shortening or straightening of an original line.[14] So far as terminal-to-terminal transportation is concerned, the Cascade Route does not function as a new line or an addition. It is simply another way of carrying goods by the same railroad between San Francisco and Portland. By which route the shipment moves, is immaterial on the question of deduction for land grants. The conclusion that the lowest public tariffs are to have land-grant deductions

[10] (1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; (1911) XVII Dec. of Comp. of Treas. 633; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474.

[11] Cf. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 329–30.

[12] *Broad River Co.* v. *South Carolina*, 281 U. S. 537, 548.

[13] 30 F. 2d 655; rehearing denied, 32 F. 2d 698.

[14] *United States* v. *Kansas Pacific Ry. Co.*, 99 U. S. 455; *United States* v. *Denver Pacific Ry. Co.*, 99 U. S. 460; *United States* v. *Central Pacific R. Co.*, 118 U. S. 235.

based upon the proportion of the land-grant mileage in the original line, seems consonant with the purpose of the acts.

Affirmed.

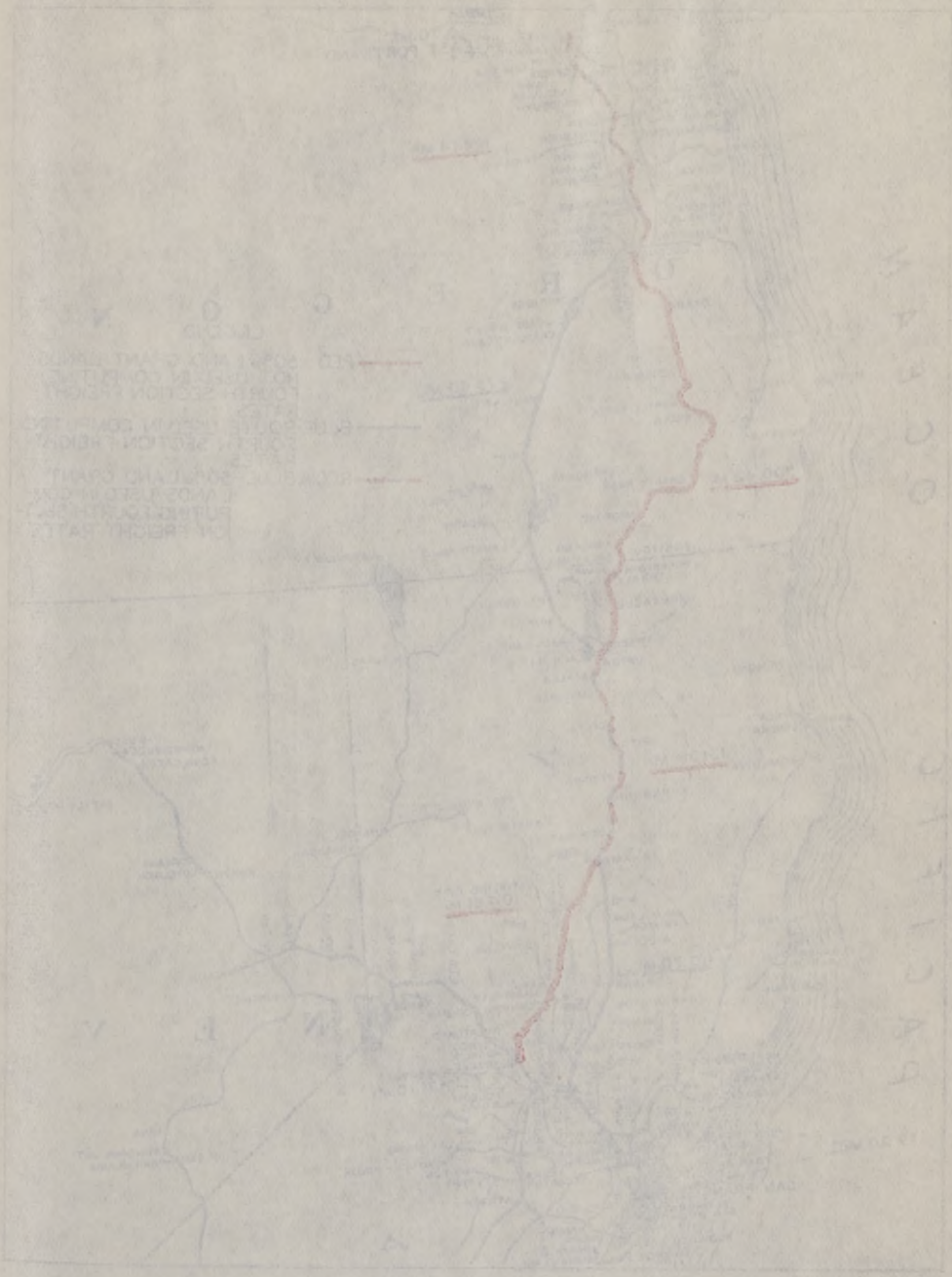
MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER, dissenting.

The land-grant Act of July 25, 1866, and compliance with it constitute a contract.[1] This case calls for construction of a provision in § 5.[2] The Court of Claims sustained the government's deduction on account of land-grant mileage that is not included in or possibly attributable to the railroad over which the shipments moved. The inclusion, as a part of the aided railroad, of 275.6 miles of the Cascade Route between Springfield Junction, Oregon and Black Butte, California, is not permissible

[1] *Lake Superior & M. R. Co.* v. *United States*, 93 U. S. 442. *Union Pacific R. Co.* v. *United States*, 104 U. S. 662, 664. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238. *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680. *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64. *United States* v. *Galveston, H. & S. A. Ry. Co.*, 279 U. S. 401.

[2] "*And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroad . . . in repair and use, and shall at all times transport the mails upon said railroad . . . for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad . . . therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." 14 Stat. 239, 240–241.



PLAINTIFF'S EXHIBIT No. 23.

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under the terms of the contract, nor is computation of the land-grant deduction from charges for transportation via Cascade on the percentage applicable to charges for transportation via Siskiyou warranted by constructions heretofore put upon like Acts. See (opposite) reproduction of map submitted as an exhibit at the argument in this Court.

I.

The grant was made to induce and aid construction of a railroad between Portland and some point to be selected by the grantees on the Central Pacific to serve the Willamette, Umqua, and Rogue River Valleys in Oregon, and the Sacramento and Shasta Valleys in California, and to be located as shown on maps made by the grantees and filed with the Secretary of the Interior. The railroad was located and constructed, and, since its completion in 1887, has been maintained and kept in use, in accordance with the contract. The aided portion is 663.13 miles long, extending between East Portland, Oregon and Roseville, California, a point on the Central Pacific east of Sacramento and about 111 miles from San Francisco. It is now called the Siskiyou Route.

Section 5 declares that the grantees shall keep "said railroad" in repair and use; that it shall be "a public highway" for the use of the United States; and that property and troops of the United States shall be transported over "said road" at the cost, charge, and expense of the corporations or companies owning or operating "the same," when so required by the Government.

Plainly the contract applies only to the land-aided railroad between Portland and Roseville; not to the haul between Portland and San Francisco, nor to that between Roseville and San Francisco. The contract neither expresses nor implies any special undertaking by the carrier as to charges for government transportation be-

tween the port or terminal of Portland and that of San Francisco.

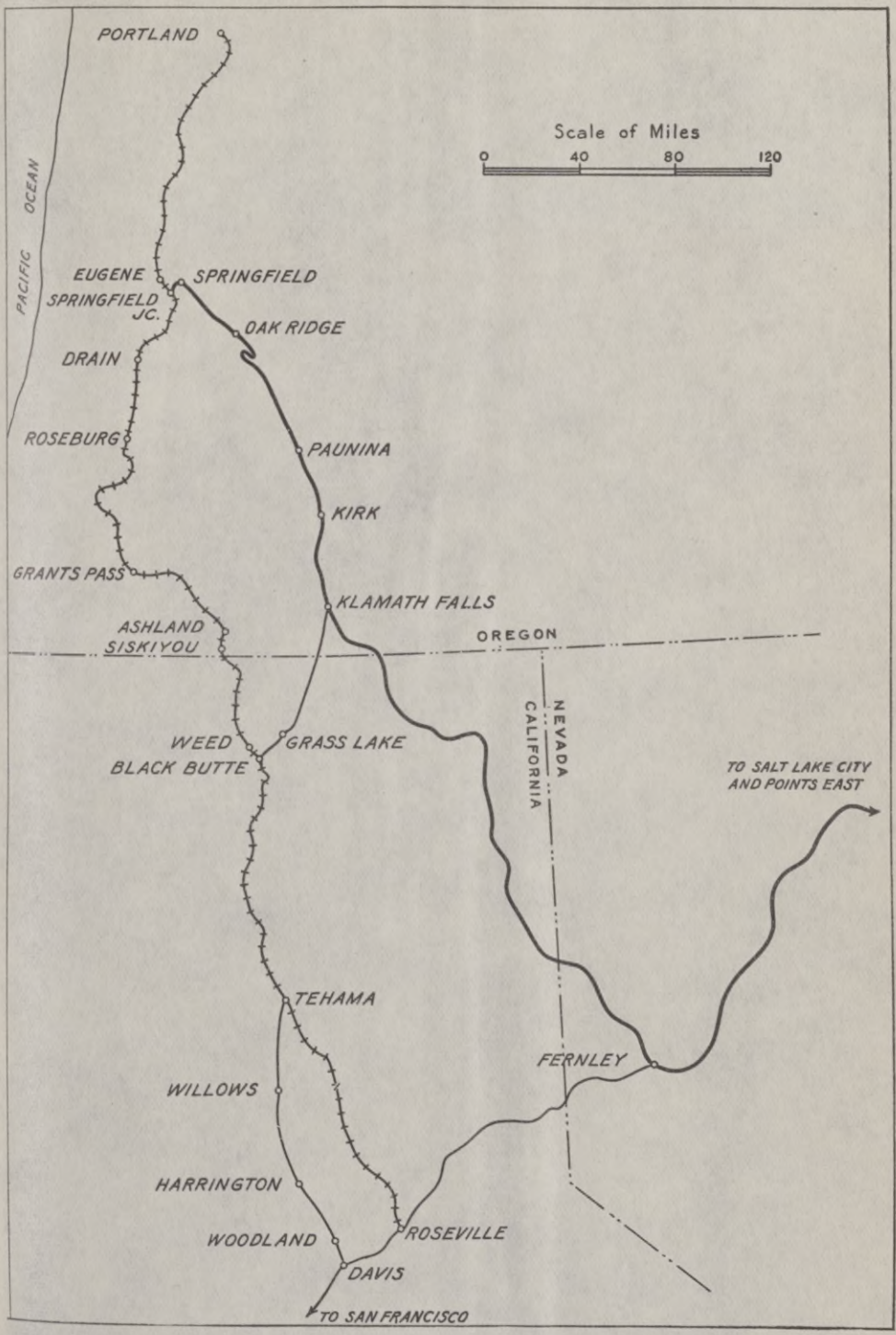
The Act of May 23, 1928 [3] merely substitutes 50 per cent of the commercial charges for free transportation under § 5. Thus, as modified, the Act of 1866 requires plaintiff to furnish government transportation between points on and wholly via the land-grant railroad for one-half the charges applicable to like service for private parties. And for government transportation between a point on the aided railroad and one on another line there is deducted from charges generally made one-half the percentage that aided mileage attributable to that service is of the total miles hauled.

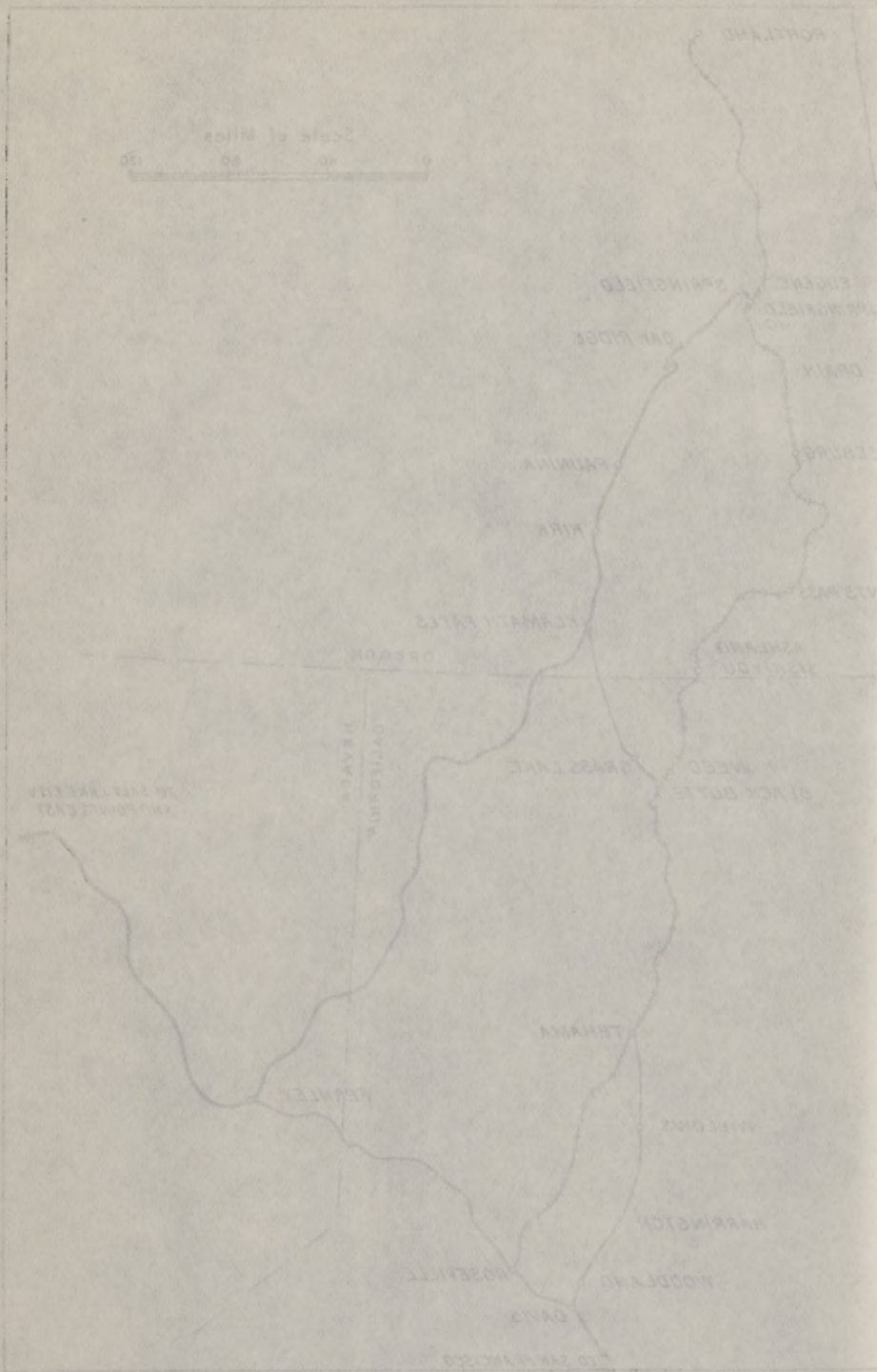
The Cascade stretch was not completed until 1926 and, as shown by the findings, it is made up of branches extended during a number of years prior to 1912 little by little from Black Butte to Kirk to reach productive forest and agricultural areas. See Diagram 1, opposite. At its northerly end a short piece from Springfield Junction to Natron was completed in 1891; in 1912 that branch was built to Oakridge to serve timber areas on both sides of the Cascades and ultimately to be a part

[3] "An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California. *Be it enacted* . . . That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278) [pursuant to which such railroads transport government property at a charge of 50 per cent of the regular tariffs]: *Provided*, that the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such government transportation."

DIAGRAM 1.

Hatched Lines Show Land-aided Mileage.





of a line connecting with the Central Pacific in Nevada or with the Union Pacific in eastern Oregon. These systems were then under one control. About the same time—1911–1914—plaintiff built from Fernley, Nevada, a point on the Central Pacific, northwesterly to Westwood, California to serve industries there. Consummation of the project to complete the line between Fernley and Springfield Junction via Natron, Oakridge, Kirk, and Klamath Falls was delayed because of the suit brought in 1908 under the Sherman Anti-Trust Act by the United States in the circuit court for the district of Utah (see 188 F. 102), which resulted in decree dissolving control by the Union Pacific of the Southern Pacific. *United States* v. *Union Pacific R. Co.*, 226 U. S. 61. In 1929, with the approval of the Interstate Commerce Commission, plaintiff completed the connection between Springfield Junction and Fernley to form a part of the through route between Portland, Salt Lake City, and points east.

The Court of Claims found that since the completion of the Cascade stretch "plaintiff has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou route . . . serving the valleys and areas described . . . producing much tonnage of timber, agricultural products, livestock, etc., and the other the Cascade route . . . also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. Plaintiff has maintained the Siskiyou route, transporting a substantial and varied traffic and serving a large and important area. The Siskiyou route and the Cascade route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines."

The stretch of railroad between Springfield Junction and Black Butte via Siskiyou, all land-aided, is 300.42 miles long; it is used for through transportation and also serves locally in the Willamette, Umqua, and Rogue River Valleys. All land-aided mileage in that route continuously has been operated and maintained for the service of the public, including transportation of property and troops of the United States. The stretch between the same points via Cascade, none of it land-aided, is 275.6 miles long, most of which is east of the Cascade Mountains. It also carries through and local traffic. To illustrate how unreasonable and arbitrary it is to attribute that mileage to the aided railroad built, as required by the Act of 1866, to open and develop the great valleys west of the mountains, let it be noted that except at and near the connecting points, Springfield Junction and Black Butte, these stretches serve widely separated territories of vast extent; the area between them is greater than that of the State of Massachusetts. The mileage of the Cascade stretch is greater than the distance between Washington and West Point via New York City. The mileage of the Siskiyou stretch is substantially the same as the distance between Washington and Pittsburgh.

Upon completion of the Siskiyou Route, plaintiff established through rates between Oregon and California points; in order to meet competition of water carriers, it was compelled to make rates between Portland and San Francisco lower than rates between intermediate points. In 1912, after enactment of the long and short haul clause of § 4, Interstate Commerce Act, the Commission permitted the maintenance of lower through rates; it found they were forced by water competition and were lower than normal, fair and reasonable rates. In 1920, § 4 was again amended to require the Commission to find that the lower through rates permitted by it were reasonably com-

pensatory. In 1927, the Commission, upon plaintiff's showing of operating costs on the Siskiyou Route, found that the through rates were less than reasonable and granted authority to establish rates between the terminals lower than intermediate rates but so much higher than the competing water rates that plaintiff could not share in the business. The Commission thereafter reopened the case. In order to show the reasonably compensatory nature of the lower through rates, plaintiff based its showing on the more favorable transportation conditions and substantially lower operating costs on the Cascade Route. Pursuant to the Commission's report and order of July, 1930, the plaintiff revised its tariffs effective November 11, 1931. The low through rates on the Siskiyou Route were discontinued and higher rates in accord with § 4 were substituted. Much lower rates, to meet water competition, were established via the Cascade Route as to transportation of about 25 per cent of all articles that move between the cities of Portland and San Francisco. During the period between completion of the Cascade Route and the effective date of the new rates, the through rates were the same via both routes.

The aided mileage in the Siskiyou Route, 663.16 miles, between Portland and San Francisco, is 85.584 per cent of the total. The aided mileage in the Cascade Route is 258.13 miles, or 35.602 per cent of the total. Charges for the shipments in question applicable via the Cascade Route, less 17.801 per cent (one-half of the per cent of land-grant mileage to total) are substantially less than those via Siskiyou, less 42.792 per cent. The Government did not expressly direct the shipments in question to be hauled over the Cascade Route but it did in fact choose to have them go that way. It was plaintiff's duty to send them over the route on which the charges would be lower. The Government refused to pay more than

the lower rates applicable via Cascade minus the land-grant deduction of 42.792 per cent applicable to the higher charges over the Siskiyou Route.

The findings compel the conclusions that the Cascade stretch between Springfield Junction and Black Butte was not built to better alignment or lessen grades of, add trackage to or otherwise improve, the land-aided stretch via Siskiyou between the same points; that it was made up of branches and extensions constructed from time to time to develop productive areas, to serve local needs and, upon completion, to be a separate and distinct railroad between Springfield Junction and Black Butte, a part of which was also to serve as a section of the transcontinental route above referred to. Clearly it is not a part of the railroad aided by the grant of 1866. It was not constructed to aid transportation on, or as a substitute for, any part of the aided railroad. The fact that it is used to haul government shipments like those in question does not suggest any failure of plaintiff fully to perform the land-grant contract to maintain and keep in use the aided railroad between Portland and Roseville. There is nothing in the grant, or in the circumstances under which it was made and complied with, that gives any support to the government's claim that, from the lower charges applicable to shipments by private parties via Cascade, it is entitled to deduct the higher land-grant percentage applicable to transportation via Siskiyou.

II.

The opinion of the Court of Claims shows its judgment to have been reached on an assumption of fact that is not sustained by the findings or otherwise supported. It says: "The method of settlement with plaintiff used by the General Accounting Office in this case has been consistently and uniformly followed by the defendant's ac-

counting officers for more than fifty years in cases involving the same or similar questions."

There is no finding to that effect, but to support the statement the opinion continues: "The principle was stated by the Second Comptroller of the Treasury in a decision April 17, 1888, as follows: 'If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line.' "

The decision referred to has not been reported or anywhere published. It may be found on file in the General Accounting Office, Miscellaneous Claims Division, Vol. 55, p. 422. The passage above-quoted is one of two sentences excerpted from different parts of the document and together published, without more, as paragraph 1160, Vol. 3, p. 299 of Kern's 1893 Digest of Decisions of the Second Comptroller of the Treasury.[4] As counsel failed to make available to us the unreported text of the decision, it is assumed that nothing more than the statement in the Digest was brought to the attention of the lower court.

To give weight to the Second Comptroller's dictum and justify its application to this case, the lower court adds: "This rule as stated has been uniformly observed in the settlement of accounts for government transportation of property and troops of the United States, and has been applied in settlement of accounts for transportation ren-

[4] The first sentence reads: "The Central Pacific Railroad Company should recognize the Government's demand that its security for repayment of money advanced in aid of the construction of the original line be not impaired or whittled away by a duplicating of the line."

dered the Government where through service has been rendered by a shorter line substituted in whole or in part for the longer aided and original line. (See stipulations of the parties in *United States* v. *Northern Pacific Ry. Co.*, 30 F. 2d 655.) This long established rule has been acquiesced in by land-grant railroads generally and was acquiesced in by this plaintiff during the period between the completion of its Cascade line in 1926 to 1931 when its accounts against the Government for the transportation of Government property were settled in this manner. It was not until the shipments involved in this suit were moved that plaintiff made protest against the position of the Government. We do not regard the fact the rates between San Francisco and Portland were the same over both routes between 1926 and 1931 as material or altering in any way the principle involved."

As to that passage, it is to be observed:

The opinion states that the rule, said to have been established by administrative practice, has been applied to transportation rendered by a "shorter line substituted in whole or in part for the longer aided and original line." The court definitely found that the Cascade stretch is a line separate and distinct from the aided railroad. It was not substituted for or used in lieu of the Siskiyou Route. It was chosen by or for the Government because applicable charges, whatever the basis of calculation of land grant deductions, were less than those for like transportation via the other stretch.

The cited stipulation between the Northern Pacific Railway and the United States cannot here be made to serve in lieu of special findings of fact.[5] Moreover, as

[5] See *M. E. Blatt Co.* v. *United States*, 305 U. S. 267, 277. *Stone* v. *United States*, 164 U. S. 380, 383. *Crocker* v. *United States*, 240 U. S. 74, 78. *Brothers* v. *United States*, 250 U. S. 88, 93. *United States* v. *Wells*, 283 U. S. 102, 120. *United States* v. *Esnault-Pelterie*, 299 U. S

will be shown, the circuit court of appeals in that case held against the carrier on the ground that new unaided mileage had been substituted for aided mileage in the original route. That case makes strongly in favor of plaintiff here, for the findings of the Court of Claims show that no part of the original aided railroad had been abandoned as to the traffic in question or otherwise.

The lower court's statement that, from the completion of the Cascade stretch in 1926 until the shipments here involved, plaintiff acquiesced in the rule adopted by the court is not supported by the findings. But, even if warranted, it is without significance for the question presented in this case did not and could not arise while the rates applicable between Portland and San Francisco were the same.

III.

The Court of Claims failed to find as fact that the Government followed, or the carriers accepted as sound, the dictum excerpted by Kern from the decision of the Second Comptroller of April 17, 1888. To supply the omission, the Government cites in its brief, without adequate statement of the facts or explanation, all administrative rulings and judicial decisions it deems to have any bearing on the question now before us. The former are referred to in footnote 10 of this Court's opinion.[6] Here the material substance of each will be indicated.

201, 206. And see *American Propeller Co.* v. *United States,* 300 U. S. 475, 479–480.

[6] The footnote reads: "(1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; (1911) XVII Dec. of Comp. of Treas. 633; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474."

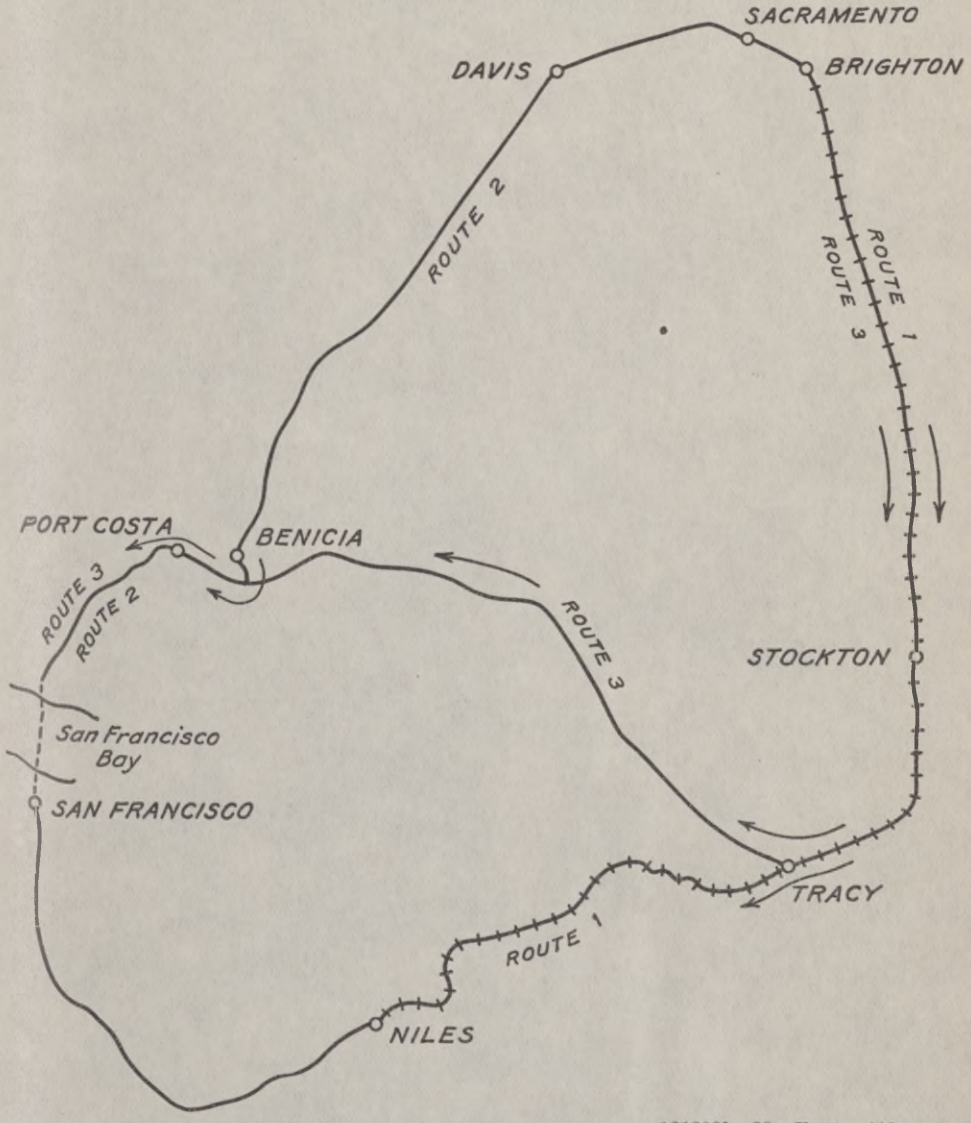
1. Ruling of April 17, 1888, by Second Comptroller of the Treasury, Butler. At that time, the Central Pacific had three lines between Sacramento and San Francisco. They are indicated on Diagram 2, opposite. Route 1, via Brighton, Tracy and Niles was the original railroad, 140 miles, of which 103 were bond-aided. Route 2 via Davis and Port Costa, 90 miles, had no aided mileage. Route 3 via Brighton, Tracy, and Port Costa was 151 miles, of which 63 belonged to the bond-aided stretch in Route 1. The bonds in aid were given under the Act of July 1, 1862, c. 120, 12 Stat. 489, 494. See also amendatory Acts of July 2, 1864, c. 216, 13 Stat. 356, and May 7, 1878, c. 96, 20 Stat. 56. Section 6 declares that the aid grants are made on condition that the company shall keep the railroad in repair and use, transport troops and property of the Government "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," and that all compensation for that transportation shall be applied to the payment of the bonds. For a time immediately preceding the Second Comptroller's decision, the Government stated the accounts of the company as though all shipments had been hauled over Route 1. The railroad maintained that payment should be made in accordance with the bond-aided mileage in the route used. Thus arose the issue decided.

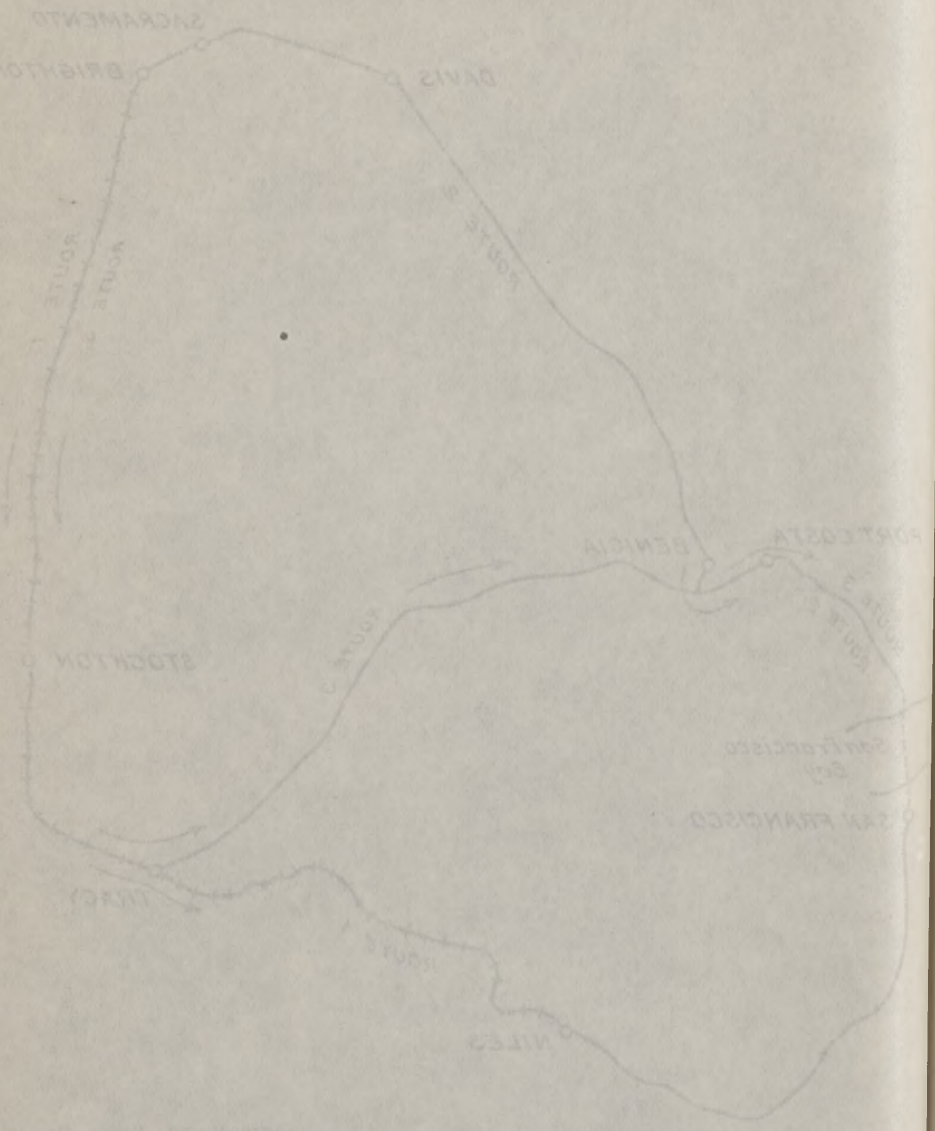
The bond-aid contract had been construed to require the Treasury to retain the compensation for government transportation over bond-aided mileage and to apply it in payment of the bonds. *United States* v. *Kansas Pacific Ry. Co.*, 99 U. S. 455. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235. These cases definitely established that compensation for government transportation over nonaided extensions of the aided railroads should not be withheld or applied to pay the bond debt. But the Sec-

DIAGRAM 2.

Scale: **Appx. 1 inch=12 miles.**

Hatched Lines Show Bond-aided Mileage





ond Comptroller held that rule not applicable. He found that accounting officers were required by the Act to determine whether the rates are "fair and reasonable" and stated the problem thus: "Given a certain state of facts, what is the service rendered by the railroad, and what is a fair and reasonable compensation therefor?"

More specifically to disclose the point, the Second Comptroller referred to the contractual relations between the Government and the carriers, and asked himself: "Are those relations impaired by the railroad, if it pursues the course which in the present case it contends to be right?" He answered affirmatively and to sustain that view reasoned as follows: To reimburse itself the Government may withhold compensation for "carriage over an aided line." The security is impaired if the railroad "parallels or duplicates an aided line between two points and diverts the government business to that line without in some way recognizing its indebtedness to the government." [7]

Then, granting that on strictest legal construction of the statutes and of the decisions of this Court there was nothing to preclude such a course by the railroad, the Second Comptroller went on to say: "But the principles of equity and ethics forbid the application of such a construction." Invoking the maxim "He that seeks equity must do equity" as being "most forcibly pertinent," he declared that so long as the railroad is indebted to the Government on account of the bond-aided line, it must

[7] And then, the decision quotes a passage from a message of President Cleveland, then very recently sent to Congress with the report of three commissioners appointed to investigate the affairs of railroad companies that had received government aid, declaring that the acts were passed upon the theory that the roads should be constructed "according to the common rules of business, fairness, and duty, and that their ability to pay their debts should not be impaired by unfair manipulations."

not imperil the government's opportunity to recoup, and concluded that all accounts, without regard to the route used, should be stated upon the basis of bond-aided mileage.

The company claimed that acquisition of Route 2 was necessary because it threatened the existence of the Central Pacific and that Route 3 was acquired for convenience because it had better grades than the original line. It argued that the Government had an interest in the new lines and should be willing to pay entire compensation for carriage over them. Against that contention the Second Comptroller said: "But the acquiring or building by a railroad of new lines connecting two points already connected by the road of the company is one of the ordinary elements of modern railroading, intended to enhance the usefulness of the original line, in the same way as does the *replacing of iron by steel rails,* or *wooden by stone buildings,* of *hand-brakes by automatic appliances.*[8] Is the Government to lose its right of withholding compensation for *carriage over a trestle,* the construction of which *in wood* it aided, simply because the railroad has seen fit *to replace the wooden structure by one of iron?*"

He denounced as untenable both the position of the Government and that of the company, and declared "that a medium course is not only practicable and equitable, but is justified under the Acts . . . by the changed and apparently unanticipated condition of affairs since the construction of the railroad was contemplated." He suggested that the company should recognize that the Government's security should not be impaired by a duplicating line, and that the Government should recognize such an improvement of route as materially lessens distance or difficulties of transportation between two points. Then reasoning in more definite terms, he said:

[8] Italics in quotations are added.

"If the original line . . ., 140 miles in length, were entirely aided, and the Government's supplies were taken over the new and unaided line, 90 miles in length, it would not be right on the one hand for the railroad to demand actual compensation for the 90 miles, or, on the other hand, for the Government to maintain that the account should be adjusted on a basis of 140 miles and that amount passed to the credit of the railroad on the Government's books. *The non-aided line was used to replace the aided line,* and credit for the 90 miles only should be given the railroad on the Government's books. The same reasoning applies when the original line was aided in part.

"If of the original 140 miles . . . 103 were aided, and the accounts were so stated as to pay the railroad for 37 miles and carry 103 miles to the railroad's credit, the same ratio should be applied when transportation is over a new line between those points, and 103/140 of the total distance traversed should be considered as aided and should be carried to the railroad's credit on the Government's books, compensation for the balance of 37/140 being paid direct to the railroad."

Following these passages the Second Comptroller said: "If a railroad have a line between two points aided in whole or in part, and subsequently acquire a new line or lines, nonaided, between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles, as though the transportation were over the original line." This is the statement found in par. 1160, 3 Dig. 2d Comp. 299, on which the Court of Claims grounded its judgment.

Applying the generalization so attempted he ruled: "On this basis the accounts of the railroad coming to this bureau will be finally settled. I am of the opinion that

substantial justice would thus be done—the railroad would not impair the security of the Government, and the Government would recognize the right of the railroad to make *improvements.*"

The crucial phrase of the generalization, "a new line or lines nonaided," would include mileage that is separate and distinct from an aided railroad maintained and kept in use between the same points. But the Second Comptroller, on the grounds that acquisition of new lines was the same as making additions and betterments to the original aided line and that Routes 2 and 3 were used to replace Route 1, treated the lines constituting the three routes as a single railroad bond-aided to the extent of 103/140 of its length.[9] It thus appears that the broad generalization does not express the principle of the decision or fit the situation described by it as mere betterment of the line built pursuant to the bond-aid contract.

The decision does not relate to the question in this case. Plaintiff does not contend that, if aided mileage of the Siskiyou stretch not used may be attributed to the Cascade stretch that was used to do the hauling in question, the corresponding percentage, 42.792 per cent, should not be applied. Plaintiff's point is that the findings preclude the assignment of any aided mileage to the nonaided Cascade stretch. The text of the Second Comptroller's decision shows that he did not decide or deal with any such issue.

2. Ruling of January 5, 1899 by Acting Comptroller Mitchell in a *Southern Pacific* case, V Dec. of Comp. of

[9] Under our decisions, the contract extended only to the aided railroad. *United States* v. *Kansas Pacific Ry. Co.*, 99 U. S. 455. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235. As Route 2 had no aided mileage and Route 3 only 63 of its 151 miles, the Comptroller erred in treating the lines constituting the three routes as a single railroad.

Treas. 364. See Diagram 2. A government clerk traveled to Sacramento via Stockton. A part of the route used was bond-aided. He returned via Benicia on the shorter and usually traveled nonaided route. The question was whether payment should be made to the company for transportation over the nonaided route. This decision merely follows the uncalled for and inapplicable generalization attempted by Second Comptroller Butler in the *Central Pacific* case.

3. Ruling of November 19, 1900 by Assistant Comptroller Mitchell in an *Illinois Central* case, VII Dec. of Comp. of Treas. 224. See Diagram 3. The company operated a land-aided railroad between Cairo and Chicago. It had two routes for passenger travel between Cairo and St. Louis: the shorter via Carbondale and Pinckneyville, had some unaided mileage; the longer, via Du Quoin, was aided throughout. The Government having failed to designate either route and the shorter being the usually traveled one over which all through trains operated, the company carried the government passenger that way. The question was whether the land-grant deduction should be calculated on the percentage of land-aided mileage in the route used or on the greater percentage in the other route. Assistant Comptroller Mitchell did not follow the general statement of Second Comptroller Butler in the *Central Pacific* case but held that, as the Government did not choose between the routes, the deduction should be calculated on the mileage used.

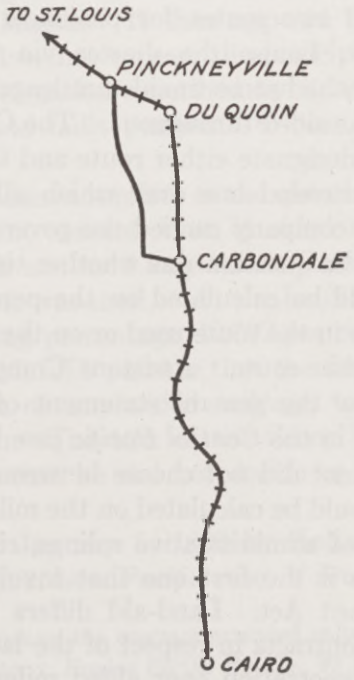
In the list of administrative rulings, cited by the Government, this is the first one that involves construction of a land-grant Act. Land-aid differs essentially from bond-aid. Contracts in respect of the latter require government transportation over aided mileage at "fair and reasonable rates" and that the compensation earned be applied on the bond debt. No diminution of charges for government transportation is exacted. The railroad re-

ceives credit instead of cash for the charges calculated at full rates. But the land-grant Acts require service either free or at half rates forever. Questions as to compensation under them concern not merely form of payment of full charges but the amount of payment. Unreasonable indeed would it be to hold that carriers' acquiescence in government construction of bond-aid Acts is binding or entitled to weight in cases involving construction of the land-grant Acts.

DIAGRAM 3.

Scale: Appx. 1 inch = 26 miles.

Hatched Lines Show Land-aided Mileage.



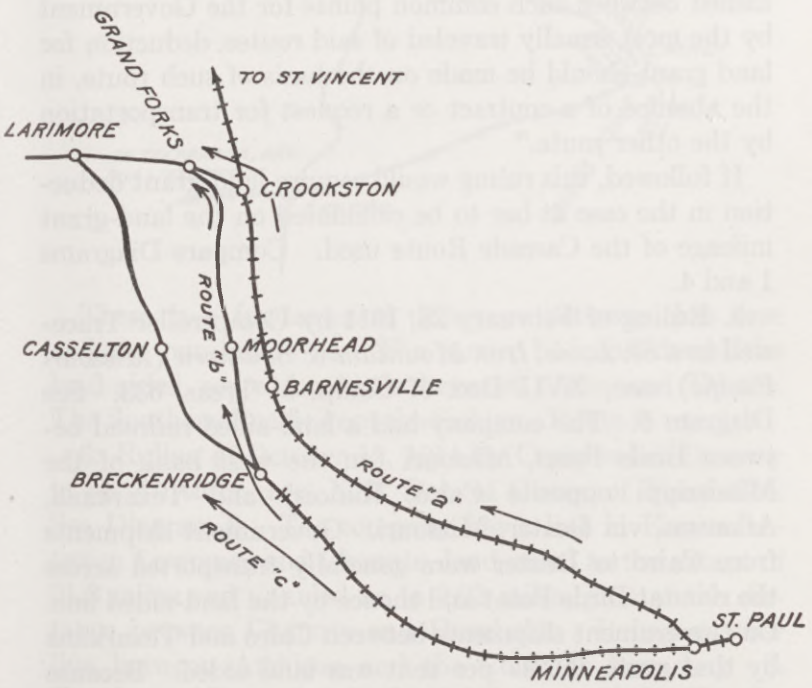
4. Ruling of January 21, 1902 by Comptroller Tracewell in a *Great Northern* case, VIII Dec. of Comp. of Treas. 474. See Diagram 4. The Government shipped

property from St. Paul, Minnesota, to points west of Larimore, North Dakota. The company had three routes between the points just named. The percentage of aided mileage in the route via Crookston, "a," is larger than that in either route "b" or "c." The Government having failed to choose a route, the company hauled by the short-

DIAGRAM 4.

Scale: Appx. 1 inch = 74 miles.

Hatched Lines Show Land-aided Mileage.



est route, "c"; it was generally used for like service. The question was whether land-grant deduction should be calculated on the percentage of the shorter line actually used or the higher percentage of the longer one not used.

The decision, as well as the quoted generalization, of Second Comptroller Butler are in terms broad enough to

cover the question presented but Comptroller Tracewell, refusing to follow either, decided against the Government's contention. He said: "Where, with Government aid, two separate and independent lines of railroad have been constructed from a common point to entirely different points, but which subsequently by extension and independent connections are projected through a common point, and all these lines have subsequently passed to the control of a single company, and transportation is furnished between such common points for the Government by the most usually traveled of said routes, deduction for land grant should be made on the basis of such route, in the absence of a contract or a request for transportation by the other route."

If followed, this ruling would require land-grant deduction in the case at bar to be calculated on the land-grant mileage of the Cascade Route used. Compare Diagrams 1 and 4.

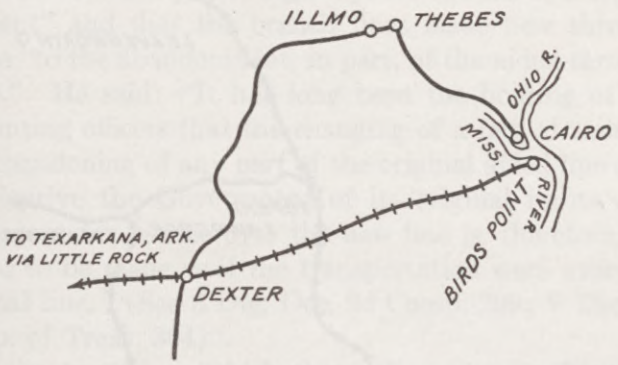
5. Ruling of February 28, 1911 by Comptroller Tracewell in a *St. Louis, Iron Mountain & Southern* (*Missouri Pacific*) case, XVII Dec. of Comp. of Treas. 633. See Diagram 5. The company had a land-aided railroad between Birds Point, Missouri (on the west bank of the Mississippi opposite Cairo, Illinois) and Texarkana, Arkansas, via Dexter, Missouri. Government shipments from Cairo to Dexter were generally transported across the river at Birds Point and thence by the land-aided line. On Government shipments between Cairo and Texarkana by that route, 99.247 per cent was land aided. Because of a change in the bed of the river, it was necessary to haul the shipments in question via Thebes and Illmo. The land-grant deduction applicable to that route was 81.234 per cent. The railroad insisted that, having been forced to give up the old route, it should not be required to make deduction for the nonaided mileage between Cairo and Dexter via Thebes. But the Comptroller re-

fused to accept that contention and ordered settlement on the basis of land-aided mileage in the route via Birds Point.

DIAGRAM 5.

Scale: Appx. 1 inch = 17 miles.

Hatched Lines Show Land-aided Mileage.



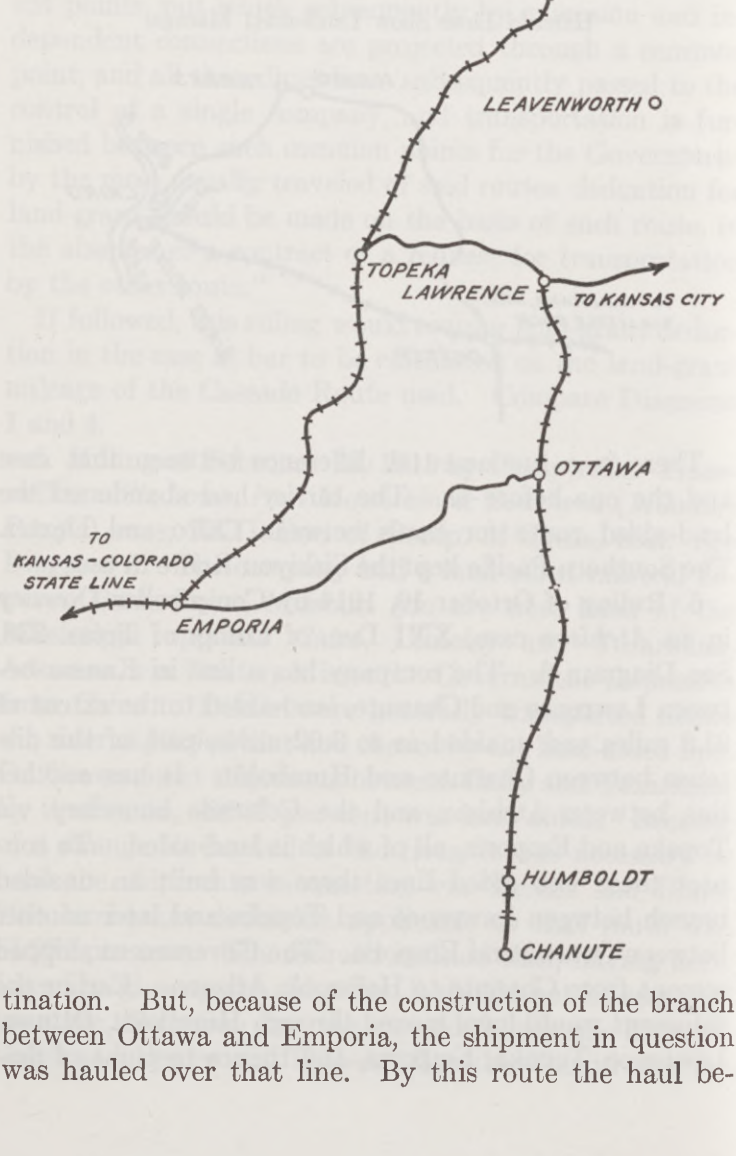
There is a fundamental difference between that case and the one before us. The carrier had abandoned the land-aided route for hauls between Cairo and Dexter. The Southern Pacific kept the Siskiyou Route in use.

6. Ruling of October 19, 1914 by Comptroller Downey in an *Atchison* case, XXI Dec. of Comp. of Treas. 238. See Diagram 6. The company has a line in Kansas between Lawrence and Chanute, land-aided to the extent of 91.3 miles and unaided as to 3.02 miles, part of the distance between Chanute and Humboldt. It has another line between Atchison and the Colorado boundary via Topeka and Emporia, all of which is land-aided. To connect these two aided lines there was built an unaided branch between Lawrence and Topeka and later another between Ottawa and Emporia. The Government shipped cement from Chanute to Holbrook, Arizona. Earlier the shipment would have moved through Humboldt, Ottawa, Lawrence, Topeka, Emporia, and thence to point of des-

DIAGRAM 6.

Scale: Appx. 1 inch = 58 miles.

Hatched Lines Show Land-aided Mileage.



tination. But, because of the construction of the branch between Ottawa and Emporia, the shipment in question was hauled over that line. By this route the haul be-

tween Chanute and Holbrook was 59.13 miles less than over the other route and aided mileage between those points was less by 91.42 miles. The Comptroller held that the land-grant deduction should be based on the land-aided mileage of the original route. He found that the land-grant Act (12 Stat. 772) required the aided railroads "to be and remain public highways for the use of the government" and that the branch lines made new through routes "to the abandonment, in part, of the aided through route." He said: "It has long been the holding of the accounting officers that the changing of a line of railroad and abandoning of any part of the original aided line does not deprive the Government of its original rights, and settlement for service over the new line is, therefore, required to be made as if the transportation were over the original line. (See 3 Dig. Dec. 2d Comp. 299; V Dec. of Comp. of Treas. 364)".

As the ground on which that ruling rests is abandonment of a part of the aided line, it gives no support to the judgment before us.

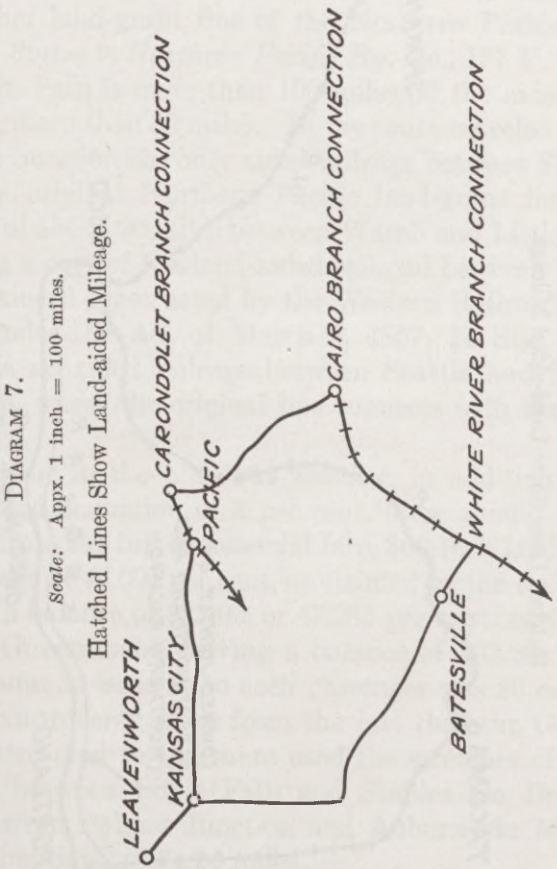
7. Ruling of October 1, 1917 by Comptroller Warwick in a *Missouri Pacific* case, XXIV Dec. of Comp. of Treas. 193. The published report does not disclose the physical situation. It is indicated by Diagram 7 prepared on the basis of information found in an unpublished opinion in the same case rendered May 8, 1917. The Government shipped stone from Batesville, Arkansas on an unaided line via Kansas City to Leavenworth Penitentiary, Kansas. An older route between the same points was via White River Branch Connection, Cairo Branch Connection, Carondolet Branch Connection, Pacific, and Kansas City. The ratio applicable in computing land-grant deduction for shipments hauled that way is 17.933 per cent. The Warden at Leavenworth paid the company for the service in question over the unaided line, without any land-grant deduction. However, the Comptroller held

the carrier subject to the same percentage of deduction as applied to the aided route. On the company's application he granted rehearing, upheld the principle on which he ordered the deduction, and declared it would be applied to future shipments. But, in view of particular facts and equities involved, he concluded that the accounts paid prior to the date of the decision could be allowed without land-grant deduction.

It requires no discussion to show that the direct route used should have been chosen for the transportation in question. The Comptroller cited no land-grant contract to support the rule that he made applicable to future shipments. Nor did he cite Second Comptroller Butler's ruling or any case—and so far as disclosed by diligent research, briefs of counsel and this Court's opinion just announced—there is none that tends to sustain so incongruous an attribution of aided mileage not used to an unaided route used.

8. Ruling of October 27, 1923 by Comptroller McCarl in a *Southern Pacific* case, 3 Comp. Gen. 267. See Diagram 8. This case involved a government shipment from Marshall (Spokane), Washington, to Roseburg, Oregon. It was routed over an unaided line of the Oregon-Washington Railroad & Navigation Company subject to an equalization agreement that charges would not exceed the amount payable had the service been by the land-grant line yielding the lowest net rate. The Northern Pacific line between Marshall and Portland via Pasco and Tacoma was land-aided. Later there was built between Pasco and Portland a line jointly owned by the Northern Pacific and the Great Northern; it is a part of the Spokane, Portland & Seattle Railway. Upon completion of that line, the Northern Pacific canceled its rates applicable between Marshall and Portland by its aided line through Tacoma and announced that the rates in its tariffs would

only apply via the new unaided line. The Comptroller held that, as to the government transportation in question, the aided stretch of the Northern Pacific had been abandoned, and that the Government was therefore entitled "to the transportation over the substituted line on the same basis as though transportation was furnished



over the original land-grant line," and directed that land-grant deduction should be allowed.

That case differs from the one at bar in that the Northern Pacific, having no tariff applicable to the shipment

via its aided line, had abandoned that line and for it substituted a new one.

9. The decisions in *Northern Pacific Ry. Co.* v. *United States* are next in chronological order. See Diagram 9,

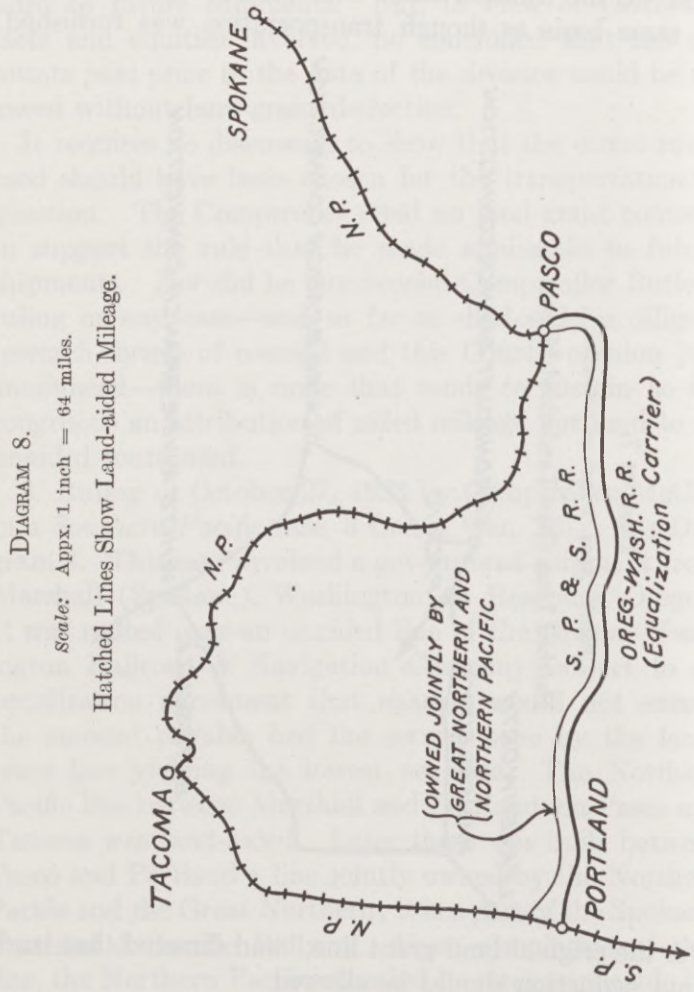


DIAGRAM 8.

Scale: Appx. 1 inch = 64 miles.

Hatched Lines Show Land-aided Mileage.

on p. 428. On government request, the company transported two Marines by through passenger train from St. Paul to Seattle. The Northern Pacific land grant

aided a route from a point on Lake Superior to one on Puget Sound. Pursuant to the terms of the statute (Act of July 2, 1864, 13 Stat. 365) the aided railroad was built from the terminal established at Ashland in Wisconsin to the one established at Tacoma in Washington. Neither St. Paul nor Seattle is or ever was a terminal on that or any other land-grant line of the Northern Pacific. See *United States* v. *Northern Pacific Ry. Co.*, 177 U. S. 435, 441. St. Paul is more than 100 miles off the aided line; Seattle, more than 50 miles. In the route traveled by the train in question the only aided mileage between St. Paul and the original Northern Pacific land-grant line is a stretch of about 20 miles between Watab and Little Falls, which is a part of the land-aided railroad between Watab and Brainerd constructed by the Western Railroad Company under the Act of March 3, 1857, 11 Stat. 195.[10] There is no aided mileage between Seattle and Palmer Junction, where the original line connects with the route used.

The issue in the case was whether, in addition to an undisputed deduction of 3 per cent, there should be deducted from the full commercial fare, $63.16, a land-grant percentage of 46.001 per cent, as claimed by the company, leaving a balance of $33.09, or 47.285 per cent, as claimed by the Government, leaving a balance of $32.29. Thus the amount in issue as to each passenger was 80 cents.

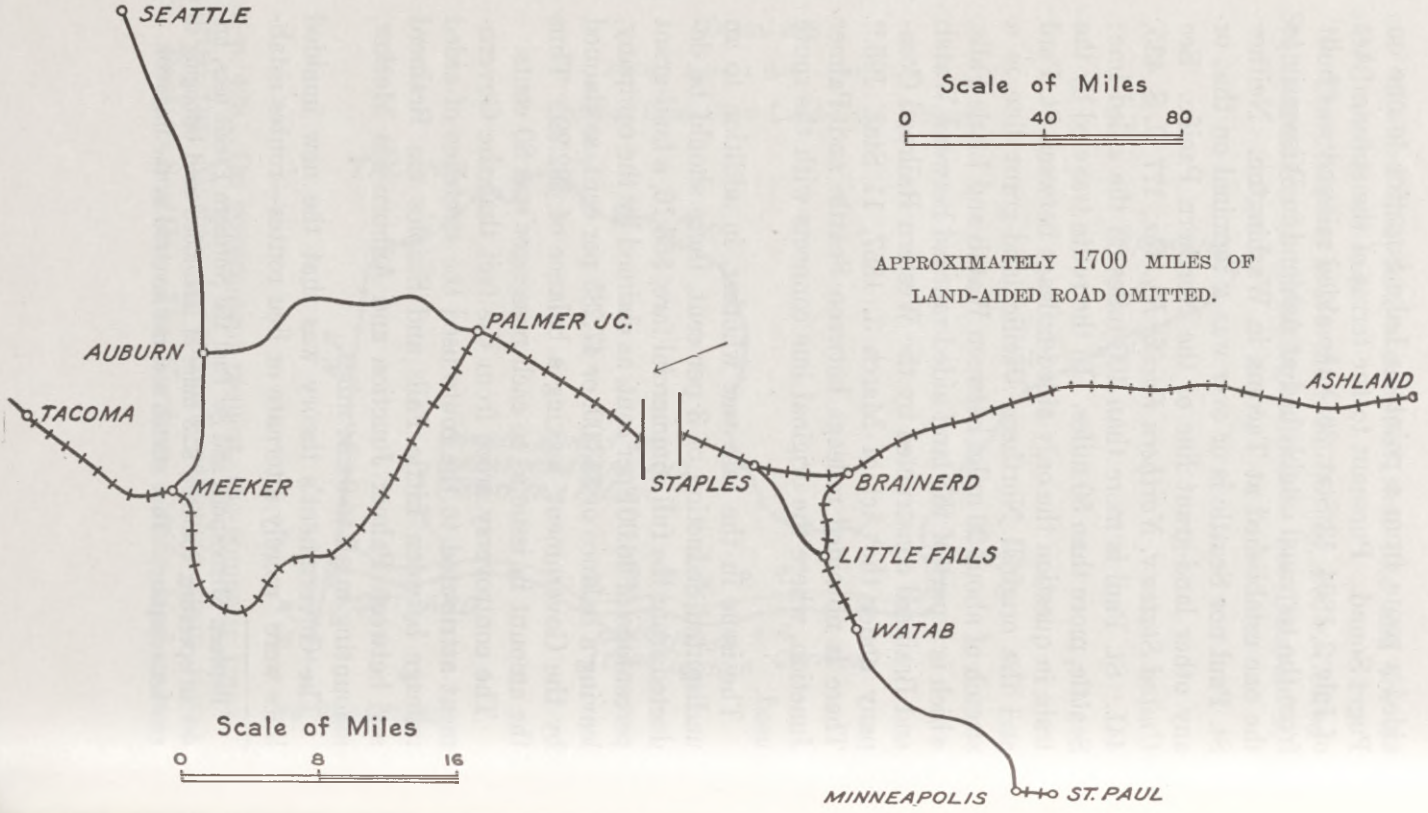
The controversy arose from the fact that the Government attributed to the route used the stretches of aided mileage between Little Falls and Staples via Brainerd and between Palmer Junction and Auburn via Meeker, amounting in all to 94.24 miles.

The Government's theory was that the new unaided lines were "merely alternate or lieu routes—routes estab-

[10] Between Minneapolis and St. Paul the Northern Pacific uses, under an operating contract, 8.23 miles of land-aided road belonging to another company. That stretch was not involved in the litigation.

Diagram 9.

Hatched Lines Show Land-aided Mileage.



lished by the railroad to shorten or straighten its line" and that therefore the calculation of land-grant deduction should take into account aided mileage not used to render the service in question. The district court refused so to interpret the facts and held the deduction should be calculated on mileage actually used. 22 F. 2d 858, 859. But the circuit court of appeals, one judge dissenting, found that the unused aided mileage had been abandoned. 30 F. 2d 655. And upon that interpretation of the stipulated facts, it said (p. 659): "It thus appears that, except by this latter route, [i. e. via unaided stretches between Little Falls and Staples, and between Palmer Junction and Auburn] through carriage by the Northern Pacific [from St. Paul] to the entire Pacific coast is abandoned." The facts clearly distinguish that case from the one now under consideration. It is here immaterial whether the judgment rests on a correct or erroneous interpretation of the stipulation on which the case was submitted. It is enough to say that the aided stretches were excluded by the company because not used and were included by the Government on the ground that having been abandoned, they should be attributed to the route used.

10. Ruling of June 23, 1931 by Comptroller General McCarl in a *Missouri Pacific* case, 10 Comp. Gen. 552. See Diagram 10. The company constructed an unaided cut-off between Jedburg Junction and Eureka Junction, intermediate points on its land-aided line between St. Louis and Pacific. The distance between them via the cut-off is 2.99 miles. Over the old land-aided line via Glencoe, it is 4.93 miles. That track was still in use for some local trains. At another place on its line, within the city of St. Louis, the company substituted 0.68 of a mile of nonaided line for a longer one which is aided. The Comptroller General held that the aided mileage not used should be attributed to the cut-off mileage used. He said: "It would seem to be too clear for serious argument that

of the distances shown after the cut-off . . . between Eureka and Jedburg and the 0.68 miles from union station connection to the union station, or a total of 3.67 miles is not over the land-grant line, but it is equally clear that the new mileage of 3.67 miles was substituted for mileage over the original line for which grants of public lands were made."

It requires imagination to discover in that case anything in principle or in fact that will support the conclusion reached by the Court of Claims in the case at bar.

11. Ruling of January 16, 1936 by Comptroller General McCarl, 15 Comp. Gen. 614. It has no bearing upon the case at bar. The question was whether, in computing percentage of land grant deduction, the line of the Spokane, Portland & Seattle Railway between Pasco and Portland (see Diagram 8), owned jointly by the Northern Pacific and the Great Northern, is to be regarded as a Northern Pacific line. The Comptroller General answered in the affirmative.

IV.

There is apparent attempt to draw from the Act of 1928 some support for the construction on which this Court affirms the judgment below. But, so far as concerns the question in this case, that Act does not indicate any congressional interpretation of the land-grant Act of 1866. The sole purpose of that measure was to substitute 50 per cent deduction in place of free transportation; it was passed in order to relieve the Southern Pacific of a burden to which other aided railroads were not subject. When it was enacted, May 23, 1928, only eight of the rulings above referred to had been made; two related to bond-aid contracts and are not in point; two were in favor of the railroads and do not support the judgment in this case. And, as above shown, none gives any support to

the expansion of the terms of the contract that is here made. The 1928 Act was passed while the decision of the district court in the *Northern Pacific* case remained un-

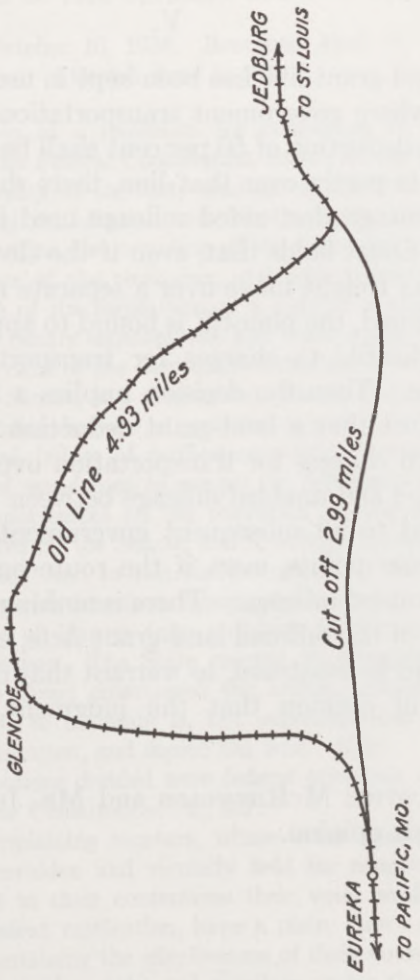


DIAGRAM 10.
Hatched Lines Show Land-aided Mileage.

reversed. 22 F. 2d 858 (1927). That case was not decided in the circuit court of appeals until 1929, 30 F. 2d 655. If the Act could be deemed to be a construction of

the land-grant—as plainly it may not—it would have to be read as approving the decision of the district court, for that was the only judicial decision in that field.

V.

The land-grant line has been kept in use. The contract is that, where government transportation is wholly over that line, deduction of 50 per cent shall be made and that, where it is partly over that line, there shall be deducted the percentage that aided mileage used is of total haul. But this Court holds that, even if the Government elects to have its freight move over a separate and distinct unaided railroad, the plaintiff is bound to apply the percentages applicable to charges for transportation over the aided line. Thus the decision implies a formula or rule to the effect that a land-grant deduction once found applicable to charges for transportation over a route made up of aided and unaided mileage between two points is to be applied to all subsequent government shipments between those points, even if the route actually used includes no aided mileage. There is nothing in this contract or in any of the railroad land-grant Acts, either as written or as hitherto construed, to warrant that construction.

I am of opinion that the judgment should be reversed.

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

Syllabus.

COLEMAN ET AL. *v.* MILLER, SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 7. Argued October 10, 1938. Reargued April 17, 18, 1939.—Decided June 5, 1939.

1. Upon submission of a resolution for ratification of a proposed amendment to the Federal Constitution, known as the Child Labor Amendment, twenty of the forty senators of the State of Kansas voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution, and later it was adopted by the other house of the legislature on a vote of a majority of its members. The twenty senators who had voted against ratification, challenging the right of the Lieutenant Governor to cast the deciding vote in the Senate, and alleging that the proposed amendment had lost its vitality because of previous rejection by Kansas and other States and failure of ratification within a reasonable time, sought a writ of mandamus to compel the Secretary of the Senate to erase an endorsement on the resolution, to the effect that it had been adopted by the Senate, and to endorse thereon the words "was not passed," and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The State entered its appearance and the State Supreme Court entertained the action, sustained the right of the plaintiffs to maintain it, but overruled their contentions, upheld the ratification, and denied the writ. *Held:*

(1) The questions decided were federal questions, arising under Article V of the Constitution. P. 437.

(2) The complaining senators, whose votes against ratification have been overridden and virtually held for naught, although if they are right in their contentions their votes would have been sufficient to defeat ratification, have a plain, direct and adequate interest in maintaining the effectiveness of their votes. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. P. 438.

(3) This Court has jurisdiction to review the decision of the state court by certiorari, under Jud. Code § 237 (b). P. 438.

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2. The Court being equally divided in opinion as to whether the question presents a justiciable controversy, or is a political question, expresses no opinion upon a contention that the Lieutenant Governor of Kansas was not a part of the "legislature," and under Article V of the Federal Constitution could not be permitted a deciding vote on the ratification of the proposed amendment. P. 446.
3. In accordance with the precedent of the Fourteenth Amendment, the efficacy of ratification of a proposed amendment to the Federal Constitution by a state legislature which had previously rejected the proposal, is *held* a question for the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment. P. 447.
4. The legislature of Kansas having actually ratified the proposed Child Labor Amendment, this Court should not restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. There is found no basis in either Constitution or statute for such judicial action. P. 450.
5. R. S. § 205; 5 U. S. C. 160, presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. No warrant is seen for judicial interference with the performance of that duty. P. 450.
6. The Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality before being adopted by the requisite number of legislatures. P. 451.
7. In determining whether a question falls within the category of political, non-justiciable questions, the appropriateness under our system of government of attributing finality to the action of the political departments, and also the lack of satisfactory criteria for a judicial determination, are dominant considerations. P. 454.

146 Kan. 390; 71 P. 2d 518, reversed.

CERTIORARI, 303 U. S. 632, to review a judgment of the Supreme Court of Kansas denying a writ of mandamus, applied for in that court by senators of the State and members of its House of Representatives for the purpose of compelling the Secretary of the Senate to erase an endorsement purporting to show that a resolution for the

ratification of a proposal to amend the Federal Constitution had passed the Senate, and to restrain the officers of the Senate and the other house of the legislature from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor.

Messrs. Robert Stone and *Rolla W. Coleman,* on the reargument and on the original argument, for petitioners.

Mr. Clarence V. Beck on the reargument, and with *Mr. E. R. Sloan* on the original argument, for respondents.

By special leave of Court, *Solicitor General Jackson,* with whom *Mr. Paul A. Freund* was on the brief, argued the case on behalf of the United States, as *amicus curiae,* urging affirmance.

By leave of Court, *Messrs. Orland S. Loomis,* Attorney General of Wisconsin, *Mortimer Levitan* and *Newell S. Boardman,* Assistant Attorneys General, filed a brief on behalf of that State, as *amicus curiae,* urging affirmance.

Opinion of the Court by MR. CHIEF JUSTICE HUGHES, announced by MR. JUSTICE STONE.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment.[1] In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution known as "Senate Concurrent Resolu-

[1] The text of the proposed amendment is as follows (43 Stat. 670):

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

tion No. 3" was introduced in the Senate of Kansas ratifying the proposed amendment. There were forty senators. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the House of Representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the House of Representatives, to compel the Secretary of the Senate to erase an endorsement on the resolution to the effect that it had been adopted by the Senate and to endorse thereon the words "was not passed," and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six States, and had been ratified in only five States, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality.

An alternative writ was issued. Later the Senate passed a resolution directing the Attorney General to enter the appearance of the State and to represent the State as its interests might appear. Answers were filed

on behalf of the defendants other than the State and plaintiffs made their reply.

The Supreme Court found no dispute as to the facts. The court entertained the action and held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed amendment retained its original vitality, and that the resolution "having duly passed the house of representatives and the senate, the act of ratification of the proposed amendment by the legislature of Kansas was final and complete." The writ of mandamus was accordingly denied. 146 Kan. 390; 71 P. 2d 518. This Court granted certiorari. 303 U. S. 632.

First. The jurisdiction of this Court.—Our authority to issue the writ of certiorari is challenged upon the ground that petitioners have no standing to seek to have the judgment of the state court reviewed, and hence it is urged that the writ of certiorari should be dismissed. We are unable to accept that view.

The state court held that it had jurisdiction; that "the right of the parties to maintain the action is beyond question." [2] The state court thus determined in substance that members of the legislature had standing to seek, and the court had jurisdiction to grant, mandamus to compel a proper record of legislative action. Had the questions been solely state questions, the matter would

[2] The state court said on this point:

"At the threshold we are confronted with the question raised by the defendants as to the right of the plaintiffs to maintain this action. It appears that on March 30, 1937, the state senate adopted a resolution directing the attorney general to appear for the state of Kansas in this action. It further appears that on April 3, 1937, on application of the attorney general, an order was entered making the state of Kansas a party defendant. The state being a party to the proceedings, we think the right of the parties to maintain the action is beyond question. (G. S. 1935, 75–702; *State, ex rel.* v. *Public Service Comn.*, 135 Kan. 491, 11 P. 2d 999.)"

have ended there. But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court. They arose under Article V of the Constitution which alone conferred the power to amend and determined the manner in which that power could be exercised. *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221, 227; *Leser* v. *Garnett,* 258 U. S. 130, 137. Whether any or all of the questions thus raised and decided are deemed to be justiciable or political, they are exclusively federal questions and not state questions.

We find the cases cited in support of the contention, that petitioners lack an adequate interest to invoke our jurisdiction to review, to be inapplicable.[3] Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. As the validity of a state statute was not assailed, the remedy by appeal was not available (Jud. Code, § 237 (a); 28 U. S. C. 344 (a)) and the appropriate remedy was by writ of certiorari which we granted. Jud. Code, § 237 (b); 28 U. S. C. 344 (b).

The contention to the contrary is answered by our decisions in *Hawke* v. *Smith, supra,* and *Leser* v. *Garnett,*

[3] See *Caffrey* v. *Oklahoma Territory,* 177 U. S. 346; *Smith* v. *Indiana,* 191 U. S. 138; *Braxton County Court* v. *West Virginia,* 208 U. S. 192; *Marshall* v. *Dye,* 231 U. S. 250; *Stewart* v. *Kansas City,* 239 U. S. 14; *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U. S. 96.

supra. In *Hawke* v. *Smith,* the plaintiff in error, suing as a "citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton," on behalf of himself and others similarly situated, filed a petition for an injunction in the state court to restrain the Secretary of State from spending the public money in preparing and printing ballots for submission of a referendum to the electors on the question of the ratification of the Eighteenth Amendment to the Federal Constitution. A demurrer to the petition was sustained in the lower court and its judgment was affirmed by the intermediate appellate court and the Supreme Court of the State. This Court entertained jurisdiction and, holding that the state court had erred in deciding that the State had authority to require the submission of the ratification to a referendum, reversed the judgment.

In *Leser* v. *Garnett,* qualified voters in the State of Maryland brought suit in the state court to have the names of certain women stricken from the list of qualified voters on the ground that the constitution of Maryland limited suffrage to men and that the Nineteenth Amendment to the Federal Constitution has not been validly ratified. The state court took jurisdiction and the Court of Appeals of the State affirmed the judgment dismissing the petition. We granted certiorari. On the question of our jurisdiction we said:

"The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the contentions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has be-

come part of the Federal Constitution is the question presented for decision."

And holding that the official notice to the Secretary of State, duly authenticated, of the action of the legislatures of the States, whose alleged ratifications were assailed, was conclusive upon the Secretary of State and that his proclamation accordingly of ratification was conclusive upon the courts, we affirmed the judgment of the state court.

That the question of our jurisdiction in *Leser* v. *Garnett* was decided upon deliberate consideration is sufficiently shown by the fact that there was a motion to dismiss the writ of error for the want of jurisdiction and opposition to the grant of certiorari. The decision is the more striking because on the same day, in an opinion immediately preceding which was prepared for the Court by the same Justice,[4] jurisdiction had been denied to a federal court (the Supreme Court of the District of Columbia) of a suit by citizens of the United States, taxpayers and members of a voluntary association organized to support the Constitution, in which it was sought to have the Nineteenth Amendment declared unconstitutional and to enjoin the Secretary of State from proclaiming its ratification and the Attorney General from taking steps to enforce it. *Fairchild* v. *Hughes,* 258 U. S. 126. The Court held that the plaintiffs' alleged interest in the question submitted was not such as to afford a basis for the proceeding; that the plaintiffs had only the right possessed by every citizen "to require that the Government be administered according to law and that the public moneys be not wasted" and that this general right did not entitle a private citizen to bring such a suit as the one in question in the federal courts.[5] It

[4] Mr. Justice Brandeis.

[5] *Id.,* pp. 129, 130. See, also, *Frothingham* v. *Mellon,* 262 U. S. 447, 480, 486, 487.

would be difficult to imagine a situation in which the adequacy of the petitioners' interest to invoke our appellate jurisdiction in *Leser* v. *Garnett* could have been more sharply presented.

The effort to distinguish that case on the ground that the plaintiffs were qualified voters in Maryland, and hence could complain of the admission to the registry of those alleged not to be qualified, is futile. The interest of the plaintiffs in *Leser* v. *Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case. This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution.

We are of the opinion that *Hawke* v. *Smith* and *Leser* v. *Garnett* are controlling authorities, but in view of the wide range the discussion has taken we may refer to some other instances in which the question of what constitutes a sufficient interest to enable one to invoke our appellate jurisdiction has been involved. The principle that the applicant must show a legal interest in the controversy has been maintained. It has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged rights and obligations. Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.[6] But there

[6] *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394; *Trenton* v. *New Jersey*, 262 U. S. 182; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378; *Williams* v. *Mayor*, 289 U. S. 36.

has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties. Under the Urgent Deficiencies Act,[7] the Interstate Commerce Commission, and commissions representing interested States which have intervened, are entitled as "aggrieved parties" to an appeal to this Court from a decree setting aside an order of the Interstate Commerce Commission, though the United States refuses to join in the appeal. *Interstate Commerce Comm'n* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14. So, this Court may grant certiorari, on the application of the Federal Trade Commission, to review decisions setting aside its orders.[8] *Federal Trade Comm'n* v. *Curtis Publishing Co.*, 260 U. S. 568. Analogous provisions authorize certiorari to review decisions against the National Labor Relations Board.[9] *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1. Under § 266 of the Judicial Code (28 U. S. C. 380), where an injunction is sought to restrain the enforcement of a statute of a State or an order of its administrative board or commission, upon the ground of invalidity under the Federal Constitution, the right of direct appeal to this Court from the decree of the required three judges is accorded whether the injunction be granted or denied. Hence, in case the injunction is granted, the state board is entitled to appeal. See, for example, *South Carolina Highway Dept.* v. *Barnwell Brothers*, 303 U. S. 177.

The question of our authority to grant certiorari, on the application of state officers, to review decisions of state courts declaring state statutes, which these officers

[7] Act of October 22, 1913, 38 Stat. 219; 28 U. S. C. 47, 47a, 345.

[8] 15 U. S. C. 45; 28 U. S. C. 348.

[9] 29 U. S. C. 160 (e). See, also, as to orders of Federal Communications Commission, 47 U. S. C. 402 (e).

seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained. The original Judiciary Act of 1789 provided in § 25 [10] for the review by this Court of a judgment of a state court "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity"; that is, where the claim of federal right had been *denied*. By the Act of December 23, 1914,[11] it was provided that this Court may review on certiorari decisions of state courts *sustaining* a federal right. The present statute governing our jurisdiction on certiorari contains the corresponding provision that this Court may exercise that jurisdiction "as well where the federal claim is sustained as where it is denied." Jud. Code, § 237 (b); 28 U. S. C. 344 (b). The plain purpose was to provide an opportunity, deemed to be important and appropriate, for the review of the decisions of state courts on constitutional questions however the state court might decide them. Accordingly where the claim of a complainant that a state officer be restrained from enforcing a state statute because of constitutional invalidity is sustained by the state court, the statute enables the state officer to seek a reversal by this Court of that decision.

In *Blodgett* v. *Silberman,* 277 U. S. 1, 7, the Court granted certiorari on the application of the State Tax Commissioner of Connecticut who sought review of the decision of the Supreme Court of Errors of the State so far as it denied the right created by its statute to tax the transfer of certain securities, which had been placed for safekeeping in New York, on the ground that they

[10] 1 Stat. 73, 85, 86.

[11] 38 Stat. 790; see, also, Act of September 6, 1916, 39 Stat. 726.

were not within the taxing jurisdiction of Connecticut. Entertaining jurisdiction, this Court reversed the judgment in that respect. *Id.*, p. 18.

The question received most careful consideration in the case of *Boynton* v. *Hutchinson Gas Co.*, 291 U. S. 656, where the Supreme Court of Kansas had held a state statute to be repugnant to the Federal Constitution, and the Attorney General of the State applied for certiorari. His application was opposed upon the ground that he had merely an official interest in the controversy and the decisions were invoked upon which the Government relies in challenging our jurisdiction in the instant case.[12] Because of its importance, and contrary to our usual practice, the Court directed oral argument on the question whether certiorari should be granted, and after that argument, upon mature deliberation, granted the writ. The writ was subsequently dismissed but only because of a failure of the record to show service of summons and severance upon the appellees in the state court who were not parties to the proceedings here. 292 U. S. 601. This decision with respect to the scope of our jurisdiction has been followed in later cases. In *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, we granted certiorari on an application by the warden of a city prison to review the decision of the Court of Appeals of the State on *habeas corpus*, ruling that the minimum wage law of the State violated the Federal Constitution. This Court decided the case on the merits. In *Kelly* v. *Washington ex rel. Foss Co.*, 302 U. S. 1, we granted certiorari, on the application of the state authorities charged with the enforcement of the state law relating to the inspection and regulation of vessels, to review the decision of the state court holding the statute invalid in its application to navigable waters. We concluded that the state act had a permissible field of operation and the decision of the

[12] See cases cited in Note 3.

state court in holding the statute completely unenforceable in deference to federal law was reversed.

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage."

While one who asserts the mere right of a citizen and taxpayer of the United States to complain of the alleged invalid outlay of public moneys has no standing to invoke the jurisdiction of the federal courts (*Frothingham* v. *Mellon,* 262 U. S. 447, 480, 486, 487), the Court has sustained the more immediate and substantial right of a resident taxpayer to invoke the interposition of a court of equity to enjoin an illegal use of moneys by a municipal corporation. *Crampton* v. *Zabriskie,* 101 U. S. 601, 609; *Frothingham* v. *Mellon, supra.* In *Heim* v. *McCall,* 239 U. S. 175, we took jurisdiction on a writ of error sued out by a property owner and taxpayer, who had been given standing in the state court, for the purpose of reviewing its decision sustaining the validity under the Federal Constitution, of a state statute as applied to contracts for the construction of public works in the City of New York, the enforcement of which was alleged to involve irreparable loss to the city and hence to be inimical to the interests of the taxpayer.

In *Smiley* v. *Holm,* 285 U. S. 355, we granted certiorari on the application of one who was an "elector," as well as a "citizen" and "taxpayer," and who assailed under the Federal Constitution a state statute establishing congressional districts. Passing upon the merits we held that the function of a state legislature in prescribing the time, place and manner of holding elections for representatives

in Congress under Article I, § 4, was a law-making function in which the veto power of the state governor participates, if under the state constitution the governor has that power in the course of the making of state laws, and accordingly reversed the judgment of the state court. We took jurisdiction on certiorari in a similar case from New York where the petitioners were "citizens and voters of the State" who had sought a mandamus to compel the Secretary of State of New York to certify that representatives in Congress were to be elected in the congressional districts as defined by a concurrent resolution of the Senate and Assembly of the legislature. There the state court, construing the provision of the Federal Constitution as contemplating the exercise of the law-making power, had sustained the defense that the concurrent resolution was ineffective as it had not been submitted to the Governor for approval, and refused the writ of mandamus. We affirmed the judgment. *Koenig* v. *Flynn,* 285 U. S. 375.

In the light of this course of decisions, we find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.

Second. The participation of the Lieutenant Governor.—Petitioners contend that, in the light of the powers and duties of the Lieutenant Governor and his relation to the Senate under the state constitution, as construed by the supreme court of the state, the Lieutenant Governor was not a part of the "legislature" so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the

proposed amendment, when the senate was equally divided.

Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point.

Third. The effect of the previous rejection of the amendment and of the lapse of time since its submission.

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify.[13] The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "Conventions" were prescribed by the Congress, a convention could not reject and, having adjourned *sine die,* be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers,[14] that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act "but once, either by convention or through its legislature."

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[13] Jameson on Constitutional Conventions, §§ 576–581; Willoughby on the Constitution, § 329a.

[14] Jameson, *op. cit.,* §§ 582–584; Willoughby, *op. cit.,* § 329a; Ames, "Proposed Amendments to the Constitution," House Doc. No. 353, Pt. 2, 54th Cong., 2d Sess., pp. 299, 300.

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of States had already been proclaimed.[15] The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866.[16] New governments were erected in those States (and in others) under the direction of Congress.[17] The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868.[18] Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent.[19] As there were then thirty-seven States, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment," [20] and in Secretary Seward's report attention was called to the action of Ohio and New Jersey.[21] On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is

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[15] 13 Stat. 774, 775; Jameson, *op. cit.*, § 576; Ames, *op. cit.*, p. 300.

[16] 15 Stat. 710.

[17] Act of March 2, 1867, 14 Stat., p. 428. See *White* v. *Hart*, 13 Wall. 646, 652.

[18] 15 Stat. 710.

[19] 15 Stat. 707.

[20] Cong. Globe, 40th Cong., 2d Sess., p. 3857.

[21] Cong. Globe, 40th Cong., 2d Sess., p. 4070.

deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual." The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution.[22] On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey),[23] declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution and adding Georgia.[24]

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.[25] While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This

[22] 15 Stat. 706, 707.

[23] 15 Stat. 709, 710.

[24] 15 Stat. 710, 711; Ames, *op. cit.*, App. No. 1140, p. 377.

[25] The legislature of New York which had ratified the Fifteenth Amendment in 1869 attempted, in January, 1870, to withdraw its ratification, and while this fact was stated in the proclamation by Secretary Fish of the ratification of the amendment, and New York was not needed to make up the required three-fourths, that State was included in the list of ratifying States. 16 Stat. 1131; Ames, *op. cit.*, App. No. 1284, p. 388.

decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection.[26] Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." [27]

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[26] Compare Article VII.

[27] 5 U. S. C. 160. From Act of April 20, 1818, § 2; 3 Stat. 439; R. S. § 205.

The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty. See *Leser* v. *Garnett, supra,* p. 137.

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view.[28] It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

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[28] Sen. Rep. 726, 75th Cong., 1st Sess.; Sen. Rep. 788, 75th Cong., 1st Sess.: Letter of the President on January 8, 1937, to the Governors of nineteen non-ratifying States whose legislatures were to meet in that year, urging them to press for ratification. New York Times, January 9, 1937, p. 5.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. *Dillon* v. *Gloss,* 256 U. S. 368. There we sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years.[29] No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had. We are unable to agree with that contention.

It is true that in *Dillon* v. *Gloss* the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some States might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted by necessity, they should be considered and disposed of presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in *Dillon* v. *Gloss* that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what con-

[29] 40 Stat. 1050. A similar provision was inserted in the Twenty-first Amendment. *United States* v. *Chambers,* 291 U. S. 217, 222.

stitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in *Dillon* v. *Gloss* and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration." That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice

and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.

It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determina-

tion are dominant considerations.[30] There are many illustrations in the field of our conduct of foreign relations, where there are "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice." *Ware* v. *Hylton,* 3 Dall. 199, 260.[31] Questions involving similar considerations are found in the government of our internal affairs. Thus, under Article IV, § 4, of the Constitution, providing that the United States "shall guarantee to every State in this Union a Republican Form of Government," we have held that it rests with the Congress to decide what government is the established one in a State and whether or not it is republican in form. *Luther* v. *Borden,* 7 How. 1, 42. In that case Chief Justice Taney observed that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." So, it was held in the same case that under the provision of the same Article for the protection of each of the States "against domestic violence" it rested with the Congress "to determine upon the means proper to be adopted to fulfil this guarantee." *Id.,* p. 43. So, in *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118, we considered that questions arising under the guaranty of

[30] See Willoughby, *op. cit.,* pp. 1326, *et seq.;* Oliver P. Field, "The Doctrine of Political Questions in the Federal Courts," 8 Minnesota Law Review, 485; Melville Fuller Weston, "Political Questions," 38 Harvard Law Review, 296.

[31] See, also, *United States* v. *Palmer,* 3 Wheat. 610, 634; *Foster* v. *Neilson,* 2 Pet. 253, 309; *Doe* v. *Braden,* 16 How. 635, 657; *Terlinden* v. *Ames,* 184 U. S. 270, 288.

a republican form of government had long since been "definitely determined to be political and governmental" and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independently of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the senators and representatives of the State.

For the reasons we have stated, which we think to be as compelling as those which underlay the cited decisions, we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Affirmed.

Concurring opinion by MR. JUSTICE BLACK, in which MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join.

Although, for reasons to be stated by MR. JUSTICE FRANKFURTER, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling,[1] MR. JUSTICE ROBERTS,

[1] Cf., *Helvering* v. *Davis*, 301 U. S. 619, 639–40.

MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place "is conclusive upon the courts." [2] In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, calls for decisions by a "political department" of questions of a type which this Court has frequently designated "political." And decision of a "political question" by the "political department" to which the Constitution has committed it "conclusively binds the judges, as well as all other officers, citizens and subjects of . . . government." [3] Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the

[2] *Leser* v. *Garnett*, 258 U. S. 130, 137.

[3] *Jones* v. *United States*, 137 U. S. 202, 212; *Foster* v. *Neilson*, 2 Pet. 253, 309, 314; *Luther* v. *Borden*, 7 How. 1, 42; *In re Cooper*, 143 U. S. 472, 503; *Pacific States Telephone Co.* v. *Oregon*, 223 U. S. 118; *Davis* v. *Ohio*, 241 U. S. 565, 569. "And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive ["political department"] be right or wrong. It is enough to know that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union. . . . this court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive." *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420.

Constitution, leaving to the judiciary its traditional authority of interpretation.[4] To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

The state court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification; as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in *Dillon* v. *Gloss*,[5] that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a "reasonable time." Nor does the Court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to

[4] *Field* v. *Clark*, 143 U. S. 649, 672.

[5] 256 U. S. 368, 375.

decide the "political questions" of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an "unreasonable" time has elapsed. No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon* v. *Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to

the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

Opinion of MR. JUSTICE FRANKFURTER.

It is the view of MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and myself that the petitioners have no standing in this Court.

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues.[1] And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law. Compare *Muskrat* v. *United States,* 219 U. S. 346; *Tutun* v. *United States,* 270 U. S. 568; *Willing* v. *Chi-*

[1] For an early instance of the abstention of the King's Justices from matters political, see the Duke of York's Claim to the Crown, House of Lords, 1460, 5 Rot. Parl. 375, reprinted in Wambaugh, Cases on Constitutional Law, 1.

cago Auditorium Assn., 277 U. S. 274; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249.

As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are not mechanical criteria but derive from conceptions regarding the distribution of governmental powers in their manifold, changing guises, differences in the application of canons of jurisdiction have arisen from the beginning of the Court's history.[2] Conscious or unconscious leanings toward the serviceability of the judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions. For they influence awareness in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them.

Of all this, the present controversy furnishes abundant illustration. Twenty-one members of the Kansas Senate and three members of its House of Representatives brought an original mandamus proceeding in the Supreme Court of that State to compel the Secretary of its Senate to erase an endorsement on Kansas "Senate Concurrent Resolution No. 3" of January 1937, to the effect that it had been passed by the Senate, and instead to endorse thereon the words "not passed." They also sought to restrain the officers of both Senate and House from authenticating and delivering it to the Governor of the State for transmission to the Secretary of State of the United States. These Kansas legislators resorted to their Supreme Court claiming that there was no longer an amendment open for ratification by Kansas and that, in any event, it had not been ratified by the "legislature" of

[2] See *e. g.* the opinion of Mr. Justice Iredell in *Chisholm* v. *Georgia*, 2 Dall. 419, 429; concurring opinion of Mr. Justice Johnson in *Fletcher* v. *Peck*, 6 Cranch 87, 143; and the cases collected in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341.

Kansas, the constitutional organ for such ratification. See Article V of the Constitution of the United States. The Kansas Supreme Court held that the Kansas legislators had a right to its judgment on these claims, but on the merits decided against them and denied a writ of mandamus. Urging that such denial was in derogation of their rights under the Federal Constitution, the legislators, having been granted *certiorari* to review the Kansas judgment, 303 U. S. 632, ask this Court to reverse it.

Our power to do so is explicitly challenged by the United States as *amicus curiae,* but would in any event have to be faced. See *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382. To whom and for what causes the courts of Kansas are open are matters for Kansas to determine.[3] But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. Are these members of the Kansas legislature, therefore, entitled to ask us to adjudicate the grievances of which they complain?

It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency. See the correspondence between Secretary of State Jefferson and Chief Justice Jay, 3 Johnson, Correspondence and Public Papers of John Jay, 486–89. Unlike the rôle allowed to judges in a few state courts and to the Supreme Court of Canada, our exclusive business is litigation.[4] The requisites of litigation are not satisfied

[3] This is subject to some narrow exceptions not here relevant. See, e. g., *McKnett* v. *St. Louis & S. F. Ry. Co.,* 292 U. S. 230.

[4] As to advisory opinions in use in a few of the state courts, see J. B. Thayer, Advisory Opinions, reprinted in Legal Essays by J. B. Thayer, at 42 *et seq.;* article on "Advisory Opinions," 1 Enc. Soc. Sci.

when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action

475. As to advisory opinions in Canada, see *Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A. C. 571. Speaking of the Canadian system, Lord Chancellor Haldane, in *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A. C. 153, 162, said: "It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies." For further animadversions on advisory pronouncements by judges, see Lord Chancellor Sankey in *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, 66: "We sympathize with the view expressed at length by Newcombe, J., which was concurred in by the Chief Justice, [of Canada] as to the difficulty which the Court must experience in endeavoring to answer questions put to it in this way."

Australia followed our Constitutional practice in restricting her courts to litigious business. The experience of English history which lay behind it was thus put in the Australian Constitutional Convention by Mr. (later Mr. Justice) Higgins: "I feel strongly that it is most inexpedient to break in on the established practice of the English law, and secure decisions on facts which have not arisen yet. Of course, it is a matter that lawyers have experience of every day, that a judge does not give the same attention, he can not give that same attention, to a suppositious case as when he feels the pressure of the consequences to a litigant before him. . . . But here is an attempt to allow this High Court, before cases have arisen, to make a pronouncement upon the law that will be binding. I think the imagination of judges, like that of other persons, is limited, and they are not able to put before their minds all the complex circumstances which may arise and which they ought to have in their minds when giving a decision. If there is one thing more than another which is recognized in British jurisprudence it is that a judge never gives a decision until the facts necessary for that decision have arisen." Rep. Nat. Austral. Conv. Deb. (1897) 966–67.

should make us observe fastidiously the bounds of the litigious process within which we are confined.[5] No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. *Stearns* v. *Wood,* 236 U. S. 75; *Fairchild* v. *Hughes,* 258 U. S. 126.

In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens? The answer requires analysis of the grievances which they urge.

They say that it was beyond the power of the Kansas legislature, no matter who voted or how, to ratify the Child Labor Amendment because for Kansas there was no Child Labor Amendment to ratify. Assuming that an amendment proposed by the Congress dies of inanition after what is to be deemed a "reasonable" time, they claim that, having been submitted in 1924, the proposed Child Labor Amendment was no longer alive in 1937. Or, if alive, it was no longer so for Kansas because, by a prior resolution of rejection in 1925, Kansas had exhausted her power. In no respect, however, do these objections relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification.

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[5] See the series of cases beginning with *Hayburn's Case,* 2 Dall. 409, through *United States* v. *West Virginia,* 295 U. S. 463.

Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included among the necessary "three-fourths of the several States."

These legislators have no more standing on these claims of unconstitutionality to attack "Senate Concurrent Resolution No. 3" than they would have standing here to attack some Kansas statute claimed by them to offend the Commerce Clause. By as much right could a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality.

Clearly a Kansan legislator would have no standing had he brought suit in a federal court. Can the Kansas Supreme Court transmute the general interest in these constitutional claims into the individualized legal interest indispensable here? No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfilment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainments of legal interest brought here for review. For the creation of a vast domain of legal interests is in the keeping of the states, and from time to time state courts and legislators give legal protection to new individual interests. Thus, while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts. *Coyle* v. *Smith,* 221 U. S. 559; *Heim* v. *McCall,* 239 U. S. 175.

But it by no means follows that a state court ruling on the adequacy of legal interest is binding here. Thus, in *Tyler* v. *Judges,* 179 U. S. 405, the notion was rejected that merely because the Supreme Judicial Court of Massachusetts found an interest of sufficient legal significance for assailing a statute, this Court must consider such claim. Again, this Court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the constitutionality of a state statute in order to avoid compliance with it. *Smith* v. *Indiana,* 191 U. S. 138; *Braxton County Court* v. *West Virginia,* 208 U. S. 192; *Marshall* v. *Dye,* 231 U. S. 250; *Stewart* v. *Kansas City,* 239 U. S. 14. Nor can recognition by a state court of such an undifferentiated, general interest confer jurisdiction on us. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U. S. 96, reversing *Miller* v. *Columbus & Greenville Ry.,* 154 Miss. 317; 122 So. 366. Contrariwise, of course, an official has a legally recognized duty to enforce a statute which he is charged with enforcing. And so, an official who is obstructed in the performance of his duty under a state statute because his state court found a violation of the United States Constitution may, since the Act of December 23, 1914, 38 Stat. 790, ask this Court to remove the fetters against enforcement of his duty imposed by the state court because of an asserted misconception of the Constitution. Such a situation is represented by *Blodgett* v. *Silberman,* 277 U. S. 1, and satisfied the requirement of legal interest in *Boynton* v. *Hutcheson,* 291 U. S. 656, *certiorari* dismissed on another ground in 292 U. S. 601.[6]

[6] A quick summary of the jurisdiction of this Court over state court decisions leaves no room for doubt that the fact that the present case is here on *certiorari* is wholly irrelevant to our assumption of jurisdiction. Section 25 of the First Judiciary Act gave reviewing power to this Court only over state court decisions *denying* a claim of federal

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names. Therefore, none of the petitioners can here raise questions concerning the power of the Kansas legislature to ratify the Amendment.

This disposes of the standing of the three members of the lower house who seek to invoke the jurisdiction of this Court. They have no standing here. Equally with-

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right. This restriction was, of course, born of fear of disobedience by the state judiciaries of national authority. The Act of September 6, 1916, 39 Stat. 726, withdrew from this obligatory jurisdiction cases where the state decision was against a "title, right, privilege, or immunity" claimed to exist under the Constitution, laws, treaties or authorities of the United States. This change, which was inspired mainly by a desire to eliminate from review as of right cases arising under the Federal Employers' Liability Act, left such review only in cases where the validity of a treaty, statute or authority of the United States was drawn into question and the decision was against the validity, and in cases where the validity of a statute of a state or a state authority was drawn into question on the grounds of conflict with federal law and the decision was in favor of its validity. The Act of February 13, 1925, 43 Stat. 936, 937, extended this process of restricting our obligatory jurisdiction by transferring to review by *certiorari* cases in which the state court had held invalid an "authority" claimed to be exercised under the laws of the United States or in which it had upheld, against claims of invalidity on federal grounds, an "authority" exercised under the laws of the states. Neither the terms of these two restrictions nor the controlling comments in committee reports or by members of this Court who had a special share in promoting the Acts of 1916 and 1925, give any support for believing that by contracting the range of obligatory jurisdiction over state adjudications Congress

out litigious standing is the member of the Kansas Senate who voted for "Senate Concurrent Resolution No. 3." He cannot claim that his vote was denied any parliamentary efficacy to which it was entitled. There remains for consideration only the claim of the twenty nay-voting senators that the Lieutenant-Governor of Kansas, the presiding officer of its Senate, had, under the Kansas Constitution, no power to break the tie in the senatorial vote on the Amendment, thereby depriving their votes of the effect of creating such a tie. Whether this is the tribunal before which such a question can be raised by these senators must be determined even before considering whether the issue which they pose is justiciable. For the latter involves questions affecting the distribution of constitutional power which should be postponed to preliminary questions of legal standing to sue.

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enlarged the jurisdiction of the Court by removing the established requirement of legal interest as a threshold condition to being here.

Nor does the Act of December 23, 1914, 38 Stat. 790, touch the present problem. By that Act, Congress for the first time gave this Court power to review state court decisions *sustaining* a federal right. For this purpose it made *certiorari* available. The Committee reports and the debates on this Act prove that its purpose was merely to remove the unilateral quality of Supreme Court review of state court decisions on constitutional questions as to which this Court has the ultimate say. The Act did not create a new legal interest as a basis of review here; it built on the settled doctrine that an official has a legally recognizable duty to carry out a statute which he is supposed to enforce.

Thus, prior to the Act of 1914, the Kentucky case, *post*, p. 474, could not have come here at all, and prior to 1916, the Kansas case would have come here, if at all, by writ of error. By allowing cases from state courts which previously could not have come here at all to come here on *certiorari* the Act of 1914 merely lifted the previous bar—that a federal claim had been sustained—but left every other requisite of jurisdiction unchanged. Similarly, no change in these requisites was affected by the Acts of 1916 and 1925 in confining certain categories of litigation from the state courts to our discretionary instead of obligatory reviewing power.

The right of the Kansas senators to be here is rested on recognition by *Leser* v. *Garnett,* 258 U. S. 130, of a voter's right to protect his franchise. The historic source of this doctrine and the reasons for it were explained in *Nixon* v. *Herndon,* 273 U. S. 536, 540. That was an action for $5,000 damages against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. In disposing of the objection that the plaintiff had no cause of action because the subject matter of the suit was political, Mr. Justice Holmes thus spoke for the Court: "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White,* 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court." "Private damage" is the clue to the famous ruling in *Ashby* v. *White, supra,* and determines its scope as well as that of cases in this Court of which it is the justification. The judgment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount "is peculiarly appropriate for the determination of a jury," see *Wiley* v. *Sinkler,* 179 U. S. 58, 65, and for which there is no remedy outside the law courts. "Although this matter relates to the parliament," said Lord Holt, "yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of *Bernardiston* v. *Soame,* 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense." 2 Ld. Raym. 938, 958.

The reasoning of *Ashby* v. *White* and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assem-

blies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if "political" has any connotation at all. *Field* v. *Clark*, 143 U. S. 649, 670, *et seq.*; *Leser* v. *Garnett*, 258 U. S. 130, 137. In no sense are they matters of "private damage." They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. If the doctrine of *Ashby* v. *White* vindicating the private rights of a voting citizen has not been doubted for over two hundred years, it is equally significant that for over two hundred years *Ashby* v. *White* has not been sought to be put to purposes like the present. In seeking redress here these Kansas senators have wholly misconceived the functions of this Court. The writ of *certiorari* to the Kansas Supreme Court should therefore be dismissed.

MR. JUSTICE BUTLER, dissenting.

The Child Labor Amendment was proposed in 1924; more than 13 years elapsed before the Kansas legislature voted, as the decision just announced holds, to ratify it. Petitioners insist that more than a reasonable time had elapsed and that, therefore, the action of the state legislature is without force. But this Court now holds that the question is not justiciable, relegates it to the "consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States the time arrives for the promulgation of the adoption of the amendment" and declares that the decision by Congress would not be subject to review by the courts.

In *Dillon* v. *Gloss,* 256 U. S. 368, one imprisoned for transportation of intoxicating liquor in violation of § 3 of the National Prohibition Act, instituted habeas corpus proceedings to obtain his release on the ground that the Eighteenth Amendment was invalid because the resolution proposing it declared that it should not be operative unless ratified within seven years. The Amendment was ratified in less than a year and a half. We definitely held that Article V impliedly requires amendments submitted to be ratified within a reasonable time after proposal; that Congress may fix a reasonable time for ratification, and that the period of seven years fixed by the Congress was reasonable.

We said:

"It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the

States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson [in his Constitutional Conventions, 4th ed. § 585] 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810, and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. . . . Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reason-

able, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

Upon the reasoning of our opinion in that case, I would hold that more than a reasonable time had elapsed* and

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*CHRONOLOGY OF CHILD LABOR AMENDMENT.

[A State is said to have "rejected" when both Houses of its legislature passed resolutions of rejection, and to have "refused to ratify" when both Houses defeated resolution for ratification.]

June 2, 1924, Joint Resolution deposited in State Department. In that year, Arkansas ratified; North Carolina rejected. *Ratification, 1; rejection, 1.*

1925, Arizona, California and Wisconsin ratified; Florida, Georgia, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Vermont rejected; Connecticut, Delaware and South Dakota refused to ratify. *Ratifications, 4; rejections, 16; refusals to ratify, 3.*

1926, Kentucky and Virginia rejected. *Ratifications, 4; rejections, 18; refusals to ratify, 3.*

1927, Montana, ratified; Maryland rejected. *Ratifications, 5; rejections, 19; refusals to ratify, 3.*

1931, Colorado ratified. *Ratifications, 6; rejections, 19; refusals to ratify, 3.*

1933, Illinois, Iowa, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Washington and West Virginia ratified as did also Maine, Minnesota, New Hampshire, and Pennsylvania, which had rejected in 1925. *Ratifications, 20; rejections, (eliminating States subsequently ratifying) 15; refusals to ratify, 3.*

1935, Idaho and Wyoming ratified, as did Utah and Indiana, which had rejected in 1925. As in 1925, Connecticut refused to ratify. *Ratifications, 24; rejections, 13; refusals to ratify, 3.*

1936, Kentucky, which had rejected in 1926, ratified. *Ratifications, 25; rejections, 12; refusals to ratify, 3.*

1937, Nevada and New Mexico ratified, as did Kansas, which had rejected in 1925. Massachusetts, which had rejected in 1925, refused to ratify. *Ratifications, 28; rejections, 11; refusals to ratify, 3.*

Six States are not included in this list: Alabama, Louisiana, Mississippi, Nebaska, New York and Rhode Island. It appears that there has never been a vote in Alabama or Rhode Island. Louisiana

that the judgment of the Kansas supreme court should be reversed.

The point that the question—whether more than a reasonable time had elapsed—is not justiciable but one for Congress after attempted ratification by the requisite number of States, was not raised by the parties or by the United States appearing as *amicus curiae;* it was not suggested by us when ordering reargument. As the Court, in the *Dillon* case, did directly decide upon the reasonableness of the seven years fixed by the Congress, it ought not now, without hearing argument upon the point, hold itself to lack power to decide whether more than 13 years between proposal by Congress and attempted ratification by Kansas is reasonable.

MR. JUSTICE MCREYNOLDS joins in this opinion.

CHANDLER, GOVERNOR OF KENTUCKY, ET AL. *v.* WISE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 14. Argued October 10, 11, 1938. Reargued April 18, 1939.—Decided June 5, 1939.

Suit was brought in a state court to restrain the Governor and other state officials from sending to the Secretary of State of the United States a certified copy of a resolution enacted by the state legislature purporting to ratify the proposed Child Labor Amendment

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house of representatives has three times (1924, 1934 and 1936) defeated resolutions for ratification. In Mississippi, the Senate adopted resolution for ratification in 1934, but in 1936 another Senate resolution for ratification was adversely reported. In Nebraska, the House defeated ratification resolutions in 1927 and 1935, but the Senate passed such a resolution in 1929. In New York, ratification was defeated in the House in 1935 and 1937, and in the latter year, the Senate passed such a resolution.

to the Federal Constitution, it being alleged that such attempted ratification was illegal and void. *Held:*

That although the state court had jurisdiction *in limine,* the act of the Governor in forwarding the certification to the federal Secretary of State after the beginning of the suit and after a restraining order and summons had been issued, but before actual service and without knowledge of the pendency of the proceeding, had left no controversy susceptible of judicial determination; and that a writ of certiorari from this Court to review the final judgment should therefore be dismissed.

271 Ky. 252; 111 S. W. 2d 633, dismissed.

CERTIORARI, 303 U. S. 634, to review the affirmance by the court below of a judgment entered pursuant to its opinion on an earlier review, 270 Ky. 1. The suit was brought by individuals—citizens, taxpayers, and voters in Kentucky—to restrain the Governor and officers of the General Assembly from sending to the Secretary of State of the United States a certified copy of a resolution of the legislature purporting to ratify the proposed Child Labor Amendment, and for a judgment declaring the legislative Act to be illegal and void because of a rejection of the same proposed amendment by an earlier legislature of the State, as well as by more than a majority of the legislatures of the several States, and further because more than a reasonable time for ratification had elapsed since the amendment was first proposed.

Mr. J. W. Jones, Assistant Attorney General of Kentucky, on the reargument and on the original argument, for petitioners.

Mr. Lafon Allen on the original argument, and with *Mr. Oldham Clarke* on the reargument, for respondents.

By special leave of Court, *Solicitor General Jackson,* with whom *Mr. Paul A. Freund* was on the brief, argued the case on behalf of the United States, as *amicus curiae,* urging reversal.

By leave of Court, *Messrs. Orland S. Loomis,* Attorney General of Wisconsin, *Mortimer Levitan* and *Newell S. Boardman,* Assistant Attorneys General, filed a brief on behalf of that State, as *amicus curiae,* urging reversal.

Opinion of the Court by MR. CHIEF JUSTICE HUGHES, announced by MR. JUSTICE STONE.

In January, 1937, the legislature of Kentucky adopted a resolution purporting to ratify the constitutional amendment proposed by the Congress in 1924 and known as the "Child Labor Amendment." [1]

Respondents, citizens, taxpayers and voters in Kentucky, brought this suit in the state court to restrain the Governor of the Commonwealth and the officers of the General Assembly from sending certified copies of the resolution to the Secretary of State of the United States and the presiding officers of the Senate and House of Representatives, and for a judgment declaring the action of the General Assembly to be illegal and void. The complaint stated that in 1926 the proposed amendment had been rejected by the General Assembly of the Commonwealth and also by more than a majority of the legislatures of the States, and that the General Assembly could not thereafter legally reconsider and adopt the amendment; and, further, that its action was not taken within a reasonable time after the amendment was proposed.

Upon the filing of the petition, a restraining order was granted and summons was issued. On the same day, but before the Governor was actually served with a copy of the restraining order or summons, he forwarded by mail a certified copy of the resolution to the Secretary of State. It is not claimed that the Governor then knew of the pendency of the proceeding.

Plaintiffs then filed an amended petition setting forth the action taken by the Governor and sought a mandatory

[1] 43 Stat. 670.

injunction to require him to notify the Secretary of State of the pendency of the suit and that the notice which he had sent was void and should be disregarded. That action was not taken. Defendants filed a general demurrer which was sustained in the Circuit Court but its judgment was reversed by the Court of Appeals. 270 Ky. 1; 108 S. W. 2d 1024.

The court gave opportunity on the remand to the Circuit Court, with directions to overrule the demurrer, for such further proceedings as were not inconsistent with its views. Upon that remand the defendants declined to plead further and judgment was entered in accordance with the opinion of the Court of Appeals. The judgment so entered set forth (1) that an actual controversy existed between the parties, that the plaintiffs had the right to maintain the suit and the court had jurisdiction; (2) that the resolution of the legislature purporting to ratify the proposed amendment was void, not having been ratified according to the provisions of the Constitution of the United States; (3) that the notice given by the Governor to the Secretary of State was of no effect; (4) that the clerk of the court should give official notice to the Department of State that the resolution purporting to ratify the amendment was invalid, that it had not been ratified according to the provisions of the Constitution of the United States, and that the notice given by the Governor was of no effect. The clerk was further directed to send a duly authenticated copy of the judgment to the Secretary of State by registered mail.

On appeal, that judgment was affirmed by the Court of Appeals. We granted certiorari. 303 U. S. 634.

We think that, while the state court had jurisdiction *in limine,* the writ of certiorari should be dismissed upon the ground that after the Governor of Kentucky had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there

was no longer a controversy susceptible of judicial determination.

Dismissed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER think that the judgment of the Court of Appeals of Kentucky should be affirmed on the authority of *Dillon* v. *Gloss*, 256 U. S. 368, and for the reasons stated in the dissenting opinion in *Coleman* v. *Miller*, *ante*, p. 470.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

For the reasons stated in concurring opinion in *Coleman* v. *Miller*, *ante*, p. 456, we do not believe that state or federal courts have any jurisdiction to interfere with the amending process.

We therefore concur in the dismissal.

BALDWIN ET AL., TRUSTEES, *v.* SCOTT COUNTY MILLING CO.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 650. Argued April 21, 1939.—Decided June 5, 1939.

1. Where a carrier, having been ordered by the Interstate Commerce Commission to make reparation to a shipper for tariff charges then found by the Commission to have been excessive, pays the required amount upon demand of the shipper without waiting to be sued under the disadvantages prescribed by § 16 (2) of the Interstate Commerce Act, the payment is not voluntary; and where afterwards, upon rehearing, the Commission sets aside the reparation order, because the finding of unreasonable rates upon which it was based was erroneous, the carrier may maintain a suit to recover the payment from the shipper. This accords with the policy of the Act. P. 481.

The fact that the shipper paid part of the money to an expert, who acted for it before the Commission in procuring the repara-

tion, recovery of which is barred by limitations, and has used the remainder for its own purposes, furnishes no equitable defense to the suit for refund. P. 485.

2. Equitable considerations can not justify failure of a carrier to collect, or of a shipper to pay, the tariff charges required by the Interstate Commerce Act. P. 485.

343 Mo. 915; 122 S. W. 2d 890, reversed.

CERTIORARI, 306 U. S. 625, to review a judgment of the court below, which affirmed a judgment of a circuit court of Missouri for the defendant, in an action brought by the trustees of the Missouri Pacific Railway Company to recover an amount of money which the company had paid to the defendant in pursuance of an order of reparation made by the Interstate Commerce Commission.

Mr. H. H. Larimore, with whom *Mr. Thomas J. Cole* was on the brief, for petitioners.

Mr. James A. Finch, with whom *Messrs. Ralph E. Bailey* and *R. F. Baynes* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The decision in this case depends on provisions of the Interstate Commerce Act and orders of the commission.

In September, 1924, respondent and others complained to the commission that the tariff charges they had been and were then paying the Missouri Pacific and other carriers for the transportation of coal from mines in southern Illinois and western Kentucky to destinations in southeastern Missouri and northeastern Arkansas, were excessive. They asked the commission to establish reasonable rates for the future, to ascertain the amount of damages they had sustained, and to order the carriers to make reparation. After hearings the commission, by order of February 11, 1929, and supplemental order of March 11

in the same year, found that the carriers' tariff rates had been, were, and for the future would be, unreasonable to an extent indicated, prescribed as reasonable lower rates to be established for the future, and found that complainants including respondent, having paid excessive charges, had suffered damages and were entitled to reparation to the extent of the difference between amounts paid and what the charges would have been under the rates that the commission then found reasonable.

On demand of the respondent, made in accordance with the commission's rules of practice,[1] the Missouri Pacific before April 20, 1929, paid it $23,994.33, being the amounts directed to be paid by the reparation order on account of shipments for which the Missouri Pacific, delivering carrier, had collected the charges. After denial of a number of petitions for rehearing filed by the Missouri Pacific and other carriers, the commission, November 2, 1931, reopened the case. July 3, 1933, after hearings and protracted contest, it found the rates that it had theretofore condemned were not unreasonable and set aside all findings and orders that it had made, including the reparation order on which respondent had collected.

October 30, 1934, petitioners, who had been appointed trustees of the Missouri Pacific, asked respondent to refund the amount it had received; respondent refused. To recover with interest the amount the Missouri Pacific paid, petitioners brought this suit in a circuit court of Missouri; it gave judgment for respondent. The supreme court affirmed. It held that, as the Missouri Pacific had paid the amount of the reparation award with full knowledge of the facts without denying liability or waiting to be sued, the payment was a voluntary one and that therefore petitioners were not entitled to recover. The court

[1] The applicable rule is V: Reparation Statements—Formal Claims for Reparation Based Upon Findings of the Commission. See Rules of Practice Before the Commission, revised to April 1, 1936.

also held that by the voluntary payment the Missouri Pacific caused respondent to believe that the matter was a closed transaction and that in the circumstances, to which reference will later be made, it would be inequitable to require respondent to refund.

We think that petitioners are entitled to recover.

1. In absence of prior finding by the commission that the tariff charges collected for interstate transportation are unreasonable, there can be no enforceable claim for damages caused by exactions according to the tariff. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444. *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 510. *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 259. And see *Lewis-Simas-Jones Co.* v. *Southern Pacific R. Co.*, 283 U. S. 654, 661; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. Prior to the findings and orders of the commission, February 11 and March 11, 1929, respondent was not permitted to collect, nor was the Missouri Pacific or other carriers allowed to pay, the damages claimed by respondent. But when the commission made the findings and reparation orders, the carriers, in the absence of facts constituting a defense, were in duty bound to pay in accordance with the orders.

Section 16 (1)[2] provides that if the commission shall determine complainant entitled to an award of damages, it shall direct the carrier to pay complainant the sum to which he is found entitled within a specified time. Section 16 (2)[3] declares that if the carrier does not comply

[2] "If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 49 U. S. C. § 16 (1).

[3] "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in

within the time limit, complainant may bring suit setting forth the causes for which he claims damages. It also declares that, in claimants' suits in federal courts, the findings and order of the commission shall be prima facie evidence of the facts therein stated. It allows plaintiffs, if they prevail, to recover reasonable attorneys' fees. By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. . . . One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to

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the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 49 U. S. C. § 16 (2).

encourage the payment, without suit, of just demands does not militate against its validity. And in *St. Louis & S. F. R. Co.* v. *Spiller,* 275 U. S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

There is nothing in the record to indicate, nor is it suggested by respondent or in the state court's opinion, that the Missouri Pacific had any defense against respondent's claim under the findings and reparation order. The liability so established persisted until payment of the claim. It may not reasonably be held that the Missouri Pacific was bound to await suit or delay adjudication by false or frivolous answer while expenses of litigation, interest, and fees for its adversary's counsel accumulated. Sections 16 (1) and 16 (2) indicate legislative purpose to penalize failure of carriers, having no defense, to pay damages in accordance with the terms of the commission's findings and reparation orders.

But by § 16a,[4] the commission was empowered to set aside its orders. That section was drafted by the com-

[4] "After a decision, order, or requirement has been made by the commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or require-

mission at the request of the Senate Committee on Interstate Commerce and was added by the Hepburn Act of 1906. It was "a new section . . . which expressly authorizes the commission to review and modify its own decisions." [5] It was expounded by the commission as "intended to give the commission a right to rehear a matter for the purpose of correcting any injustice in a previous order." Cattle Raisers' Assn. *v.* Missouri, K. & T. Ry. Co., 12 I. C. C. 1, 3. While careful to prevent applications for rehearing from being used to avoid or delay compliance with the commission's orders, it empowers the commission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. Respondent made its demand and collected the money subject to the authority of the commission to set aside the order which authorized payment of the same.

The clauses of § 16a that authorize the commission to consider facts arising after the former hearing and that make its decisions after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6 (7); see also § 10 (2). Similarly, it condemns the obtaining of transportation for less than

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ment is in any respect unjust or unwarranted, the commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order." 49 U. S. C. § 16a.

[5] Nineteenth Annual Report of the Interstate Commerce Commission, p. 12.

the legally established rate. See § 10 (3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, 582. *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406. By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

The retention by respondent of money collected under the findings and order that the commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act.

2. The facts on which the state court held it would be inequitable to require respondent to refund may be briefly stated. Respondent employed an expert to represent it before the commission and promised to pay him one-half the amount recovered as reparation. Upon collection, it promptly paid as agreed. When petitioners asked refund, more than five years had elapsed and suit to recover back the fee was barred by the statute of limitations. Respondent used the other half to pay dividends and for other corporate purposes. As above indicated, the court held the payment to be voluntary and rested its ruling on that fact. But as shown above it was not voluntary; it was demanded by respondent and compelled by the Act, findings, and reparation order. Moreover, equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges. *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink, supra. New York Central & H. R. R. Co.* v. *York & Whitney Co., supra.*

Reversed.

AMERICAN TOLL BRIDGE CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 704. Argued April 21, 1939.—Decided June 5, 1939.

1. Provisions of the California Political Code requiring county supervisors when granting a toll bridge franchise to fix tolls which must not raise annually an income exceeding 15 per cent. of a specified base, and providing that tolls shall not be increased or diminished unless it be shown that the receipts from them in any one year are "disproportionate" to the base, can not be construed to mean that tolls shall not be reduced unless they yield in excess of the 15 per cent. P. 488.
2. A toll bridge company was notified that an investigation of the operation of its bridge would extend to the tolls. It was accorded and accepted opportunity to introduce evidence, and submitted its case for decision without request for findings or argument. The state commission, in reducing tolls, filed a decision sufficiently indicating the facts on which it made the order. In its petitions for rehearing and for judicial review the company, though setting forth other objections specifically, did not claim that procedural due process had been denied by the commission. *Held,* that there is no basis for asserting the claim in this Court. *Morgan* v. *United States,* 304 U. S. 1, is not in point. P. 492.
3. A company owning two bridges objected to regulation of the tolls on one without including the other, claiming that they were parts of the same system but competing, and that reduction of tolls on the one would force reduction on the other. *Held:*

   (1) That determination of the proper unit was in the first instance for the rate-fixing commission. P. 494.

   (2) As the other bridge is not used or useful in rendering any of the service covered by the tolls under investigation, and the duty to operate the one is independent of the duty to operate the other, the claim that the commission in confining its regulation to the one bridge abused its discretion and denied procedural due process, is without foundation. P. 494.
4. Where an order reducing bridge tolls extended only to automobiles and passengers, leaving intact the tolls for other classes of traffic, a claim that the reduction was confiscatory was not established by proof that the revenues as a whole from all of the traffic

were inadequate; there must be allocation or apportionment, to the traffic covered by the reduced tolls, of operating expenses, cost of depreciation, taxes, sinking fund contributions, property values, etc., fairly attributable to the service covered by the order. P. 494.
12 Cal. 2d 184; 83 P. 2d 1, affirmed.

APPEAL from a judgment of the Supreme Court of California upholding an order of the State Railroad Commission which reduced in part the tolls charged for use of one of the appellant's bridges.

Mr. Max Thelen for appellant.

Mr. Ira H. Rowell for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This appeal is from a judgment of the highest court of the State upholding an order of the state railroad commission that reduces tolls for use of appellant's bridge across the Carquinez Straits between the counties of Contra Costa and Solano. Appellant contends that the order violates Art. I, § 10, of the Constitution; that the commission's procedure was repugnant to the due process clause of the Fourteenth Amendment, and that the order, in violation of that clause, prescribes rates that are confiscatory.

February 5, 1923, the board of supervisors of Contra Costa County, exerting power conferred by state legislation,[1] passed ordinance No. 171 granting to the Rodeo-Vallejo Ferry Company a franchise to construct and for 25 years to operate the Carquinez bridge. June 4, 1923, the same board granted to the Delta Bridge Corporation a like franchise for the construction and operation of a bridge across the San Joaquin River near Antioch, between the counties of Contra Costa and Sacramento.

[1] Political Code, §§ 2843, 2845, 2846, and 2872 (as amended May 8, 1923, Cal. Stats. 1923, p. 272).

Each ordinance provides that, on the expiration of the franchise, the property rights, including title to the bridge, revert to the adjacent counties. Appellant became the owner of both franchises. The Antioch bridge was opened in January, 1926, and the Carquinez in May, 1927.

When the Carquinez bridge opened, the board of supervisors fixed tolls at 60 cents for automobiles and at 10 cents for each person in a vehicle or on foot.[2] That scale was in operation when the commission made the order in question which reduced these charges to 45 and 5 cents, respectively. Jurisdiction over toll bridges having been conferred upon it by a statute of 1937,[3] the commission in August of that year on its own motion commenced an investigation of all toll bridges. But, in October following, it commenced a separate proceeding solely to investigate reasonableness of Carquinez tolls. February 8, 1938, it announced its opinion and promulgated the order in question. Appellant obtained judicial review; the court upheld the order. 12 Cal. 2d 184.

The statutory provisions authorizing the county board to grant the franchises, ordinance No. 171, and the grantees' acceptance constitute a contract between the parties. *Contra Costa Co.* v. *American Toll Bridge Co.*, (1937) 10 Cal. 2d 359; 74 P. 2d 749. As to that, there is no controversy. But appellant contends that under the franchise it has a contract right that the bridge tolls shall not be reduced by the public authorities unless it shall first appear that they are yielding a rate in excess of 15 per cent upon the rate base specified by §§ 2845 and 2846, Political Code.

These sections provide:

§ 2845. "The board of supervisors granting authority to construct a toll-bridge . . . must at the same time: . . .

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[2] The franchise ordinance fixed these tolls at 75 cents and 15 cents.

[3] Act of August 27, 1937, Cal. Stats. 1937, p. 2473.

"2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.

"3. Fix the rate of tolls which may be collected for crossing the bridge . . . which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge . . . for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; . . . "[4]

§ 2846. "The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge. . . . The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

The state court held that § 2846 contemplates increases as well as reductions, limited by the 15 per cent maximum, at any time the disproportion is shown to exist. It construed the language of that section to be inconsistent with the intent to contract that appellant shall have a 15 per cent return, if yielded by the tolls specified in the franchise. The opinion explains that: "Rather is it to be assumed that the legislature intended, not only to afford an adequate and proportionate return to the grantee, but

[4] By Act of May 9, 1923, par. 3 was amended to read as follows: "Fix the rate of tolls which may be collected for crossing the bridge . . . which may raise annually an income not exceeding fifteen per cent on the actual cost of the construction or erection of the bridge . . . and such additional income as will provide for the annual cost of operation, maintenance, amortization and taxes of the bridge. . . ." Cal. Stats. 1923, p. 288.

that it also intended some measure of protection to the public's right to be charged not more than a reasonable toll for the use of the bridge. . . . In 1872, when section 2846 was enacted by the legislature, sufficient scope was allowed between both interests, public and private, to permit adequate elasticity in the exercise of the legislative rate-making function in the light of prevailing economic conditions. Such a statute does not savor of a contract obligation to the grantee. Its object was to delegate to and vest in the designated body the power to regulate tolls as circumscribed by the stated limitation." 12 Cal. 2d 195; 83 P. 2d 6.

Upon the issue whether the order is repugnant to the contract clause, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," this Court, while inclining to the state court's construction, will decide for itself whether, as claimed by appellant, the franchise by contract limits exertion of sovereign powers to regulate tolls. *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 438. *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 593. And, if it plainly appears that it does, this Court will not hesitate so to adjudge. *Detroit United Ry.* v. *Michigan,* 242 U. S. 238, 251–253. *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517, 524, 536. *Detroit* v. *Detroit Citizens Street Ry. Co.,* 184 U. S. 368, 382, 389. *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352. Compare *Georgia* v. *Chattanooga,* 264 U. S. 472, 480.

Upon an elaborate review of the California legislation relating to bridge tolls, appellant says that in the first period, 1850 to 1857, bridge franchises allowed owners to take only such tolls as the courts of sessions and, later, the county boards should fix annually; that in the second period, 1857 to 1864, tolls were limited to those fixed by county boards annually, subject to change by the legislature; that in the third period, 1862 to 1872, general statutes and special acts authorized such rates as the

county boards should annually prescribe, declaring, however, that they should not be so low as to make income less than a specified percentage of a defined base. On that foundation, it maintains that there was an evolution of policy to grant to builders and operators of bridges contract rights as to tolls. In that light it examines the language of §§ 2845 and 2846 and concludes that the proper construction of the franchise in question is that unless the yield becomes in excess of 15 per cent the license tax must not be increased and the rate of toll must not be diminished.

We assume, without detailed examination, that the legislation so portrayed indicates that in the period next preceding 1872, when the provisions of § 2846 were enacted, the State had adopted the policy of safeguarding operators of toll bridges against rate reduction by county boards below specified levels. But that fact may not be employed to arrive at a construction not indicated by the language used. So far as concerns the point under consideration, the meaning of the statutory provision is plain. Section 2845 requires the county board, when granting the franchise, to fix the license tax within specified limits and a rate of toll, which must not raise annually an income exceeding 15 per cent of base. Section 2846 declares that the license tax and the rate of toll so fixed must not be diminished unless receipts are disproportionate to base. Thus plainly the commands are that at first the tolls must be fixed, but not to produce income above the 15 per cent specified, and that the tolls so fixed shall not be diminished unless yield is disproportionate to the defined base. Neither in text nor in reason is the "fifteen per cent" prescribed as maximum yield tied to, or made the test by which to ascertain whether receipts from tolls are, "disproportionate." We construe these statutory provisions to negative appellant's claim that by the franchise in question the State bargained away power to reduce tolls for use of the Carquinez bridge unless

annual return becomes more than 15 per cent. See *e. g. Paducah* v. *Paducah Ry. Co.*, 261 U. S. 267, 275; *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, 417–419; *Railroad Commission* v. *Los Angeles Ry. Corp.*, 280 U. S. 145, 152, 155. The order is not repugnant to the contract clause.

Appellant claims that, in violation of the due process clause of the Fourteenth Amendment, the commission denied it a full and fair hearing and failed adequately to find the facts. The commission initiated the proceeding, entitled "In the matter of the investigation upon the commission's own motion, into the rates, charges, contracts, classifications, rules and regulations of American Toll Bridge Company covering its operation of the toll bridge over the Carquinez Straits between the counties of Contra Costa and Solano"; gave appellant notice that the investigation would extend to tolls for use of that bridge; accorded it opportunity to introduce evidence and present its contentions; and received the evidence offered by it, 233 pages of the printed record and numerous exhibits. Appellant submitted the case for decision without making any request for findings and without argument, oral or written. The commission, without formal findings, filed its decision which, sufficiently to meet requirements of due process, indicates the facts on which it made the order.

Then appellant filed petition for rehearing. That document, including eight captions and 12 sub-captions and an exhibit, occupies 39 printed pages of the record.[5] It

[5] I. Introduction.

II. Exclusion of Antioch Bridge.

1. The Facts.
2. Inevitable Effect of Decision on Tolls of Carquinez Bridge, Antioch Bridge and Martinez-Benicio Ferry.
3. The Decision is Contrary to the Commission's Own Traditions and Policy.
4. The Commission's Action Deprives American Toll Bridge Company of Its Property Without Due

specifically sets forth the grounds on which appellant claimed the decision to be unlawful. These include the commission's determination of the various classes of facts usually considered in cases in which prescribed rates are challenged as confiscatory. The petition contains no hint of claim that the commission denied appellant procedural due process. Nor was that specified in the petition for judicial review. *Morgan* v. *United States,* 304 U. S. 1, on which appellant relies, was decided after filing of that petition and before argument in the California court. That court rightly held it not in point.

Process of Law in Violation of Guarantees of the Federal and the State Constitutions.

III. Failure to Give Fair Return on Fair Value of Carquinez Bridge.
  1. Calculations of Commission in Computing Its Rate.
  2. Errors in Commission's Computations.
    (1) Rate Base.
    (2) Money Available for Return on Rate Base (under 50¢ toll).
  3. Return Under Rate Fixed by Commission.
  4. In View of the Cost of Money to American Toll Bridge Company, a Return of Only 6.6% or 6.9% on the Fair Value of the Carquinez Bridge Would be Confiscatory.
  5. Summary as to Fair Return, Carquinez Bridge.

IV. Failure to Give Fair Return on Fair Value of Carquinez and Antioch Bridges.
  1. Rate Base.
  2. Return Under Rate Fixed by Commission.
  3. Effect of Commission's Decision Would be to Confiscate Property of American Toll Bridge Company in Both Carquinez and Antioch Bridges.

V. Under Commission's Tolls American Toll Bridge Company Would be Unable to Meet Its Requirements to Its Bondholders and Stockholders.

VI. Impairment of Contract Obligations.

VII. False Analogy With Publicly Owned and Operated San Francisco Bay Bridges.

VIII. Violation of Constitutional and Statutory Rights.

Appellant also claims that the commission denied it procedural due process by excluding the Antioch bridge rates from the proceeding. It moved to include with this proceeding an investigation of the Antioch bridge tolls. In support of the motion, it suggested that the bridges are part of a single system but compete with each other; that operations of the Antioch are less satisfactory financially than those of the Carquinez; and that reduction of Carquinez tolls would force reduction of Antioch tolls.

In the first instance, at least, determination of the proper unit for rate making was for the commission. The Antioch bridge is not used or useful to render any service covered by the Carquinez tolls; appellant's duty to operate either bridge is independent of its obligation to operate the other. The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, and clearly there is no foundation for the claim that in excluding the Antioch the commission denied appellant procedural due process. See *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 206, 209. *Wabash Valley Electric Co.* v. *Young*, 287 U. S. 488, 495–8. *Florida Power & Light Co.* v. *Miami*, 98 F. 2d 180. *International Ry. Co.* v. *Prendergast*, 1 F. Supp. 623. Cf. *Coney* v. *Broad River Power Co.*, 171 S. C. 377; 172 S. E. 437.

There is no foundation for the claim that the commission's procedure violated the due process clause of the Fourteenth Amendment.

There remains for consideration the contention that the prescribed rates are confiscatory. The burden is on appellant to show that enforcement of the order will compel it to furnish the service covered by the reduced rates for less than a reasonable rate of return on the value of the property used, at the time it is being used, for that service. And, in the absence of clear and convincing proof that the reduced tolls are too low to yield that return, it

may not be adjudged that the State by enforcement of the measure complained of will deprive appellant of its property without due process of law. *Chicago & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339, 344–345. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 441, 446. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8, 16. *The Minnesota Rate Cases,* 230 U. S. 352, 433, 452. *Brush Electric Co.* v. *Galveston,* 262 U. S. 443, 446. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 448.

The terms of the order must first be given attention. It directs appellant to change the items of its schedule of charges, reading as follows: "Passengers (7 years of age and older) on foot or in vehicles . . . $.10. Auto only . . . .60" so as to read: "Passengers (7 years of age and older) on foot or in vehicles . . . .05. Auto only . . . .45." Thus, the order extends only to automobiles and passengers. The Carquinez franchise specifies, until otherwise ordered by the commission, tolls applicable to other classes of traffic crossing the bridge, namely, bicycles, carts and wagons, commercial or delivery automobiles and motor trucks, ditchers, harvesters, etc., cattle and stock, motor stages to which commutation rates are applied when operated as specified, freight, hearses, horses, motorcycles, and trailers.

Appellant fails to establish, by allocation or apportionment to the traffic covered by the tolls so reduced, the operating expenses, cost of depreciation, taxes, and contributions to the sinking fund for amortization of investment that are fairly attributable to the service covered by the order; it also fails to establish the amount of property value that is justly assignable to that traffic. Obviously, the return to be yielded by the reduced tolls cannot be found without comparison of the revenues to be derived from the service with the amounts of operating expenses and other charges rightly to be made against them. Inadequacy of revenues from all traffic

does not tend to show that the rates on automobiles and persons prescribed by the commission's order are too low. *The Minnesota Rate Cases, supra,* 452–453. *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 372, 378, 381. It follows that appellant is not entitled to a decree that the order is confiscatory.

More need not be written to dispose of the issues presented in this case. But in view of appellant's earnest contentions, it is not inappropriate to say that the record, considered in the light of its argument, fails to show that the rate reduction will so lessen revenues from the Carquinez bridge that there will remain less than sufficient, under the due process clause, to constitute just compensation for its use—a reasonable rate of return on the value of the bridge property.

Judgment affirmed.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS concur in the result.

HAGUE, MAYOR, ET AL. *v.* COMMITTEE FOR INDUSTRIAL ORGANIZATION ET AL.

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

No. 651. Argued February 27, 28, 1939.—Decided June 5, 1939.

In a suit to enjoin municipal officers from enforcing ordinances forbidding the distribution of printed matter, and the holding without permits of public meetings, in streets and other public places, *Held:*

1. The case is within the jurisdiction of the District Court. Pp. 512–513, 525.

2. The ordinances and their enforcement violate the rights under the Constitution of the individual plaintiffs, citizens of the United States; but a complaining corporation can not claim such rights. P. 514.

3. The ordinances are void. Pp. 516, 518.

4. Provisions of the decree enjoining forcible removal of plaintiffs or exercise of personal restraint over them without warrant, or confinement without lawful arrest and production for prompt judicial hearing, saving lawful search and seizure, or interference with their free access to streets, parks or public places of the city,—are not vague and impracticable. P. 517.

5. The decree properly enjoined interference with the right of plaintiffs, their agents etc., to communicate their views as individuals to others on the streets in an orderly and peaceable manner, reserving the right of defendants to enforce law and order by lawful search and seizure or arrest. P. 517.

6. In so far as the decree relates to distribution of literature and holding of meetings, the decree should enjoin enforcement of the void ordinances, and not undertake to enumerate the conditions under which those activities may be carried on. P. 518.

Per ROBERTS, J., with whom BLACK, J., concurred. The CHIEF JUSTICE concurred in part (p. 532).

1. The District Court lacked jurisdiction under Jud. Code § 24 (1). P. 508.

(a) In suits under § 24 (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involves the necessary sum. P. 507.

(b) The record in this suit is bare of any showing of the value of the asserted rights to the complainants individually. P. 508.

(c) Complainants may not aggregate their interests in order to attain the requisite jurisdictional amount. P. 508.

2. The District Court had jurisdiction under Jud. Code, § 24 (14). P. 513.

(a) Freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgment by § 1 of the Fourteenth Amendment; and R. S. § 1979 and Jud. Code § 24 (14) afford redress in a federal court for such abridgment. P. 512.

(b) Natural persons alone are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures to

"citizens of the United States." Only the individual complainants may maintain this suit. P. 514.

3. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. Distinguishing *Davis* v. *Massachusetts*, 167 U. S. 43. P. 515.
4. The ordinance here in question, which forbids public assembly in the streets or parks of the city without a permit from the Director of Safety, who may refuse such permit upon his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage," is void upon its face. P. 516.

   It does not make comfort or convenience in the use of the streets or parks the standard of official action, and can be made the instrument of arbitrary suppression of free expression of views on national affairs. Uncontrolled official suppression of the privilege of public assembly can not be made a substitute for the duty to maintain order in connection with the exercise of the right.
5. The question whether exemption from the searches and seizures proscribed by the Fourth Amendment is afforded by the privileges and immunities clause of the Fourteenth is not involved. P. 517.
6. An ordinance absolutely prohibiting distribution of circulars, handbills, placards, etc., in any street or public place is void. *Lovell* v. *Griffin*, 303 U. S. 444. P. 518.

Per STONE, J., with whom REED, J., concurred. The CHIEF JUSTICE concurred in part (p. 532).

1. Freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. P. 519.

   There is no occasion in this case to consider whether freedom of speech and of assembly are immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States.
2. The decree which is now affirmed is without support in the record, if the constitutional right of free speech and assembly is dependent on the privileges and immunities clause rather than the due process clause of the Fourteenth Amendment. Complainants

are not alleged, shown, or found to be citizens of the United States. The findings do not support the conclusion that the proposed meetings of complainants were for any purpose affecting the relationship between complainants and the United States or pertaining to United States citizenship. The decree is not restricted to interferences with rights or immunities of United States citizenship, but enjoins unlawful interference with all meetings for lawful purposes and the lawful dissemination of all information. Pp. 522–524.

3. The suit is maintainable under Jud. Code, § 24 (14) as a suit for protection of rights and privileges guaranteed by the due process clause. P. 525.

   The right of the individual complainants to maintain it conferred by § 24 (14) does not depend on their citizenship and can not rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act.

4. The liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. P. 527.

   A corporation can not be said to be deprived of the civil rights of freedom of speech and of assembly.

5. The right conferred by the Civil Rights Act of April 20, 1871, to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution has been preserved, and whenever the right is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under Jud. Code § 24 (14) to entertain it without proof that the amount in controversy exceeds $3,000. P. 531.

   Jud. Code § 24 (1), conferring upon the district court jurisdiction of suits "arising under the Constitution or laws of the United States" in which the value in controversy exceeds the sum of $3,000, is not to be interpreted as requiring a different result.

101 F. 2d 774, modified and affirmed.

CERTIORARI, 306 U. S. 624, to review a decree which modified and affirmed a decree of injunction, 25 F. 2d 127, in a suit brought by individuals, unincorporated labor organizations, and a membership corporation, against officials of a municipality to restrain alleged violations of constitutional rights of free speech and of assembly.

Messrs. Charles Hershenstein and *Edward J. O'Mara* with whom *Messrs. James A. Hamill* and *John A. Matthews* were on the brief, for petitioners. See p. 661.

Messrs. Morris L. Ernst and *Spaulding Frazer,* with whom *Messrs. Lee Pressman* and *Benjamin Kaplan* were on the brief, for respondents. See p. 668.

By leave of Court, the Committee on the Bill of Rights of the American Bar Association, filed a brief, as *amici curiae,* discussing the right of assembly. See p. 678.

MR. JUSTICE BUTLER, presiding in the absence of the CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS:

The judgment of the court in this case is that the decree is modified and as modified affirmed. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of the case. MR. JUSTICE ROBERTS has an opinion in which MR. JUSTICE BLACK concurs, and MR. JUSTICE STONE an opinion in which MR. JUSTICE REED concurs. The CHIEF JUSTICE concurs in an opinion. MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent for reasons stated in opinions by them respectively.

MR. JUSTICE ROBERTS delivered an opinion in which MR. JUSTICE BLACK concurred:

We granted certiorari as the case presents important questions in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to a federal statute, by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of federal courts of suits to restrain the abridgment of such privilege and immunity.

The respondents, individual citizens, unincorporated labor organizations composed of such citizens, and a mem-

bership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city.

The bill alleges that acting under a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a State, or a change of government by other than lawful means, the petitioners, and their subordinates, have denied respondents the right to hold lawful meetings in Jersey City on the ground that they are Communists or Communist organizations; that pursuant to an unlawful plan, the petitioners have caused the eviction from the municipality of persons they considered undesirable because of their labor organization activities, and have announced that they will continue so to do. It further alleges that acting under an ordinance which forbids any person to "distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet," the petitioners have discriminated against the respondents by prohibiting and interfering with distribution of leaflets and pamphlets by the respondents while permitting others to distribute similar printed matter; that pursuant to a plan and conspiracy to deny the respondents their Constitutional rights as citizens of the United States, the petitioners have caused respondents, and those acting with them, to be arrested for distributing printed matter in the streets, and have caused them, and their associates, to be carried beyond the limits of the city or to remote places therein, and have compelled them to board ferry boats destined for New York; have, with violence and force, interfered with the distribution of pamphlets discussing the rights of citizens

under the National Labor Relations Act; have unlawfully searched persons coming into the city and seized printed matter in their possession; have arrested and prosecuted respondents, and those acting with them, for attempting to distribute such printed matter; and have threatened that if respondents attempt to hold public meetings in the city to discuss rights afforded by the National Labor Relations Act, they would be arrested; and unless restrained, the petitioners will continue in their unlawful conduct. The bill further alleges that respondents have repeatedly applied for permits to hold public meetings in the city for the stated purpose, as required by ordinance,[1] although they do not admit the validity of the ordinance; but in execution of a common plan and purpose, the petitioners have consistently refused to issue any permits for meetings to be held by, or sponsored by, respondents, and have thus prevented the

[1] "The Board of Commissioners of Jersey City Do Ordain:

"1. From and after the passage of this ordinance, no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety.

"2. The Director of Public Safety is hereby authorized and empowered to grant permits for parades and public assembly, upon application made to him at least three days prior to the proposed parade or public assembly.

"3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

"4. Any person or persons violating any of the provisions of this ordinance shall upon conviction before a police magistrate of the City of Jersey City be punished by a fine not exceeding two hundred dollars or imprisonment in the Hudson County jail for a period not exceeding ninety days or both."

holding of such meetings; that the respondents did not, and do not, propose to advocate the destruction or overthrow of the Government of the United States, or that of New Jersey, but that their sole purpose is to explain to workingmen the purposes of the National Labor Relations Act, the benefits to be derived from it, and the aid which the Committee for Industrial Organization would furnish workingmen to that end; and all the activities in which they seek to engage in Jersey City were, and are, to be performed peacefully, without intimidation, fraud, violence, or other unlawful methods.

The bill charges that the suit is to redress "the deprivation, under color of state law, statute and ordinance, of rights privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States providing for equal rights of citizens of the United States . . ." It charges that the petitioners' conduct "is in violation of their [respondents] rights and privileges as guaranteed by the Constitution of the United States." It alleges that the petitioners' conduct has been "in pursuance of an unlawful conspiracy . . . to injure oppress threaten and intimidate citizens of the United States, including the individual plaintiffs herein, . . . in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States. . . ."

The bill charges that the ordinances are unconstitutional and void, or are being enforced against respondents in an unconstitutional and discriminatory way; and that the petitioners, as officials of the city, purporting to act under the ordinances, have deprived respondents of the privileges of free speech and peaceable assembly secured to them, as citizens of the United States, by the Fourteenth Amendment. It prays an injunction against continuance of petitioners' conduct.

The bill alleges that the cause is of a civil nature, arising under the Constitution and laws of the United States, wherein the amount in controversy exceeds $3,000, exclusive of interest and costs; and is a suit in equity to redress the deprivation, under color of state law, statute and ordinance, of rights, privileges and immunities secured by the Constitution of the United States, and of rights secured by the laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

The answer denies generally, or qualifies, the allegations of the bill but does not deny that the individual respondents are citizens of the United States; denies that the amount in controversy "as to each plaintiff and against each defendant" exceeds $3,000, exclusive of interest and costs; and alleges that the supposed grounds of federal jurisdiction are frivolous, no facts being alleged sufficient to show that any substantial federal question is involved.

After trial upon the merits the District Court entered findings of fact and conclusions of law and a decree in favor of respondents.[2] In brief, the court found that the purposes of respondents, other than the American Civil Liberties Union, were the organization of unorganized workers into labor unions, causing such unions to exercise the normal and legal functions of labor organizations, such as collective bargaining with respect to the betterment of wages, hours of work and other terms and conditions of employment, and that these purposes were lawful; that the petitioners, acting in their official capacities, have adopted and enforced the deliberate policy of excluding and removing from Jersey City the agents of the respondents; have interfered with their right of passage upon the streets and access to the parks of the city; that these ends have been accomplished by force and violence

[2] 25 F. Supp. 127.

despite the fact that the persons affected were acting in an orderly and peaceful manner; that exclusion, removal personal restraint and interference, by force and violence, are accomplished without authority of law and without promptly bringing the persons taken into custody before a judicial officer for hearing.

The court further found that the petitioners, as officials, acting in reliance on the ordinance dealing with the subject, have adopted and enforced a deliberate policy of preventing the respondents, and their associates, from distributing circulars, leaflets, or handbills in Jersey City; that this has been done by policemen acting forcibly and violently; that the petitioners propose to continue to enforce the policy of such prevention; that the circulars and handbills, distribution of which has been prevented, were not offensive to public morals, and did not advocate unlawful conduct, but were germane to the purposes alleged in the bill, and that their distribution was being carried out in a way consistent with public order and without molestation of individuals or misuse or littering of the streets. Similar findings were made with respect to the prevention of the distribution of placards.

The findings are that the petitioners, as officials, have adopted and enforced a deliberate policy of forbidding the respondents and their associates from communicating their views respecting the National Labor Relations Act to the citizens of Jersey City by holding meetings or assemblies in the open air and at public places; that there is no competent proof that the proposed speakers have ever spoken at an assembly where a breach of the peace occurred or at which any utterances were made which violated the canons of proper discussion or gave occasion for disorder consequent upon what was said; that there is no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public and that there is competent proof that the

municipal authorities have granted permits to various persons other than the respondents to speak at meetings in the streets of the city.

The court found that the rights of the respondents, and each of them, interfered with and frustrated by the petitioners, had a value, as to each respondent, in excess of $3,000, exclusive of interest and costs; that the petitioners' enforcement of their policy against the respondents caused the latter irreparable damage; that the respondents have been threatened with manifold and repeated persecution, and manifold and repeated invasions of their rights; and that they have done nothing to disentitle them to equitable relief.

The court concluded that it had jurisdiction under § 24 (1) (12) and (14) of the Judicial Code; [3] that the petitioners' official policy and acts were in violation of the Fourteenth Amendment, and that the respondents had established a cause of action under the Constitution of the United States and under R. S. 1979, R. S. 1980, and R. S. 5508, as amended.[4]

The Circuit Court of Appeals concurred in the findings of fact; held the District Court had jurisdiction under § 24 (1) and (14) of the Judicial Code; modified the decree in respect of one of its provisions, and, as modified, affirmed it.[5]

By their specifications of error, the petitioners limit the issues in this court to three matters. They contend that the court below erred in holding that the District Court had jurisdiction over all or some of the causes of action stated in the bill. Secondly, they assert that the court erred in holding that the street meeting ordinance is unconstitutional on its face, and that it has been un-

[3] 28 U. S. C. § 41 (1), (12) and (14).

[4] 8 U. S. C. §§ 43 and 47 (3), 18 U. S. C. § 51.

[5] *Hague* v. *Committee for Industrial Organization,* 101 F. 2d 774.

constitutionally administered. Thirdly, they claim that the decree must be set aside because it exceeds the court's power and is impracticable of enforcement or of compliance.

First. Every question arising under the Constitution may, if properly raised in a state court, come ultimately to this court for decision. Until 1875,[6] save for the limited jurisdiction conferred by the Civil Rights Acts, *infra,* federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon United States courts has been narrowly limited.

Section 24 of the Judicial Code confers original jurisdiction upon District Courts of the United States. Subsection (1) gives jurisdiction of "suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000" and "arises under the Constitution or laws of the United States."

The wrongs of which respondents complain are tortious invasions of alleged civil rights by persons acting under color of state authority. It is true that if the various plaintiffs had brought actions at law for the redress of such wrongs the amount necessary to jurisdiction under § 24 (1) would have been determined by the sum claimed in good faith.[7] But it does not follow that in a suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under subsection (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of

[6] See Act of March 3, 1875, c. 137, 18 Stat. 470.

[7] *Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487. Compare *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 288.

such amount, calls for substantial proof on the part of the plaintiff of facts justifying the conclusion that the suit involves the necessary sum.[8] The record here is bare of any showing of the value of the asserted rights to the respondents individually and the suggestion that, in total, they have the requisite value is unavailing, since the plaintiffs may not aggregate their interests in order to attain the amount necessary to give jurisdiction.[9] We conclude that the District Court lacked jurisdiction under § 24 (1).

Section 24 (14) grants jurisdiction of suits "at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." [10]

The petitioners insist that the rights of which the respondents say they have been deprived are not within those described in subsection (14). The courts below have held that citizens of the United States possess such rights by virtue of their citizenship; that the Fourteenth Amendment secures these rights against invasion by a State, and authorizes legislation by Congress to enforce the Amendment.

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[8] *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; compare *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269.

[9] *Wheless* v. *St. Louis*, 180 U. S. 379; *Pinel* v. *Pinel*, 240 U. S. 594, 596; *Scott* v. *Frazier*, 253 U. S. 243.

[10] The section is derived from R. S. 563, § 12, which, in turn, originated in § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, as reënacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.

Prior to the Civil War there was confusion and debate as to the relation between United States citizenship and state citizenship. Beyond dispute, citizenship of the United States, as such, existed. The Constitution, in various clauses, recognized it [11] but nowhere defined it. Many thought state citizenship, and that only, created United States citizenship.[12]

After the adoption of the Thirteenth Amendment, a bill, which became the first Civil Rights Act,[13] was introduced in the 39th Congress, the major purpose of which was to secure to the recently freed negroes all the civil rights secured to white men. This act declared that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States and should have the same rights in every State to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property to the same extent as white citizens. None other than citizens of the United States were within the provisions of the Act. It provided that "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right secured or protected by this act" should be guilty of a misdemeanor. It also conferred on district courts jurisdiction of civil actions by persons deprived of rights secured to them by its terms.

By reason of doubts as to the power to enact the legislation, and because the policy thereby evidenced might be reversed by a subsequent Congress, there was intro-

[11] See Art. I, §§ 2 and 3; Art. II, § 1.

[12] See *Scott* v. *Sandford*, 19 How. 393.

[13] Act of April 9, 1866, c. 31, 14 Stat. 27.

duced at the same session an additional amendment to the Constitution which became the Fourteenth.

The first sentence of the Amendment settled the old controversy as to citizenship by providing that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Thenceforward citizenship of the United States became primary and citizenship of a State secondary.[14]

The first section of the Amendment further provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

The second Civil Rights Act[15] was passed by the 41st Congress. Its purpose was to enforce the provisions of the Fourteenth Amendment, pursuant to the authority granted Congress by the fifth section of the amendment. By § 18 it reënacted the Civil Rights Act of 1866.

A third Civil Rights Act, adopted April 20, 1871,[16] provided "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; . . ." This, with changes of the arrangement of clauses which were not intended to alter the scope of the provision, became R. S. 1979, now Title 8, § 43 of the United States Code.

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[14] *Selective Draft Cases*, 245 U. S. 366, 389.

[15] May 31, 1870, 16 Stat. 140. The act was amended by an Act of February 28, 1871, 16 Stat. 433.

[16] 17 Stat. 13, § 1.

As has been said, prior to the adoption of the Fourteenth Amendment, there had been no constitutional definition of citizenship of the United States, or of the rights, privileges, and immunities secured thereby or springing therefrom. The phrase "privileges and immunities" was used in Article IV, § 2 of the Constitution, which decrees that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as "natural rights"; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.[17]

While this description of the civil rights of the citizens of the States has been quoted with approval,[18] it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.[19]

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[17] *Corfield* v. *Coryell,* 4 Wash. C. C. 371; 6 Fed. Cas. No. 3230.

[18] *The Slaughter-House Cases,* 16 Wall. 36, 76; *Maxwell* v. *Dow,* 176 U. S. 581, 588, 591; *Canadian Northern Ry. Co.* v. *Eggen,* 252 U. S. 553, 560.

[19] *Downham* v. *Alexandria,* 10 Wall. 173; *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U. S. 142; *La Tourette* v. *McMaster,* 248 U. S. 465; *Chalker* v. *Birmingham & N. W. Ry. Co.,* 249 U. S. 522;

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgment [20] by § 1 of the Fourteenth Amendment; and whether R. S. 1979 and § 24 (14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment,[21] it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.

Shaffer v. *Carter*, 252 U. S. 37; *United States* v. *Wheeler*, 254 U. S. 281; *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377; *Whitfield* v. *Ohio*, 297 U. S. 431.

[20] As to what constitutes state action within the meaning of the amendment, see *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339, 347; *Home Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Mooney* v. *Holohan*, 294 U. S. 103, 112; *Lovell* v. *Griffin*, 303 U. S. 444, 450.

[21] *The Slaughter-House Cases*, 16 Wall. 36, 77; *Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Virginia*, 100 U. S. 339; *In re Kemmler*, 136 U. S. 436, 448.

In the *Slaughter-House Cases* it was said, 16 Wall. 79: "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus,* are rights of the citizen guaranteed by the Federal Constitution."

In *United States* v. *Cruikshank,* 92 U. S. 542, 552–553, the court said:

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."

No expression of a contrary view has ever been voiced by this court.

The National Labor Relations Act declares the policy of the United States to be to remove obstructions to commerce by encouraging collective bargaining, protecting full freedom of association and self-organization of workers, and, through their representatives, negotiating as to conditions of employment.

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim. The District Court had jurisdiction under § 24 (14).

Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for "citizens of the United States." [22] Only the individual respondents may, therefore, maintain this suit.

Second. What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power.

The findings of fact negative the latter assumption. In support of the former the petitioners rely upon *Davis* v. *Massachusetts,* 167 U. S. 43. There it appeared that, pursuant to enabling legislation, the city of Boston adopted an ordinance prohibiting anyone from speaking, discharging fire arms, selling goods, or maintaining any booth for public amusement on any of the public grounds of the city except under a permit from the Mayor. Davis spoke on Boston Common without a permit and without applying to the Mayor for one. He was charged with a violation of the ordinance and moved to quash the complaint, *inter alia,* on the ground that the ordinance abridged his privileges and immunities as a citizen of the United States and denied him due process of law because it was arbitrary and unreasonable. His contentions were overruled and he was convicted. The judgment was

[22] *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557; *Holt* v. *Indiana Manufacturing Co.,* 176 U. S. 68; *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359; *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112.

affirmed by the Supreme Court of Massachusetts and by this court.

The decision seems to be grounded on the holding of the state court that the Common "was absolutely under the control of the legislature," and that it was thus "conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe." The Court added that the Fourteenth Amendment did not destroy the power of the States to enact police regulations as to a subject within their control or enable citizens to use public property in defiance of the constitution and laws of the State.

The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks.

We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the

streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance quoted in Note 1 void upon its face.[23] It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.

The bill recited that policemen, acting under petitioners' instructions, had searched various persons, including the respondents, and had seized innocent circulars and pamphlets without warrant or probable cause. It prayed injunctive relief against repetition of this conduct. The District Court made no findings of fact concerning such searches and seizures and granted no relief with respect to them. The Circuit Court of Appeals did not enlarge the terms of the decree but found that unreasonable searches and seizures had occurred and that the prohibitions of the Fourth Amendment had been taken over by the Fourteenth so as to protect citizens of the United States against such action.

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[23] *Lovell* v. *Griffin, supra.* See the construction of the ordinance by the Supreme Court of New Jersey in *Thomas* v. *Casey,* 121 N. J. L. 185; 1 A. 2d 866.

The decree as affirmed by the court below does not restrain any searches or seizures. In each of its provisions addressed to interference with liberty of the person, or to the conspiracy to deport, exclude, and interfere bodily with the respondents in pursuit of their peaceable activities, the decree contains a saving clause of which the following is typical: "except in so far as such personal restraint is in accordance with any right of search and seizure." In the light of this reservation we think there was no occasion for the Circuit Court of Appeals to discuss the question whether exemption from the searches and seizures proscribed by the Fourth Amendment is afforded by the privileges and immunities clause of the Fourteenth, and we have no occasion to consider or decide any such question.

Third. It remains to consider the objections to the decree. Section A deals with liberty of the person and prohibits the petitioners from excluding or removing the respondents or persons acting with them from Jersey City, exercising personal restraint over them without warrant or confining them without lawful arrest and production of them for prompt judicial hearing, saving lawful search and seizure; or interfering with their free access to the streets, parks, or public places of the city. The argument is that this section of the decree is so vague in its terms as to be impractical of enforcement or obedience. We agree with the court below that the objection is not well founded.

Section B deals with liberty of the mind. Paragraph 1 enjoins the petitioners from interfering with the right of the respondents, their agents and those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner. It reserves to the petitioners full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer. We think this paragraph unassailable.

Paragraphs 2 and 3 enjoin interference with the distribution of circulars, handbills and placards. The decree attempts to formulate the conditions under which respondents and their sympathizers may distribute such literature free of interference. The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin, supra,* and petitioners so concede. We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.

Paragraph 4 has to do with public meetings. Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There is an initial command that the petitioners shall not place "any previous restraint" upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does.

The bill should be dismissed as to all save the individual plantiffs, and § B, paragraphs 2, 3 and 4 of the decree should be modified as indicated. In other respects the decree should be affirmed.

MR. JUSTICE STONE:

I do not doubt that the decree below, modified as has been proposed, is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end, and I think the matter is of sufficient importance to merit discussion in some detail.

It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357; *Fiske* v. *Kansas,* 274 U. S. 380; *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *De Jonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *Griffin,* 303 U. S. 444. It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers, *Slaughter-House Cases,* 16 Wall. 36; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Maxwell* v. *Bugbee,* 250 U. S. 525, 538; *Hamilton* v. *Regents,* 293 U. S. 245, 261, and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined.

As will presently appear, the right to maintain a suit in equity to restrain state officers, acting under a state law, from infringing the rights of freedom of speech and of assembly guaranteed by the due process clause, is given by Act of Congress to every person within the jurisdiction of the United States whether a citizen or not, and such a suit may be maintained in the district court without allegation or proof that the jurisdictional amount required by § 24 (1) of the Judicial Code is involved. Hence there is no occasion, for jurisdictional purposes or any other, to consider whether freedom of speech and of assembly are immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States, or to revive the contention,

rejected by this Court in the *Slaughter-House Cases, supra,* that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.[1]

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[1] The privilege or immunity asserted in the *Slaughter-House Cases* was the freedom to pursue a common business or calling, alleged to have been infringed by a state monopoly statute. It should not be forgotten that the Court, in deciding the case, did not deny the contention of the dissenting justices that the asserted freedom was in fact infringed by the state law. It rested its decision rather on the ground that the immunity claimed was not one belonging to persons by virtue of their citizenship. "It is quite clear," the Court declared (p. 74), "that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend on different characteristics in the individual." And it held that the protection of the privileges and immunities clause did not extend to those "fundamental" rights attached to state citizenship which are peculiarly the creation and concern of state governments and which Mr. Justice Washington, in *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 6 Fed. Cas. No. 3230, mistakenly thought to be guaranteed by Article IV, § 2 of the Constitution. The privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws. *Slaughter-House Cases,* 16 Wall. 36, 79; see *Twining* v. *New Jersey,* 211 U. S. 78, 97, 98.

That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court. *In re Kemmler,* 136 U. S. 436, 448; *McPherson* v. *Blacker,* 146 U. S. 1, 38; *Giozza* v. *Tiernan,* 148 U. S. 657, 661; *Duncan* v. *Missouri,* 152 U. S. 377, 382. Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause. *Walker* v. *Sauvinet,* 92 U. S. 90; *Hurtado* v. *California,* 110 U. S. 516; *Presser* v. *Illinois,* 116 U. S. 252; *O'Neill* v. *Vermont,* 144 U. S. 323; *Maxwell* v. *Dow,* 176

That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren. But it is said that the freedom of respondents with which the petitioners have interfered is the "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peace-

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U. S. 581; *West* v. *Louisiana,* 194 U. S. 258; *Twining* v. *New Jersey, supra; Palko* v. *Connecticut,* 302 U. S. 319.

The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the *Slaughter-House Cases.* If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, such as were described in *Corfield* v. *Coryell, supra,* it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases,* with the decision against enlargement.

Of the fifty or more cases which have been brought to this Court since the adoption of the Fourteenth Amendment in which state statutes have been assailed as violating the privileges and immunities clause, in only a single case was a statute held to infringe a privilege or immunity peculiar to citizenship of the United States. In that one, *Colgate* v. *Harvey,* 296 U. S. 404, it was thought necessary to support the decision by pointing to the specific reference in the *Slaughter-House Cases, supra,* 79, to the right to pass freely from state to state, sustained as a right of national citizenship in *Crandall* v. *Nevada,* 6 Wall. 35, before the adoption of the Amendment.

The cases will be found collected in Footnote 2 of the dissenting opinion in *Colgate* v. *Harvey,* 296 U. S. 404, 445. To these should be added *Holden* v. *Hardy,* 169 U. S. 366; *Ferry* v. *Spokane, P. & S. R. Co.,* 258 U. S. 314; *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63; *Whitfield* v. *Ohio,* 297 U. S. 431; *Breedlove* v. *Suttles,* 302 U. S. 277; *Palko* v. *Connecticut,* 302 U. S. 319.

ably for discussion of the Act, and of the opportunities and advantages offered by it," and that these are privileges and immunities of citizens of the United States secured against state abridgment by the privileges and immunities clause of the Fourteenth Amendment. It has been said that the right of citizens to assemble for the purpose of petitioning Congress for the redress of grievances is a privilege of United States citizenship protected by the privileges and immunities clause. *United States* v. *Cruikshank,* 92 U. S. 542, 552–553. We may assume for present purposes, although the step is a long and by no means certain one, see *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey, supra,* that the right to assemble to discuss the advantages of the National Labor Relations Act is likewise a privilege secured by the privileges and immunities clause to citizens of the United States, but not to others, while freedom to assemble for the purpose of discussing a similar state statute would not be within the privileges and immunities clause. But the difficulty with this assumption is, as the record and briefs show, that it is an afterthought first emerging in this case after it was submitted to us for decision, and like most afterthoughts in litigated matters it is without adequate support in the record.

The respondents in their bill of complaint specifically named and quoted Article IV, § 2, now conceded to be inapplicable, and the due process and equal protection clauses of the Fourteenth Amendment as the provisions of the Constitution which secure to them the rights of free speech and assembly. They omitted the privileges and immunities clause of the Fourteenth Amendment from their quotation. They made no specific allegation that any of those whose freedom had been interfered with by petitioners was a citizen of the United States. The general allegation that the acts of petitioners complained of violate the rights of "citizens of the United States, in-

cluding the individual plaintiffs here," and other allegations of like tenor, were denied by petitioners' answer. There is no finding by either court below that any of respondents or any of those whose freedom of speech and assembly has been infringed are citizens of the United States, and we are referred to no part of the evidence in which their citizenship is mentioned or from which it can be inferred.

Both courts below found, and the evidence supports the findings, that the purpose of respondents, other than the Civil Liberties Union, in holding meetings in Jersey City, was to organize labor unions in various industries in order to secure to workers the benefits of collective bargaining with respect to betterment of wages, hours of work and other terms and conditions of employment. Whether the proposed unions were to be organized in industries which might be subject to the National Labor Relations Act or to the jurisdiction of the National Labor Relations Board does not appear. Neither court below has made any finding that the meetings were called to discuss, or that they ever did in fact discuss, the National Labor Relations Act. The findings do not support the conclusion that the proposed meetings involved any such relationship between the national government and respondents or any of them, assuming they are citizens of the United States, as to show that the asserted right or privilege was that of a citizen of the United States, and I cannot say that an adequate basis has been laid for supporting a theory—which respondents themselves evidently did not entertain—that any of their privileges as citizens of the United States, guaranteed by the Fourteenth Amendment, were abridged, as distinguished from the privileges guaranteed to all persons by the due process clause. True, the findings refer to the suppression by petitioners of exhibits, one of which turns out to be a handbill advising workers they have the legal right, under

the Wagner Act, to choose their own labor union to represent them in collective bargaining. But the injunction, which the Court now rightly sustains, is not restricted to the protection of the right, said to pertain to United States citizenship, to disseminate information about the Wagner Act. On the contrary it extends and applies in the broadest terms to interferences with respondents in holding any lawful meeting and disseminating any lawful information by circular, leaflet, handbill and placard. If, as my brethren think, respondents are entitled to maintain in this suit only the rights secured to them by the privileges and immunities clause of the Fourteenth Amendment—here the right to disseminate information about the National Labor Relations Act—it is plain that the decree is too broad. Instead of enjoining, as it does, interferences with all meetings for all purposes and the lawful dissemination of all information, it should have confined its restraint to interferences with the dissemination of information about the National Labor Relations Act, through meetings or otherwise. The court below rightly omitted any such limitation from the decree, evidently because, as it declared, petitioners' acts infringed the due process clause, which guarantees to all persons freedom of speech and of assembly for any lawful purpose.

No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, but which the privileges and immunities clause secures only to citizens, and then only to the limited extent that their relationship to the national government is affected. I am unable to rest decision here on the assertion, which I think the record fails to support, that respondents must depend upon their limited privileges as citizens of the United States in order to sustain their cause, or upon so palpable an avoidance

of the real issue in the case, which respondents have raised by their pleadings and sustained by their proof. That issue is whether the present proceeding can be maintained under § 24 (14) of the Judicial Code as a suit for the protection of rights and privileges guaranteed by the due process clause. I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose.

If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, inadequately supported by the record, in order to attain an end easily and certainly reached by following the beaten paths of constitutional decision.

The right to maintain the present suit is conferred upon the individual respondents by the due process clause and Acts of Congress, regardless of their citizenship and of the amount in controversy. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, provided that "any person who, under color of any law, statute, ordinance . . . of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." And it directed that such proceedings should be prosecuted in the several district or circuit courts of the United States. The right of action given by this section was later specifically limited to "any citizen of the United States or other person within the jurisdiction thereof," and was

extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution. As thus modified the provision was continued as § 1979 of the Revised Statutes and now constitutes § 43 of Title 8 of the United States Code. It will be observed that the cause of action, given by the section in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses.

Following the decision of the *Slaughter-House Cases* and before the later expansion by judicial decision of the content of the due process and equal protection clauses, there was little scope for the operation of this statute under the Fourteenth Amendment. The observation of the Court in *United States* v. *Cruikshank,* 92 U. S. 542, 551, that the right of assembly was not secured against state action by the Constitution, must be attributed to the decision in the *Slaughter-House Cases* that only privileges and immunities peculiar to United States citizenship were secured by the privileges and immunities clause, and to the further fact that at that time it had not been decided that the right was one protected by the due process clause. The argument that the phrase in the statute "secured by the Constitution" refers to rights "created," rather than "protected" by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the Constitution in order to "secure the

Blessings of Liberty," uses the word "secure" in the sense of "protect" or "make certain." That the phrase was used in this sense in the statute now under consideration was recognized in *Carter* v. *Greenhow,* 114 U. S. 317, 322, where it was held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the "right secured to him by that clause of the Constitution" [the contract clause], to which he had "chosen not to resort." See, as to other rights protected by the Constitution and hence secured by it, brought within the provisions of R. S. § 5508, *Logan* v. *United States,* 144 U. S. 263; *In re Quarles and Butler,* 158 U. S. 532; *United States* v. *Mosley,* 238 U. S. 383.

Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Life Ins. Co.* v. *Riggs,* 203 U. S. 243, 255; *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363.

The question remains whether there was jurisdiction in the district court to entertain the suit although the matter in controversy cannot be shown to exceed $3,000 in value because the asserted rights, freedom of speech and freedom of assembly, are of such a nature as not to be susceptible of valuation in money. The question is the same whether the right or privilege asserted is secured by the privileges and immunities clause or any other. When the Civil Rights Act of 1871 directed that suits for violation of § 1 of that Act should be prosecuted

in the district and circuit courts, the only requirement of a jurisdictional amount in suits brought in the federal courts was that imposed by § 11 of the Judiciary Act of 1789, which conferred jurisdiction on the circuit courts of suits where "the matter in dispute" exceeded $500 and the United States was a plaintiff, or an alien was a party, or the suit was between citizens of different states; and it was then plain that the requirement of a jurisdictional amount did not extend to the causes of action authorized by the Civil Rights Act of 1871. By the Act of March 3, 1875, c. 137, 18 Stat. 470, the jurisdiction of the circuit courts was extended to suits at common law or in equity "arising under the Constitution or laws of the United States" in which the matter in dispute exceeded $500. By the Act of March 3, 1911, c. 231, 36 Stat. 1087, the circuit courts were abolished and their jurisdiction was transferred to the district courts, and by successive enactments the jurisdictional amount applicable to certain classes of suits was raised to $3,000. The provisions applicable to such suits, thus modified, appear as § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1).

Meanwhile, the provisions conferring jurisdiction on district and circuit courts over suits brought under § 1 of the Civil Rights Act of 1871 were continued as R. S. §§ 563 and 629, and now appear as § 24 (14) of the Judicial Code, 28 U. S. C. § 41 (14). The Act of March 3, 1911, 36 Stat. 1087, 1091, amended § 24 (1) of the Judicial Code so as to direct that "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." [2] Thus,

[2] This provision made no change in existing law but was inserted for the purpose of removing all doubt upon the point. See H. R. Rep. No. 783, Part 1, 61st Cong., 2d Sess., p. 15; Sen. Rep. No. 388, Part 1, 61st Cong., 2d Sess., p. 11. Cf. *Miller-Magee Co.* v. *Carpenter*, 34 F. 433; *Ames* v. *Hager*, 36 F. 129.

since 1875, the jurisdictional acts have contained two parallel provisions, one conferring jurisdiction on the federal courts, district or circuit, to entertain suits "arising under the Constitution or laws of the United States" in which the amount in controversy exceeds a specified value; the other, now § 24 (14) of the Judicial Code, conferring jurisdiction on those courts of suits authorized by the Civil Rights Act of 1871, regardless of the amount in controversy.

Since all of the suits thus authorized are suits arising under a statute of the United States to redress deprivation of rights, privileges and immunities secured by the Constitution, all are literally suits "arising under the Constitution or laws of the United States." But it does not follow that in every such suit the plaintiff is required by § 24 (1) of the Judicial Code to allege and prove that the constitutional immunity which he seeks to vindicate has a value in excess of $3,000. There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite. We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them.

That such was not the purpose of the Act of 1875 in extending the jurisdiction of federal courts to causes of action arising under the Constitution or laws of the United States involving a specified jurisdictional amount, is evident from the continuance upon the statute books of

§ 24 (14) side by side with § 24 (1) of the Judicial Code, as amended by the Act of 1875. Since the two provisions stand and must be read together, it is obvious that neither is to be interpreted as abolishing the other, especially when it is remembered that the 1911 amendment of § 24 (1) provided that the requirement of a jurisdictional amount should not be construed to apply to cases mentioned in § 24 (14). This must be taken as legislative recognition that there are suits authorized by § 1 of the Act of 1871 which could be brought under § 24 (14) after, as well as before, the amendment of 1875 without compliance with any requirement of jurisdictional amount, and that these at least must be deemed to include suits in which the subject matter is one incapable of valuation. Otherwise we should be forced to reach the absurd conclusion that § 24 (14) is meaningless and that a large proportion of the suits authorized by the Civil Rights Act cannot be maintained in any court, although jurisdiction of them, with no requirement of jurisdictional amount, was carefully preserved by § 24 (14) of the Judicial Code and by the 1911 amendment of § 24 (1). By treating § 24 (14) as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose.

The practical construction which has been given by this Court to the two jurisdictional provisions establishes that the jurisdiction conferred by § 24 (14) has been preserved to the extent indicated. In *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68, suit was brought to restrain alleged unconstitutional taxation of patent rights. The Court held that the suit was one arising under the Constitution or laws of the United States within the meaning of § 24 (1) of the Judicial Code and that the United States Circuit Court

in which the suit had been begun was without jurisdiction because the challenged tax was less than the jurisdictional amount. The Court remarked that the present § 24 (14) applied only to suits alleging deprivation of "civil rights." On the other hand, in *Truax* v. *Raich,* 239 U. S. 33, aff'g 219 F. 273, this Court sustained the jurisdiction of a district court to entertain the suit of an alien to restrain enforcement of a state statute alleged to be an infringement of the equal protection clause of the Fourteenth Amendment because it discriminated against aliens in their right to seek and retain employment. The jurisdiction of a district court was similarly sustained in *Crane* v. *Johnson,* 242 U. S. 339, on the authority of *Truax* v. *Raich, supra.* The suit was brought in a district court to restrain enforcement of a state statute alleged to deny equal protection in suppressing the freedom to pursue a particular trade or calling. For the purposes of the present case it is important to note that the constitutional right or immunity alleged in these two cases was one of personal freedom, invoked in the *Raich* case by one not a citizen of the United States. In both cases the right asserted arose under the equal protection, not the privileges and immunities clause; in both the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money. The jurisdiction was sustained despite the omission of any allegation or proof of jurisdictional amount, pointedly brought to the attention of this Court.

The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there

is jurisdiction in the district court under § 24 (14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000. As the right is secured to "any person" by the due process clause, and as the statute permits the suit to be brought by "any person" as well as by a citizen, it is certain that resort to the privileges and immunities clause would not support the decree which we now sustain and would involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate.

Mr. Chief Justice Hughes, concurring:

With respect to the merits I agree with the opinion of Mr. Justice Roberts and in the affirmance of the judgment as modified. With respect to the point as to jurisdiction I agree with what is said in the opinion of Mr. Justice Roberts as to the right to discuss the National Labor Relations Act being a privilege of a citizen of the United States, but I am not satisfied that the record adequately supports the resting of jurisdiction upon that ground. As to that matter, I concur in the opinion of Mr. Justice Stone.

Mr. Justice McReynolds, dissenting:

I am of opinion that the decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with instructions to dismiss the bill. In the circumstances disclosed, I conclude that the District Court should have refused to interfere by injunction with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.

There was ample opportunity for respondents to assert their claims through an orderly proceeding in courts of the state empowered authoritatively to interpret her laws with final review here in respect of federal questions.

MR. JUSTICE BUTLER, dissenting:

I am of opinion that the challenged ordinance is not void on its face; that in principle it does not differ from the Boston ordinance, as applied and upheld by this Court, speaking through Mr. Justice White, in *Davis* v. *Massachusetts,* 167 U. S. 43, affirming the Supreme Judicial Court of Massachusetts, speaking through Mr. Justice Holmes, in *Commonwealth* v. *Davis,* 162 Mass. 510; 39 N. E. 113, and that the decree of the Circuit Court of Appeals should be reversed.

UNITED STATES *v.* ROCK ROYAL CO-OPERATIVE, INC. ET AL.*

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

No. 771. Argued April 24, 25, 1939.—Decided June 5, 1939.

Under the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture, after notice and hearings, made an order for fixing and equalizing minimum prices to be paid producers for milk sold to dealers ("handlers") and disposed of by the latter either in liquid form or as milk products within a "marketing area" comprising the City of New York and adjacent counties.

*Together with No. 826, *Noyes, Commissioner of Agriculture and Markets of the State of New York,* v. *Rock Royal Co-operative, Inc. et al.;* No. 827, *Dairymen's League Cooperative Assn., Inc.* v. *Rock Royal Co-operative, Inc. et al.;* and No. 828, *Metropolitan Co-operative Milk Producers Bargaining Agency, Inc.* v. *Rock Royal Co-operative, Inc. et al.,* also on appeals from the District Court of the United States for the Northern District of New York.

Efforts to secure the consent of dealers to a marketing agreement having failed, the order, before its promulgation, was submitted by referendum to producers, the vote resulting, as determined by the Secretary with the approval of the President, in acceptance of the order by at least two-thirds of those producers who during a representative period had been engaged in production of milk for the marketing area. The Secretary had found that two-thirds of the milk comes to this area from other States where it is produced, or from the State of New York through other States, and that the other one-third, produced in New York, becomes "physically and inextricably intermingled" with this "interstate" milk; and that all is handled either in the current of interstate commerce or so as to affect, burden and obstruct interstate commerce in milk and its products. The Secretary had determined also that prices calculated to give milk a purchasing power for producers equivalent to that enjoyed in the base periods selected by §§ 2 and 8e of the Act would not be reasonable, in view of prices for feed and "other economic conditions," and resorted to the authority granted by § 8c (18), to fix prices so as to "reflect" those factors and "insure a sufficient quantity of pure and wholesome milk and be in the public interest." The order provides a method for computing "minimum prices" or values for the milk received by "handlers" during the computation period, varying according to the class of use to which the milk is put, the butter-fat content, distance of transportation, etc. It then provides for fixing the "uniform price" which producers are actually paid by the proprietary (non-coöperative) "handlers," and which in substance is determined by multiplying the amount of milk of each class received by all "handlers" during the period, less certain deductions, by the respective "minimum price," making certain deductions, and dividing the total of the remainders by the total amount of the milk received. For the purpose of equalization, the order requires "handlers" to pay into a "Producer Settlement Fund" the amount by which their purchases at the "minimum prices" exceeds the amount of their purchased milk multiplied by the "uniform price." When the value of a "handler's" purchased milk at the "minimum prices" is less than if bought at the "uniform price," the Fund pays him the difference for distribution to his producers. By the terms of the order, coöperative associations of producers which are also "handlers" need not pay the "uniform price," but may settle with their patrons according to their contracts. The order by these and other means sought to bring

about a fair division among producers of the fluid milk market and utilization of the rest of the supply in other dairy staples and thus to correct evils arising from over-production of the fluid milk, price-cutting, etc. Cf., *Nebbia* v. *N. Y.*, 291 U. S. 502. In a suit by the Government to enforce the order against a proprietary producer of milk and coöperative associations of producers, in which other coöperative producers intervened on the side of the plaintiff, the District Court adjudged the order invalid and dismissed the bill. *Held:*

1. Suspension of the order by the Secretary, under § 8c (16) (A) of the Act, because of the effect of the decree on its administration and enforcement, did not render the proceedings moot, since rights accrued under the order were preserved and reports, accountings and payments under it were sought from the defendants. P. 555.

2. Contentions that the adoption of the order was influenced by false representations and coercive tactics practiced by certain cooperative associations, which intervened in this case, are immaterial, as there is no authority in the courts to go behind the conclusion of the Secretary to inquire into the influences which caused the producers to favor the resolution. P. 556.

3. The provision of the Act, § 8 (12), authorizing coöperatives to express their approval or disapproval of such orders for all their members or patrons, is not unreasonable. P. 559.

4. If the order and Act are otherwise valid, the fact that their effect would be to give coöperatives a monopoly of the market, would not violate the Sherman Act or justify a refusal of an injunction enforcing the order. P. 560.

5. The objection that the Act does not authorize the provision of the order exempting coöperatives from payment of "uniform prices" required to be paid by proprietary "handlers" can not be taken by defendants who are themselves coöperatives, but can be taken by a defendant proprietary. P. 560.

6. This exemption of coöperatives is authorized by § 8c (F) of the Act, which provides that "Nothing . . . shall . . . prevent a coöperative . . . from . . . making distribution [of net proceeds] . . . in accordance with the contract between the association and its producers." P. 561.

7. The objection that, in authorizing payments to coöperatives and certain other "handlers" from the Producer Settlement Fund, the order is without statutory basis can not be raised by "han-

dlers," whether proprietary or coöperative, since "handlers" have no financial interest in that fund. P. 561.

8. Section 8c (5) of the Act, in sanctioning exemptions of producer coöperative associations from the duty imposed by the order on other "handlers," of paying a uniform price to producers, is not unconstitutionally discriminative. P. 562.

This results from the nature of coöperatives, the policy of Congress in their regard, their relations to their members and to price-cutting, as compared with ordinary business corporations.

9. No unconstitutional discrimination is produced by provisions of the order, sanctioned by the Act, which limit minimum prices to milk sold in the marketing area or which passes through a plant in the marketing area, thereby permitting "handlers" to purchase other milk from the same production area at any price they may please. P. 565.

If such "unpriced" milk be sold by the "handler" outside of the market area designated by the order for a price greater than can be obtained within the area, thus enabling the "handler" to replace losses on sales within the area and still be in a position to pay the "uniform price" for milk supplied to the area,—this is a competitive situation which the order did not create and with which it does not deal.

10. Special differentials on milk coming from certain counties located most favorably to the marketing area, allowed by the order under § 8c (5) (A) of the Act, are not shown to discriminate unduly between producers. The Secretary's determination of their propriety, made on substantial evidence, is supported by a strong presumption. P. 567.

11. Where milk sold by the dairy farmer locally and milk from other States are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions arising from excessive surplus and the social and sanitary evils created by low prices, the power of Congress extends also to the local sales. P. 568.

12. The federal commerce power, where it exists, is complete and perfect. P. 569.

13. Congress has power over the prices of milk in interstate commerce of the same nature and extent as the power retained by the States over their internal commerce in milk. *Nebbia* v. *New York*, 291 U. S. 502. P. 569.

14. The provisions of the Act and the order which require a "handler" whose purchases at the "minimum price" exceed their value at the "uniform price" to pay the surplus into the Producer Settlement Fund, instead of paying it to his patrons, do not deprive him of liberty and property without due process. P. 571.

This pooling device is ancillary to the price regulation; both are designed to foster and protect interstate commerce by smoothing out the difficulties of milk surplus and cut-throat competition which burdened the marketing. P. 572.

As Congress would have the right to limit the quantities of milk in interstate commerce, it may permit its movement on these terms of pool settlement.

15. The Act declares a definite policy to restore parity prices for farmers; directs the Secretary to issue orders to that end whenever he has reason to believe they will tend to effectuate that policy; limits the terms of such orders specifically, while allowing flexible auxiliary administrative discretion; confines its application to specified farm products and the orders to such areas as are "practicable"; and requires preliminary hearings and findings, with right to object to the Secretary and appeal to the courts. In these respects it sets up sufficient standards and does not delegate legislative power in violation of the Constitution. P. 574.

Even though procedural safeguards in the Act can not validate an unconstitutional delegation, they do protect against arbitrary abuse of properly delegated authority. P. 576.

16. Section 8c (18) of the Act, which provides that whenever he finds upon hearing and evidence that prices giving milk and milk products purchasing power equivalent to that of the "base period," defined in §§ 2 and 8e, are not reasonable, in view of the price and available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area, the Secretary shall fix such prices as he finds "will reflect such factors and insure a sufficient quantity of pure and wholesome milk and be in the public interest,"—sets up a standard sufficient to avoid improper delegation of power. P. 576.

17. The provisions of the Act for submission of proposed orders for approval of producers of milk, through a referendum, § 8c (9) (B), and the provision authorizing coöperatives to cast the votes of their producer patrons, are not invalid delegation. P. 577.

18. Sections 8c (5) (A), 8c (5) (C) and 8c (5) (F), construed together, and with § 8c (1), show that there was no intention to except coöperatives of the agency type (distinguished from the "sale" type) from the duty imposed on handlers generally to pay into the Producer Settlement Fund and share the expenses of administration. The term "purchased" in § 8c (5) (A) means "acquired for marketing"; the section can not be construed as freeing agents, coöperative or proprietary, from the requirement to account at the minimum prices for milk handled. P. 578.

This conclusion accords with the legislative reports and debates and administrative construction.

19. The provisions of the Act, § 8c (5) (F), permitting a cooperative to distribute the "net proceeds" of all its sales to its members in accordance with its contract with them, refers to the results of the coöperative's sales in the marketing area after complying with the equalization requirements. P. 579.

20. A provision of the order authorizing any "handler," in determining its net pool obligation, to subtract "the quantity of milk received from the "handler's own farm," does not apply to a coöperative "handler" which has no farm. P. 581.

26 F. Supp. 534, reversed.

Appeals under § 2 of the jurisdictional Act of August 24, 1937, from a decree of the District Court dismissing two suits brought by the Government to enforce an order of the Secretary of Agriculture, issued under the Agricultural Marketing Agreement Act of June 3, 1937, regulating the handling of milk in an area comprising the City of New York and neighboring counties. One of the suits was against three incorporated "coöperatives," representing milk producers, in the handling of milk in this area. The defendant corporation in the other suit was a "proprietary" handler. One of the appellants is Noyes, Commissioner of Agriculture and Markets of the City of New York, who intervened and petitioned, among other things, for enforcement of a regulation under the state law, in so far as the traffic in question might be adjudged

to be intrastate commerce. Inasmuch as the operations of all of the defendants are found to be of interstate character, the Court rules that his petition be dismissed. The other three appeals are by the United States and by two incorporated "coöperatives," which intervened to combat charges made against them by the defendants, concerning their activities in aid of the adoption and enforcement of the federal order.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold,* and *Messrs. John S. L. Yost, Charles J. McCarthy, Robert K. McConnaughey,* and *Mastin G. White* were on the brief of the United States in No. 771, for appellants.

Messrs. Milo R. Kniffen and *Louis S. Wallach* were on a brief for appellant in No. 826; *Messrs. Seward A. Miller* and *Edward Schoeneck* were on a brief for appellant in No. 827; and *Messrs. Edmund F. Cooke* and *John E. Larson* were on a brief for appellant in No. 828.

Mr. Leonard Acker for the Central New York Co-operative Assn., and *Mr. Willard R. Pratt* for the Rock Royal Co-operative, Inc., et al., appellees.

By leave of Court, briefs of *amici curiae* were filed in No. 771 by *Messrs. Claude T. Reno,* Attorney General of Pennsylvania, and *Harry Polikoff,* Deputy Attorney General, on behalf of that State, urging the validity of Order No. 27; and by *Mr. Henry S. Manley* on behalf of the New York State Guernsey Breeders Co-operative, Inc. et al.

Mr. Justice Reed delivered the opinion of the Court.

These appeals involve the validity of Order No. 27 of the Secretary of Agriculture, issued under the Agricul-

tural Marketing Agreement Act of 1937,[1] regulating the handling of milk in the New York metropolitan area.

On October 27, 1938, the United States of America filed a complaint against the Rock Royal Co-operative, Inc., the Central New York Coöperative Association, Inc., and Schuyler Junction New York Milk Shed Coöperative, Inc., seeking a mandatory injunction requiring the defendants and their representatives to comply with the provisions of the Order. On November 26, 1938, a similar action was filed in the same court against the Jetter Dairy Company, Inc. On December 2 these causes were consolidated. The original proceedings had sought relief not only for violations of the Order of the Secretary of Agriculture but also, if the court should find that the defendants or any of them were not subject to that Order, for violation of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York. The two orders are *in pari materia,* one covering milk moving in or directly burdening, obstructing or affecting interstate commerce and the other [2] covering milk in intrastate commerce. Each defendant is a dealer handling milk moving in interstate commerce. On December 15, Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, was permitted to intervene as a party plaintiff in the consolidated action. He sought an injunction commanding the defendants and their representatives to comply with Order No. 126 or, should it be determined that their milk was not subject to this Order, to comply with the Order of the Secretary of Agriculture.

In their answers, the defendants pleaded certain affirmative defenses, setting up the invalidity of Order No. 27 because of improper efforts to secure its adoption.

[1] Act of June 3, 1937, 50 Stat. 246.

[2] As authorized by N. Y. Laws 1937, c. 383. See *Noyes* v. *Erie & Wyoming Farmers Co-op.,* 170 Misc. 42; 10 N. Y. S. 2d 114.

Broadly speaking, these defenses were based upon erroneous representations alleged to have been made by officials and by certain private organizations to bring about the approval of the Order and upon an alleged conspiracy of the same private organizations to create a monopoly by means of the Order. The motion to strike these defenses having been overruled, the Dairymen's League Coöperative Association, hereinafter called the League, and the Metropolitan Coöperative Milk Producers Bargaining Agency, Inc., hereinafter called the Agency, were permitted to intervene to combat them.

The answers also challenged the two orders and the Act as contrary to the Fifth and Fourteenth Amendments to the Constitution and the Act as involving improper delegation of legislative power. The Central New York Cooperative Association denied the power of the Congress to enact the legislation under the Commerce Clause and set up as a further defense that it was not subject to either order.

After a hearing upon the merits, the District Court dismissed the complaints. The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid. It was further held that §§ 8c (5) (B) (ii) and 8c (5) (F) of the Act violate the due process clause of the Fifth Amendment, that the Order is discriminatory and takes property without compensation, that approval of the producers was secured by unlawful misrepresentation and coercion and that important provisions of the Order, authorizing payments to coöperative and proprietary handlers, have no basis in the Act. *United States* v. *Rock Royal Co-operative,* 26 F. Supp. 534, 548, 550, 544, 545, 553. As the unconstitutionality of certain sections of an Act of Congress was one ground of the decision an appeal was allowed directly to this Court.[3]

[3] § 2, Act of Aug. 24, 1937, 50 Stat. 752; 28 U. S. C. § 349a.

The Statute.[4] The controversy revolves almost entirely around Order No. 27. Back of the Order is the statute under which it was issued, the Agricultural Marketing Agreement Act of 1937, which reënacted and amended certain provisions of the Agricultural Adjustment Act.[5]

[4] Pertinent portions of the Act are as follows:

Act, § 8c (1). "The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. . . ."

(2) "Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin)."

(3) "Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order."

(4) "After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity."

(5) "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method

(Footnote 4 continues on next page.)

[5] Act of May 12, 1933, 48 Stat. 31, as amended Aug. 24, 1935, 49 Stat. 750.

As its name implies, it was aimed at assisting in the marketing of agricultural commodities.

By § 1 it is declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs

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for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

. . . . . .

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

. . . . . .

"(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the 'Capper-Volstead Act', engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in

the purchasing power of farmers" thus destroying the value of agricultural assets to the detriment of the national public interest. This interference is declared to "burden and obstruct the normal channels of interstate commerce."

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all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

"(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

[N. B. (6) relates to products other than milk.]

(7) "In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

"(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

"(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

"(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

"(i) To administer such order in accordance with its terms and provisions;

"(ii) To make rules and regulations to effectuate the terms and provisions of such order;

"(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

"(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official

By § 2 it is declared to be the policy of Congress, through the exercise of the powers conferred upon the Secretary of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities

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capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

(18) "The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

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a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. . . ."

Under § 2 of the Act, the base period for agricultural commodities, except tobacco and potatoes, is fixed at the pre-war period of August, 1909, to July, 1914. Where the purchasing power during the base period cannot be satisfactorily determined from available statistics within the Department of Agriculture, the Secretary is authorized to take as the base period from August, 1919, to July, 1929, or a portion thereof. § 8e. In prescribing minimum prices for milk the statute authorizes the Secretary to fix minimum prices without restriction to the purchasing power during the base period so as to reflect the prices of available supplies of feed and other economic conditions, if he finds after a hearing that minimum prices with a base period purchasing power are unreasonable. § 8c (18).

Section 8a (6) gives jurisdiction to the district courts of the United States to enforce and to prevent and restrain any person from violating any of the orders, regulations or agreements under its provisions.

Section 8b authorizes the Secretary of Agriculture to enter into marketing agreements with the producers and others engaged in the handling of agricultural commodities in or affecting interstate commerce. These agreements may be for all agricultural commodities and their products, are entirely voluntary and may cover the handling of the commodity by any person engaged in the various operations of processing or distribution. Agreements are involved only incidentally in this proceeding.

Section 8c provides for a use of orders, instead of agreements, in certain situations. These orders apply only to specified commodities, including milk.[6] They are to be entered only when the Secretary of Agriculture has rea-

[6] § 8c (2).

son to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity or product thereof, and after notice and an opportunity for hearing. It is necessary also for the Secretary of Agriculture to set forth in such order a finding upon the evidence introduced at the hearing that the issuance of the Order and the terms and conditions thereof will tend to effectuate the declared policy.[7] When, as here, the commodity is milk, the Act requires [8] that the Order contain one or more of terms specified in § 8c (5) and no others, except certain terms common to all orders and set out in § 8c (7). These terms, as used in the Order under examination, will be referred to later. Orders may only be issued [9] after hearing upon a marketing agreement which regulates the handling of the commodity in the same manner as the order. Without special determination of the Secretary of Agriculture and approval of the President, orders are not to become effective unless approved by handlers as required by the Act.[10]

Notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to such commodity, the Secretary of Agriculture, with the approval of the President, may issue an order without the adoption of an agreement if he determines that the refusal or failure of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the

[7] § 8c (4).
[8] § 8c (5).
[9] § 8c (10).
[10] § 8c (8).

commodity within the production area or two-thirds of those engaged in the production of the commodity for sale in the marketing area specified in the marketing agreement or order. § 8c (9). Section 8c (19) authorizes a referendum to determine whether the issuance of the order is approved by the producers. Section 8c (12) provides that the Secretary shall consider the approval or disapproval by any coöperative association as the approval or disapproval of the producers who are members, stockholders or patrons of the coöperative association.

Section 8c (15) provides for administrative review by the Secretary on petition of a handler objecting to any provision as not in accordance with law and seeking a modification or exemption therefrom. By (15) (B) the district courts have jurisdiction to review such ruling.

The Problem.—In accordance with the provisions of the Act the Secretary of Agriculture, before promulgating Order No. 27, conducted public hearings attended by handlers, producers and consumers of milk and their representatives throughout the milkshed. No defendant, however, was represented. These hearings followed the presentation by the Agency to the Secretary and to the Commissioner of a proposed marketing agreement and order regulating the handling of milk in the New York marketing area with a request for action under the federal and New York statutes. The hearings were jointly held by the federal and state governments. The coöperation of the two governments was the culmination of a course of investigation and legislation which had continued over many years. The problem from the standpoint of New York was fully considered and the results set out in the Report of 1933 of the Joint Legislative Committee to Investigate the Milk Industry. This investigation was followed by the creation of the Milk Control Board with broad powers to regulate the dairy business of the state. This board had power to fix prices to

be paid to producers and to be charged to consumers.[11] A later New York act, the Rogers-Allen Act,[12] authorized the state commissioner to coöperate with the federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government to be carried out under joint administration.

The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. In the milkshed and marketing area of metropolitan New York these problems are peculiarly acute.[13] It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. The sale of milk in metropolitan New York is ringed around with requirements of the health departments to assure the purity of the supply. Only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk. More than sixty thousand dairies located in the states of New York, Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania and Vermont hold certificates

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[11] Certain of these powers were upheld in *Nebbia* v. *New York*, 291 U. S. 502.

[12] N. Y. Laws 1937, c. 383.

[13] *Nebbia* v. *New York*, 291 U. S. 502; *Baldwin* v. *Seelig*, 294 U. S. 511; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163.

of inspection and approval from the Department of Health of the City of New York. More than five hundred receiving plants similarly scattered have been approved for the receiving and shipping of grades A and B milk. Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act.

Order No. 27.[14] The Secretary of Agriculture found that two-thirds of the milk produced for the New York marketing area actually moves in interstate commerce and that the remaining one-third produced within the

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[14] Pertinent portions are as follows:

Order, Article VI, § 1. "Net Pool Obligation of Handlers.—The net pool obligation of any handler for milk received from producers during each month shall be a sum of money computed for such month as follows:

"1. Determine the total quantity of milk in each class at each plant;

"2. Subtract from the quantity of milk in each class the quantity of such milk received from other plants or from other handlers;

"3. Subtract pro rata out of each class the quantity of milk received from the handler's own farm;

"4. Subtract from the remaining quantity of milk in each class, the quantity of each to which the prices in section 1 of Article IV do not apply, which result shall be known as the 'net pooled milk' in each class.

"5. Multiply the total quantity of net pooled milk in each class, at all plants of the handler combined, by the respective class prices set forth in section 1 of article IV and add together the resulting sums;

. . . . . .

"8. Deduct 20 cents per hundredweight for all net pooled milk received from producers at plants in the counties or portions of counties listed below in this section. The result thus obtained shall be known as the 'handler's net pool obligation.' "

Counties—*New Jersey:* Hunterdon, Somerset, Essex, Union, Morris, Warren, Sussex, Passaic. *New York:* Columbia, Dutchess, Nassau, Orange, Putnam, Suffolk, Westchester. *Connecticut:* Litchfield. *Massachusetts:* Berkshire. *Towns in Ulster County, New York:* Marbletown, Hurley, Kingstown, Ulster, Rosendale, Esopus, New Paltz, Lloyd, Gardiner, Plattekill, Marlborough, Shawangunk.

"Sec. 2. Computation of the Uniform Price.—The market administrator shall on or before the 14th day of each month, audit for mathematical correctness and obvious errors the final report submitted for the preceding month by each handler and, on the 14th day of such month, compute from all of such corrected reports the uniform price in the following manner:

"1. Combine into one total the net pool obligations of all handlers;

State of New York was "physically and inextricably intermingled" with the interstate milk; that all was handled either in the current of interstate commerce or so as to affect, burden and obstruct such interstate commerce in

"2. Subtract the total of payments required to be made for such month by section 5 of article VII and the total of payments claimed pursuant to section 6 of article VII;

"3. Add the amount of cash in the producer settlement fund;

"4. Divide the result by the total quantity of milk represented in the sum obtained pursuant to paragraph 1 of this section; and

"5. Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. This result shall be known as the uniform price for such month for milk containing 3.5 percent butterfat received from producers at plants in the 201–210 mile zone."

Article VII, § 1. "Time of Payment.—On or before the 25th day of each month each handler which is not a cooperative association of producers shall make payment to each producer for all milk delivered by such producer at any plant during the preceding month at not less than the uniform price, subject to differentials set forth in sections 2 and 3 of this article."

Article VII, § 2. "Transportation and Location Differentials.—The uniform price shall be plus or minus the differential shown in column B of the schedule contained in section 3 of article IV for the zone of the plant as established for the purposes of section 3 of article IV, plus 25 cents in the case of plants located in the counties listed in paragraph 8 of section 1 of article VI."

Article VII, § 5. "Payments to Cooperative Associations.—Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. . . . Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

"1. One cent per hundredweight of net pooled milk at any handler's plant which was caused to be delivered from its members

milk and its products. An exception was made as to milk regulated by the order of the Commissioner of Agriculture and Markets of the State of New York. The Secretary further found that prices calculated in accordance with the Agricultural Marketing Agreement Act of 1937

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by such association and on which such handler has made the reports and payments required by this order.

"2. Except as set forth in paragraph 3 of this section, 2½ cents per hundredweight of net pooled milk at plants of other handlers which was reported and collected for by such association.

"3. Five cents per hundredweight of net pooled milk at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, 5 cents per hundredweight of any net pooled milk which was caused by it to be delivered to any other handler and which is reported and collected for by such association.

"SEC. 6. Market Service Payment.—The market administrator shall pay out of the producer settlement fund to any handler immediately after audit of claim for such payment made on forms supplied by the market administrator:

"1. With respect to milk received from producers at a plant operated by such handler equipped only for the receiving and shipping of milk to the marketing area, which was, during any month except November or December, moved to a plant where it was utilized in Classes II–A, II–B, III–A, III–B, III–C, III–D, or, during the month of October, IV–A, and from which, if operated by such handler, no Class I milk was shipped to the marketing area during such month, 23 cents per hundredweight of milk so moved, plus 4 cents per hundredweight for the first five miles or fraction thereof, plus ¼ cent per hundredweight per mile for the next 20 miles, and plus $\frac{1}{10}$ of 1 cent per hundredweight per additional mile, of the shortest highway distance between the two plants; and

"2. Thirty cents per hundredweight of Class I milk sold during the months of November and December in the marketing area which was received from producers at a plant which is equipped for condensing or drying milk and from which, during the months of May and June preceding, in terms of equivalent of milk received at such plant, no milk in excess of 10 percent and no cream in excess of 50 percent was shipped to the marketing area."

to give this milk a purchasing power equivalent to the parties mentioned in §§ 2 and 8e of that Act were not reasonable in view of the supplies and prices of feeds and other economic conditions which affect the supply and demand for milk. He then fixed a minimum price for milk to be determined from time to time by formula.

By the Order the marketing area is defined as the City of New York and the counties of Nassau, Suffolk and Westchester. A producer is any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area. A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale. "Handler" includes coöperative associations. The administrative sections of the Order setting up a milk administrator and defining his duties are not attacked. Nor are those which classify milk.

Article IV is important since it establishes minimum prices for milk. There are various differentials based upon use, butter fat content, and distances between the points of production and consumption which it is unnecessary to analyze. For the purposes of this opinion it is sufficient to say, as an example, that the minimum price each handler should pay for milk is fixed by a formula which varies with the butter-price range for 92-score butter at wholesale in the New York market during the 60 days preceding the 25th day of the preceding month. The handlers are required to file reports as to their receipts and utilization of milk of the various classes. It should be understood, however, that this minimum price is not the amount which the producer receives but the price level or so-called "value" from which is calculated the actual amount in dollars and cents which he is to receive.

By Article VI a uniform price is computed and it is this uniform price which the producer is actually paid by

the proprietary (noncoöperative) handlers. The uniform price is determined by a computation which in substance multiplies the amount of milk (classified according to its use) received by all handlers, less certain quantities of milk permitted to be deducted, by the minimum prices fixed by Article IV for the different classes of milk. From the result various payments and reservations are deducted and the remainder is divided by the total quantity of milk received. To equalize, handlers pay into the producer settlement fund. While much over-simplified the operation will be made clear by summarizing the provisions of Article VII to require that handlers shall pay to the producer settlement fund the amount by which their purchased milk multiplied by the minimum prices for the various classes is greater than their purchased milk multiplied by the uniform price. When the handlers' purchased milk multiplied by the minimum price is less than when it is multiplied by the uniform price, the producer settlement fund pays them the difference for distribution to their producers. These provisions give uniform prices to all producers, with exceptions to be herein stated, in accordance with the general use of milk for the preceding period.

Other provisions of the Order upon which an attack is made will be pointed out in the discussion of the particular objections.

Suspension of Order.—It developed at the argument of the causes in this Court that the Secretary of Agriculture on March 18, 1939,[15] had suspended Order No. 27 on account of the effect of the decree below on its administration and enforcement. § 8c (16) (A). Since this suspension is authorized by the statute and the Order preserves accrued rights, we are of the opinion this step does not make these proceedings moot. Reports

[15] 4 Fed. Reg. 1259.

of their receipts and classified sales of milk, accounting of their pool obligations in the determination of the uniform price and settlement with their producers on the basis of the Order, as well as the payment of money, are sought from the defendants. The controversy over the validity of the Order and the power to enforce its provisions remains.

Adoption of the Order.—Before considering the validity of the Marketing Act and the provisions of the Order under attack, we shall examine the contention of the defendants that the Order was adopted under circumstances which require a court of equity to refuse to enforce it. After dealers had refused or failed to sign the proposed marketing agreement, the Secretary conducted a referendum under § 8c (19) to ascertain whether the issuance of Order No. 27 was approved by two-thirds of the producers, as required by § 8c (9). Vigorous campaigns were waged by both proponents and opponents of the Order. Among the proponents were the League and the Agency. After the vote, the Secretary on August 24, 1938, with the approval of the President, determined that the issuance of the Order was favored by at least two-thirds of the producers, and declared it effective as of September 1, 1938.[16]

The defendants base their appeal to the conscience of the chancellor upon matters connected with the referendum which they claim amount to fraud in its adoption. The alleged fraud is said to consist of widespread public misrepresentations to the effect that all producers would receive the same price for their milk and a conspiracy between the League and others to convert the state and national acts into instruments for the creation of a monopoly in large handlers in the sale of fluid milk in the marketing area.

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[16] 3 Fed. Reg. 2100.

The findings supporting the charges of misrepresentation and conspiracy may be summarized as determining that the intervening plaintiffs, the League and the Agency, participated actively in proposing, adopting and inducing both producers and handlers to accept the Order. In greater detail, the findings show that the League was instrumental in the organization of the Agency; that it has representatives upon the Agency's Board of Directors; that the Agency has acted as an organization for promoting action under both federal and state acts; that both League and Agency published papers which gave vigorous support to the campaign for approval of the Order. At the time of the hearings the Agency issued an explanatory booklet stating that an equal purchasing price would be paid by all dealers for milk of the same use and that each producer would share equally the benefits of the fluid milk market. Both Agency and League announced repeatedly that handlers would be required to pay a uniform price and that no handler would receive a competitive advantage over the others. The Agency expended over $63,000 between December 1, 1937, and June 1, 1938, and over $45,000 between the latter date and September 1, 1938, the date the order went into effect, as it actively supported the federal-state order program. Voting on the Order took place August 18, 19 and 20. Of 38,627 votes counted as valid in the referendum, 33,663 or 87.1 percent were in favor of the issuance of the Order, and 4,964 or 12.9 percent were opposed. Of the favorable votes, the League cast 22,287.

Supporting evidence beyond the coördinated activities of the Agency, the League and other coöperatives for the charge of conspiracy to monopolize by securing the adoption of the Order was found by the District Court in the provisions of the Order. Competitive advantages to cooperatives in the Order were thought by it to indicate an improper influence by them in its drafting. These will

be discussed later from the point of view of their legality under permissible classification. The court found that the conspiracy to obtain a monopoly was carried out by coercive tactics on the part of producers, under the leadership of the League and the Agency. These tactics consisted of threats to handlers that if they did not comply with the Order, the producers would withhold delivery of milk. These schemes, the lower court determined, were so successful in securing the drafting, adoption and acceptance of the Order that a conspiracy to monopolize interstate commerce contrary to the Sherman Act was established. It held that the occurrence of the incidents just detailed compelled refusal of the injunction. We do not agree.

While considering the manner of the adoption of the Order, the validity of the Act and the provisions of the Order must be assumed. The Order was submitted to the producers for approval after the hearings specified in the statute. The full text of the Order with explanatory pamphlets was mailed each prospective voter. In the face of this fact, erroneous statements cannot be permitted to render the submission futile. There is no evidence that any producer misunderstood. A casual sentence in one of the pamphlets of the Department of Agriculture and a number of other statements in publications of the League and Agency were to the effect that dealers would pay all producers the uniform price for milk. Such assertions need the qualifications given in the Order that they are not applicable to milk sold outside the marketing area or to milk handled by coöperatives. The variation from the facts is not immaterial in view of the value or volume of milk involved. But the Order, Article VII, plainly stated that coöperatives were not covered by the payment requirements and it appeared, also, that milk sold outside the marketing area was not

within its terms. A study of the official form of the Order would have cleared up any misconception created by the language. The Secretary of Agriculture declared that three-fourths of the producers affected by the Order approved its terms. The litigants do not deny that three-fourths of the voters voted for the institution of the Order. There is no authority in the courts to go behind this conclusion of the Secretary to inquire into the influences which caused the producers to favor the resolution.

The coercion by the League and the Agency, exercised upon the handlers after the adoption of the Order to force or induce them to acquiesce in its operation, is of the same indirect character as the alleged misrepresentation. It is the partisan coercion of the producer seeking to compel dealer support of the plan by the threat of the use of his economic power over his own milk. The coercion was ineffective upon these defendants. Producers' organizations urged in their papers and meetings diversion of milk from handlers to influence them to agree to the Order. Such efforts could not have had an effect on the prior vote of the producers. It is quite true that the League which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act, authorizing coöperatives to express the approval or disapproval for all of their members or patrons.[17] This is not an unreasonable provision, as the coöperative is the marketing agency of those for whom it votes. If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This ade-

[17] § 8c (12).

quately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful.[18] If the Act and Order are otherwise valid, the fact that their effect would be to give coöperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction.

Correlation of Order and Act. There is another phase of the argument against the Order which is not affected by the validity of the Act or its application in the Order and therefore is ready for disposition before the constitutional questions need be reached. Defendants contend there is no statutory basis for the sections of the Order exempting coöperatives from the payment of the uniform price[19] and authorizing payments to them and certain handlers from the producer settlement fund.[20]

The Government makes the point that none of the defendants, all handlers, can object to these terms of the Order because only producers delivering milk to coöperatives are affected by the exemption of coöperative handlers from the requirement to pay at not less than the uniform price and only producers are affected by the use of the pooled money for §§ 5 and 6 payments to coöperative and other handlers. Although three of the defendants cannot complain of the benefits conferred upon coöperatives, for they are coöperatives, the defendant Jetter Dairy Company has standing to raise the issue of want of statutory authority to except coöperative handlers from the payment of the uniform price. It is a proprietary corporation, a handler of milk, required by the Order

[18] Cf. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145; *California Water Service Co.* v. *Redding*, 304 U. S. 252, 254.

[19] Article VII, § 1.

[20] Article VII, §§ 5 and 6.

to pay uniform prices for the milk it purchases.[21] This requirement to pay uniform prices arises from the provisions of Article IV that it shall pay minimum prices. The two are the same except for the deduction of certain service payments. The coöperatives are excepted from the payment. The burden of payment is laid directly upon Jetter while others are excepted. None of the defendants, on the other hand, is in a position to raise the issue of lack of statutory authority for the payments authorized by Article VII, §§ 5 and 6. Whether coöperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants' profit or loss depends upon the spread each receives between the class price and sale price. If the deductions from the fund are small or nothing, the patron receives a higher uniform price but the handler is not affected.[22]

We now consider whether the Act authorizes the exception of the coöperatives from the uniform payment provisions of Article VII, § 1. This authority, if it exists, is in § 8c (5) (F) of the Act. The earlier paragraphs provide for minimum prices to be paid by handlers to producers and associations of producers, subject to usual quality and location differentials not important here. These would require minimum prices to be paid by coöperatives when, as here, they were handlers under the definition of the Order,[23] were it not for the exception of

[21] Article VII, § 1.

[22] *Currin* v. *Wallace,* 306 U. S. 1, 18; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 42; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, 181; *Gorieb* v. *Fox,* 274 U. S. 603, 606; cf. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 513; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 598.

[23] Article I, § 1, subsec. 6.

these same coöperatives under subsection (F): "Nothing . . . shall . . . prevent a coöperative . . . from . . . making distribution thereof [net proceeds] . . . in accordance with the contract between the association and its producers." This language specifically permits, indeed requires, the Order to except coöperatives from the requirement of paying minimum prices to producers. As the minimum price is paid to the producer through the payment of the uniform price, after equalization in the pool, there is authority in the Act to except the coöperative from the payment of the uniform price.

I. Terms of the Order.

Certain provisions of the Order were found by the District Court to show unconstitutional discrimination against one or more of the defendants. The discriminations of which complaint is made arise from the application to the New York problem of § 8c (5) of the Act relating to milk.

A. *Uniform Price.*—The Jetter Dairy Company, a proprietary handler, urges that as milk coöperatives need not pay producers a uniform price, it is unreasonably discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In § 8c (5) (F) there is a definition of the type of coöperative permitted to settle with its members in accordance with the membership contract. The general characteristics of coöperatives are well understood. The Capper-Volstead Act defines such coöperatives as associations of producers, corporate or otherwise, with or without capital stock, marketing their product for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealings limited to 50 percent non-member products.[24] Different

[24] 42 Stat. 388.

treatment has been accorded marketing coöperatives by state and federal legislation alike.[25] Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer-controlled coöperative associations as will be in harmony with the policy toward coöperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." [26] These agricultural coöperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such coöperatives and business organizations have repeatedly been held to justify different treatment.[27] *Frost*

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[25] United States—The Clayton Act, § 6, 38 Stat. 731; Robinson-Patman Act, § 4, 49 Stat. 1528; Capper-Volstead Act, 42 Stat. 388; War Finance Corporation Act, 40 Stat. 506, as amended 42 Stat. 181, 182; The Grain Futures Act, 42 Stat. 1000; The Agricultural Marketing Act, 46 Stat. 91.

States—See Hanna, The Law of Coöperative Marketing Associations (1931), c. 3.

[26] Agricultural Adjustment Act, § 10 (b), 48 Stat. 37, as amended by § 16 (b) (1) of the Act of August 24, 1935, 49 Stat. 767, as adopted by § 1 (h) of the Act of June 3, 1937, 50 Stat. 246.

[27] *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 173; *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 21; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Cooperative Assn.*, 276 U. S. 71, 89. The Government furnishes us with a collection of state cases approving the special advantages given co-operatives: *Tobacco Growers Coop. Assn.* v. *Jones*, 185 N. C. 265; 117 S. E. 174; *Kansas Wheat Growers* v. *Schulte*, 113 Kan. 672; 216 P. 311; *Brown* v. *Staple Cotton Growers Co-op. Assn.*, 132 Miss. 859; 96 So. 849; *Northern Wisconsin Co-op. T. P.* v. *Bekkedal*, 182 Wis. 571; 197 N. W. 936; *Dark Tobacco Gr. Co-op. Assn.* v. *Dunn*, 150 Tenn. 614; 266 S. W. 308; *Minnesota Wheat Growers* v. *Huggins*, 162 Minn. 471; 203 N. W. 420; *List* v. *Burley Tobacco Growers Co-op. Assn.*, 114 Ohio St. 361; 151 N. E. 471; *Dark Tobacco Growers Co-op. Assn.* v. *Robertson*, 84 Ind. App. 51; 150 N. E. 106; *Potter* v. *Dark Tobacco Growers Co-op.*, 201 Ky. 441; 257 S. W. 33; *Harrell* v. *Cane Growers Co-op.*, 160 Ga. 30; 126

v. *Corporation Commission* [28] in fact recognized the validity of such classification. The Commission was enjoined from issuing a license for the operation of a coöperative cotton gin, under a proviso directing it to do so on petition of 100 citizens and taxpayers without the showing of public necessity required for other ginners. The applicant was organized for profit, though dividends were limited, and its membership was not confined to producers. The court thought the distinctions had no reasonable relation to the subject of the legislation, special opportunities for coöperatives. It was said the Court had "no reason to doubt" that the classification was valid as applied to true coöperatives.[29]

The producer coöperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership coöperative and with limited profit to the stock coöperative. It is organized by producers for their mutual benefit.[30] For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.

S. E. 531; *Nebraska Wheat Growers* v. *Norquest,* 113 Neb. 731; 204 N. W. 798; *Warren* v. *Alabama Farm B. Cotton Assn.,* 213 Ala. 61; 104 So. 264; *Manchester Dairy System* v. *Hayward,* 82 N. H. 193; 132 Atl. 12, 19; *Clear Lake Co-operative Live Stock Assn.* v. *Weir,* 200 Iowa 1293; 206 N. W. 297; *Hollingsworth* v. *Texas Hay Assn.,* 246 S. W. 1068; *Washington Cranberry Assn.* v. *Moore,* 117 Wash. 430; 201 P. 773; *Poultry Producers* v. *Barlow,* 189 Cal. 278; 208 P. 93; *Oregon Growers Co-op. Assn.* v. *Lentz,* 107 Ore. 561; 212 P. 811; *South Carolina Cotton Growers* v. *English,* 135 S. C. 19; 133 S. E. 542; *Milk Producers Co.* v. *Bell,* 234 Ill. App. 222 and *Barns* v. *Dairymen's Co-operative Assn., Inc.,* 220 App. Div. (N. Y.) 624; 222 N. Y. S. 294.

[28] 278 U. S. 515.

[29] *Id.,* 523.

[30] Cf. N. Y. Coöperative Corporations Law.

The commodity handled by a coöperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the coöperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The coöperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the coöperators' reactions would parallel those of stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so.[31] We do not find an unreasonable discrimination in excepting producers' coöperatives from the requirement to pay a uniform price.

B. *Unpriced Milk.* Another discrimination is said to reside in that part of the Order which limits minimum prices to milk "sold in the marketing area or which passes through a plant in the marketing area." Other milk, though from the same production area, is "unpriced milk" and does not figure in the computation of the uniform price. Where both priced and unpriced milk are dealt in by a handler, he must furnish a statement to the producer showing the percentage of his milk paid for at the uniform price.[32] The defendants handle only milk which is sold in the marketing area. They assert that an un-

[31] *Railroad Co.* v. *Ellerman,* 105 U. S. 166; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 480.

[32] Order, Article VII, § 1.

reasonable discrimination results in favor of handlers, such as the League, which market milk both in and outside the marketing area.

The basis of the complaint is that large dealers and coöperative handlers with extensive gathering and distributing facilities are permitted to purchase milk throughout the milk shed at any price they please, if the milk does not pass through a plant in the marketing area, and sell it at any price they please, provided the sale is outside the limited New York marketing area. By reason of the fact that milk sells for more in New Jersey than in New York, a greater profit is made by the handler. If he so desires, the handler can use this profit to replace losses on New York area sales and still be in a position to pay the uniform price to producers on pool milk. This is said to create a discrimination against the defendants.

It is possible for the handlers with unpriced milk to use their profits from the profitable extra area trade in the way suggested. It was equally possible for them to do so before the Order. It is a competitive situation which the Order did not create and with which it does not deal. We are of the view that there is no discrimination by reason of this situation.

The District Court found that handlers of unpriced milk "are permitted to blend prices paid or purported to have been paid for such milk sold in other markets, with the uniform price announced by the Administrator for milk sold in the area, thereby reducing the actual price paid by such handlers, for milk sold in the Metropolitan Area, in competition with milk sold by the defendants." "If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof." It is erroneous to suppose that by buying some milk at less than the minimum, the

"actual price" paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum but for the part sold in the marketing area or passing through plants there located the minimum is paid. This is all that justifies the language of the finding that "the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price. . . ."

C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area.[33] This is to enable handlers to pay the producers at these plants.[34] The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. § 8c (5) (A). This was found discriminatory as between producers by the District Court but there was no finding or conclusion of law as to any discrimination against defendants. The District Court was of the opinion this was unfair to these defendants who have no patrons in these counties. Here the defendants urge further advantages from this arrangement to their competitors who have patrons in these counties because near locations, freight differentials considered, have lower transportation costs. The differential increases milk prices to the producers. This payment tends to stimulate production. Larger production means more benefit from the freight advantage to competitors. The discrimination seems fanciful and remote. It would not justify a court in overturning the Secretary's determination of the propriety of the differentials on evidence found by the lower court to be substantial. Such an administrative determination carries a presumption of the existence of a state

[33] Order, Article VI, § 1.

[34] Order, Article VII, § 2.

of facts justifying the action far too strong to be overturned by such suggestions as are made here.[35]

II. Constitutionality of the Act.

A. *Minimum Prices.* The Act authorizes and the Order undertakes the fixing of minimum prices for the purchase of milk "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" in milk.[36] There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce. Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.[37]

The challenge is to the regulation "of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant." It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate com-

[35] *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209; *Pacific States Co.* v. *White,* 296 U. S. 176, 185.

[36] § 8c (1).

[37] *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Houston & Texas Ry. Co.* v. *United States,* 234 U. S. 342, 351–2; *Minnesota Rate Cases,* 230 U. S. 352, 399; *Labor Board Cases,* 301 U. S. 1; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith, ante,* p. 38; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601.

merce.[38] We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole.[39] Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.[40] Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production.[41] Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales.

This power over commerce when it exists is complete and perfect.[42] It has been exercised to fix a wage scale for a limited period,[43] railroad tariffs [44] and fees and charges for live-stock exchanges.[45]

The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate com-

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[38] *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291; *Lemke* v. *Farmers' Grain Co.,* 258 U. S. 50, 54; cf. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10.

[39] *Currin* v. *Wallace,* 306 U. S. 1.

[40] *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 220.

[41] *Mulford* v. *Smith, supra,* note 37.

[42] *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Minnesota Rate Cases,* 230 U. S. 352, 398.

[43] *Wilson* v. *New,* 243 U. S. 332, 346.

[44] 34 Stat. 589, 49 U. S. C. § 15 (1).

[45] *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Stafford* v. *Wallace,* 258 U. S. 495.

merce. Since *Munn* v. *Illinois*, this Court has had occasion repeatedly to give consideration to the action of states in regulating prices.[46] Recently, upon a reëxamination of the grounds of state power over prices, that power was phrased by this Court to mean that "upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." [47]

The power of a state to fix the price of milk has been adjudicated by this Court.[48] The people of great cities depend largely upon an adequate supply of pure fresh milk. So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by the municipal health authorities. It belongs to that category of commodities that for many years has been subjected to the regulatory power of the state. A thorough exposition of the milk situation in the New York shed was made in the *Nebbia* case. There is nothing to add to what was there said, save to point out that since that decision, we have held that a state cannot prohibit the sale of imported milk where the extra-state purchase price was below the prescribed minimum [49] and that a Pennsylvania regulatory

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[46] *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251; *Nebbia* v. *New York*, 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Townsend* v. *Yeomans*, 301 U. S. 441.

Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522; *Tyson & Bro.* v. *Banton*, 273 U. S. 418; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235.

[47] *Nebbia* v. *New York*, 291 U. S. 502, 537.

[48] *Id.*

[49] *Baldwin* v. *Seelig*, 294 U. S. 511.

law, including minimum prices, applied in the absence of federal legislation to milk purchased in Pennsylvania for shipment into the New York marketing area.[50] In *Hegeman Farms Corp.* v. *Baldwin,*[51] this Court sustained again the New York Milk Control Statute against the complaint that the price limits were arbitrary. A variation in prices to be charged the consumer between dealers who had and dealers who had not well advertised trade names was upheld.[52] The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce [53] rests with the Congress in the commerce between the states.

B. *Equalization Pool.*—In order to equalize the prices received by producers, handlers are required to clear their purchases through the producer settlement fund. Payments into and withdrawals from this fund depend upon the "value" of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the purchased milk and upon whether his obligations to producers are greater or less than the uniform price due the producers under the scheme. The result of the use of the device of an equalization pool is that each producer, dealing with a proprietary handler, gets a uniform or weighted average price for his milk, with differentials for quality, location or other usual market variations, irrespective of the manner of its use. The Act, § 8c (5) (B) (ii) and (C) and the Order, Articles IV, VI and VII, authorize such an adjustment.

The defendants' objection to the equalization pool, here considered, is not to the disbursements from the fund for expenses of standby or marketing services

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[50] *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346.

[51] 293 U. S. 163.

[52] *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251.

[53] *Nebbia* v. *New York,* 291 U. S. 502; *Townsend* v. *Yeomans,* 301 U. S. 441.

authorized by Article VII, §§ 5 and 6, concerning which we hold the handler has no standing to complain. It is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford* v. *Smith*,[54] we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.

[54] *Supra*, note 37.

Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation,[55] bank deposit insurance, [56] and distribution of benefits in the Transportation Act.[57]

The defendants rely particularly upon *Thompson* v. *Consolidated Gas Utilities Corp.*,[58] and *Railroad Retirement Board* v. *Alton R. Co.*[59] In the *Thompson* case, the Texas Railroad Commission ordered proration of gas production in the Panhandle. It was assumed that proration to prevent waste and protect correlative rights in a pool was valid but it was held that the proration order in issue was for none of these purposes. It was for the "sole purpose . . . to compel those [with market outlets] . . . to purchase gas from potential producers" who have no market. This was not deemed to be reasonably related to the conservation of gas or the protection of correlative rights. In the *Retirement Board* case, the pooling principle was involved but was found to be invalid because the burdens on the roads were not equalized with the benefits. Entry on service was made at different age levels for different roads. Employees seventy or older were required to retire. Some roads had none. Solvent and insolvent roads were liable alike. All carriers were treated as a single employer. It was these provisions, deemed unequal, which led to the conclusion that the manner of pooling of funds denied due process. In this case, the pooling has differentials to cover the variations of quality and location.

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[55] *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *New York Central R. Co.* v. *White,* 243 U. S. 188.

[56] *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Abie State Bank* v. *Bryan,* 282 U. S. 765.

[57] *New England Divisions Case,* 261 U. S. 184; *Dayton Goose Creek Ry.* v. *United States,* 263 U. S. 456.

[58] 300 U. S. 55, 77, 78.

[59] 295 U. S. 330, 355 *et seq.*

C. *Delegation.*—There are three issues of delegation presented: (1) the delegation of authority to the Secretary of Agriculture to establish marketing areas; (2) the delegation of authority to producers to approve a marketing order without an agreement of handlers; and (3) the delegation of authority to coöperatives to cast the votes of producer patrons.

From the earliest days the Congress has been compelled to leave to the administrative officers of the government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied.[60] In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable.[61] The present Act, we believe, satisfies these tests.

1. *Delegation to the Secretary of Agriculture.*—The purpose of the Act is "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to

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[60] *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421; *Schechter Corp.* v. *United States,* 295 U. S. 495, 529; *Currin* v. *Wallace,* 306 U. S. 1.

[61] *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *United States* v. *Chemical Foundation,* 272 U. S. 1, 12; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 193; *United States* v. *Grimaud,* 220 U. S. 506, 516; *Avent* v. *United States,* 266 U. S. 127, 130.

farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." To accomplish this, the Secretary of Agriculture is directed to issue orders, whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act. Unlike the language of the National Industrial Recovery Act condemned in the *Schechter* case, page 538, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms.[62] In this Act it is to restore parity prices, § 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in § 8c (5) and (7). While considerable flexibility is provided by § 8c (7) (D),

[62] "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." 48 Stat. 195.

it gives opportunity only to include provisions auxiliary to those definitely specified.

The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, § 8c (2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by § 8c (4). Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary, in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment. Numerous parties again filed briefs. A right by statute is given handlers to object to the Secretary to any provision of an order as not "in acordance with law," with the privilege of appeal to the courts. § 8c (15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority.[63]

A further provision of the Act is to be noted as it was employed as a standard to determine the minimum price. This is § 8c (18). Acting under this section, the Secretary fixed a fluctuating minimum price based upon wholesale butter prices in New York. While it is true that the

[63] Cf. *Schechter Corp.* v. *United States,* 295 U. S. at 533.

determination of price under this section has a less definite standard than the parity tests of §§ 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with § 2 and § 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.

2. *Delegation to Producers.*—Under § 8c (9) (B) of the Act it is provided that any order shall become effective notwithstanding the failure of 50 percent of the handlers to approve a similar agreement, if the Secretary of Agriculture with the approval of the President determines, among other things, that the issuance of the order is approved by two-thirds of the producers interested or by interested producers of two-thirds of the volume produced for the market of the specified production area. By subsection 19 it is provided that for the purpose of ascertaining whether the issuance of such order is approved "the Secretary may conduct a referendum among producers." The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is

necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.[64]

3. *Authorization of Coöperatives to Cast the Votes of Producer Patrons.*—This objection, too, falls before the answering argument that inasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose.

Coöperatives in the Equalization Fund.—The defendant, Central New York Coöperative Association, denies liability under Articles VI, VII and VIII of the Order on the ground that it is not liable to pay its net pool obligation into the administrative fund or to meet the expenses of administration. The asserted reason for its freedom from liability is that it is a coöperative composed of milk producers and distributes the milk of its members and others as agent.

The coöperative owns no farms. Its members are dairy farmers. By their contract they agree "to deliver . . . all . . . milk produced . . . which said milk is to be marketed and distributed by the [coöperative] . . ." The latter "agrees to pay . . . for the milk . . . a price . . . based upon the amount received . . . less the expenses . . ." Nonmembers' milk is marketed under the same contract. The coöperative leases receiving and distributing facilities from a business corporation. The milk is received by the coöperative at receiving plants and shipped to the city depot. It distributes through other business corporations which are wholly-owned subsidiaries of the coöperative. These distributing subsidiaries use the leased physical facilities under verbal contracts with the coöperative. The coöperative receives the net amount from the sales and distributes to its patrons under license from the Director of the Division of

[64] *Currin* v. *Wallace*, 306 U. S. 1, 15.

Milk Control of New York permitting the marketing in the manner described.

Section 8c (5) (A) authorizes an order to classify milk and fix minimum prices which all handlers shall pay for milk purchased from producers. Section 8c (5) (C) authorizes the equalization pool and the handlers' payment to this settlement fund. It is urged that coöperatives which merely act as agents for their members are not included in handlers purchasing from producers. This is said to be definitely shown by the provisions of § 8c (5) (F) providing that nothing contained in the subsection shall be construed to prevent a Capper-Volstead coöperative from making distribution to its "producers in accordance with the contract." The Order defines a handler as including a coöperative association "with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered" to other handlers. Under the provisions of the Order, Article VII, §§ 8 and 9, coöperative handlers as other handlers equalize their purchases by payment into the producer settlement fund, even though they are not required to pay the uniform price to their producers by reason of the exception of Article VII, § 1, and the provisions of § 8c (5) (F), as explained at page 561.

Coöperative contracts are of two general types, sale and agency.[65] The Central New York Coöperative operates under the agency type.

It is obvious that the use of the word "purchased" in the Act, § 8c (5) (A) and (C), would not exclude the "sale" type of coöperative. When § 8c (5) (F) was drawn, however, it was made to apply to both the "sale" and "agency" type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C). The section which au-

[65] Hanna, Law of Coöperative Marketing Associations, pp. 210, 256.

thorizes all orders, § 8c (1), makes no distinction. The orders are to be applicable to "processors, associations of producers, and others engaged in the handling" of commodities. The reports on the bill show no effort to differentiate.[66] Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of "agency" coöperatives. The administrative construction has been to include such organizations as handlers.[67] With this we agree. As here used the word "purchased" means "acquired for marketing." Subsection (A) cannot be construed as freeing agents, coöperative or proprietary, from the requirement to account at the minimum prices for milk handled.

As a corollary the contention is made also by Central Coöperative that no coöperative may be required to pay its surplus receipts over uniform prices into the equalization fund. This, too, is based upon a construction of § 8c (5)(F) as permitting a coöperative to make settlement with its members in accordance with the terms of its own contract with them. If the coöperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be most strongly marked. Such a construction is not required. Coöperatives are covered by § 8c (1) and (5) (A) and (B), and by the provisions of the Order, except as to the payment of the uniform price. Any payments below the uniform price fall on their members. We are of the view that the administrative construction is correct and that the "net proceeds" of (F) refer to the result of the coöperative sales in the marketing area after complying with the equalization requirements.

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[66] House Report No. 1241, 74th Cong., 1st Sess.; Senate Report No. 1011, 74th Cong., 1st Sess.

[67] *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1, 13–14.

The defendant, Central New York Coöperative Association, raises for itself a final point. In determining the net pool obligation of any handler for milk received from producers,[68] the handler is authorized to subtract pro rata out of each class from the milk involved in the pool "the quantity of milk received from the handler's own farm." We have determined that this coöperative, though marketing milk under an agency contract with its members, is a handler subject to the Act and Order. The coöperative argues that as its members, farmers, would not need to account to the pool for their personal sales to consumers, the coöperative, being utilized as an agent to market the farmers' milk, is under no obligation to contribute to equalization. As the coöperative does not have its own farm but is itself a handler under the Act, it must pay into the producer settlement fund.

Inasmuch as all the defendants in these appeals are handling milk in interstate commerce, the petition for the enforcement of Official Order No. 126, issued under c. 383 of the Laws of 1937 of the State of New York, concerning milk not covered by Order No. 27 of the Secretary of Agriculture, should be dismissed.

The order of the District Court in Nos. 771, 827 and 828 is reversed and the causes are remanded to that Court with instructions to enter an order specifically enforcing up to the time of suspension the provisions of Order No. 27, issued by the Secretary of Agriculture August 15, 1938, regulating the handling of milk in the New York marketing area, as to all the defendants and enjoining defendants, their officers, agents and servants, from further violation of the Order.

The order of the District Court in dismissing the petition of Holton V. Noyes, as Commissioner of Agriculture and Markets of the State of New York, is affirmed.

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[68] Article VI, § 1.

[Over.]

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the judgment and opinion of the Court except insofar as the opinion appears to imply that power of Congress to enact the marketing law depends upon the use and nature of milk. They do not believe that we are called upon in this case to indicate, as they think we do, that there is such a constitutional limitation on the power of Congress to regulate interstate commerce.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER, dissenting.

We are of opinion that the decree below should be affirmed.

In our view the challenged order of the Secretary must succumb to two manifest objections. It is unnecessary for us to dissect the record in search of other impediments.

First. Congress possesses the powers delegated by the Constitution—no others. The opinion of this Court in *Schechter Poultry Corp.* v. *United States* (1935), 295 U. S. 495—noteworthy because of modernity and reaffirmation of ancient doctrine—sufficiently demonstrates the absence of Congressional authority to manage private business affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity; also, sowing and reaping the fodder which inspires them.

Second. If perchance Congress possesses power to manage the milk business within the various states, authority so to do cannot be committed to another. A cursory examination of the statute shows clearly enough the design to allow a secretary to prescribe according to his own errant will and then to execute. This is not government by law but by caprice. Whimseys may displace deliber-

ate action by chosen representatives and become rules of conduct. To us the outcome seems wholly incompatible with the system under which we are supposed to live.

MR. JUSTICE ROBERTS, dissenting.

In Nos. 772, 809 and 865* I have expressed my views as to the unconstitutionality of the provisions of the Agricultural Marketing Agreement Act of 1937 here involved, in view of their attempted delegation of legislative powers. That matter is not pressed in the present cases and I need not here advert to the subject. I am of opinion, nevertheless, that Order No. 27 is not, in the respects to be discussed, authorized by the Act, but if it is authorized, deprives the appellees of their property without due process of law in violation of the Fifth Amendment.

This conclusion is based upon findings of fact of the District Court. While the findings in question are the subject of assignments of error, the appellants failed, either in brief or in oral argument, to point out that they lack substantial support in the evidence. Examination of the record discloses that these findings are based on uncontradicted testimony, authentic documentary evidence, and a stipulation of the parties. They should, therefore, be accepted here. They may briefly be recapitulated.

Under the terms of the Act and the order, all of the appellees are handlers and the Dairymen's League Coöperative Association, the appellant in No. 827, is likewise a handler. By Art. VII, § 1, of the order, on or before the 25th day of each month, each handler which is not a coöperative association of producers is required to pay to each producer the uniform price fixed by the order for all milk delivered by the producer during the preceding month which was sold in the marketing area. The coöperative associations which are handlers are not required

H. P. Hood & Sons, Inc. v. *United States, post,* 588, 603.

to make payment for similar milk at the uniform price or at any stated price. Art. VII, § 8, requires all handlers, on or before the 18th day of each month, to pay to the market administrator for the Producer Settlement Fund "the amount by which his net pool obligation for the preceding month is greater than the amount obtained by multiplying the net pooled milk of such handler by the uniform price." Thus each handler is required to pay into the fund for all milk used in the marketing area the difference between $2.45 per cwt. and the uniform price for all Class I milk. Handlers selling milk received from producers in the production area, but marketed outside the marketing area, (denominated "unpriced milk") are not required to pay a uniform price for such milk or to pay into the fund the difference between the uniform price and the actual market value of such milk, or any fixed amount in respect thereof. They are permitted to blend prices paid or purported to have been paid for unpriced milk with the uniform price announced by the Administrator for milk sold in the marketing area, thereby reducing the actual price paid by them for milk sold in the marketing area in competition with other handlers who sell milk only in that area. In a pamphlet issued by the Secretary, the provisions of the order are so construed and the method of accounting is described as follows:

"Thus, the handler may multiply the total pounds of milk sold by it in the area by the uniform price; multiply the total pounds of milk sold in other markets and which is called 'unpriced milk' by 'such prices as it sees fit;' add the totals, and divide by the total pounds of milk, to obtain the average of 'blended' price paid producers for all milk. If the price figured by the handler for unpriced milk, is lower than its actual market value, the handler, by blending, is thereby permitted to pay producers for all milk at less than the Order price, and less than the actual value thereof."

The appellees' receiving stations in the production area supply the marketing area defined by the order. The appellee, Jetter Dairy Company, sells milk in competition with dealers operating milk receiving stations in the production area in New York, who ship milk received at their stations to the marketing area. Other appellees buy milk which is sold to independent dealers in competition with milk received at the other stations in the producing area. Several of the appellees' largest competitors, including the Dairymen's League Coöperative, sell large proportions of their milk outside the marketing area in northern New Jersey. The Milk Control Board of New Jersey fixed a base price of $2.76 per cwt. to producers for 3.5 milk f. o. b. country milk plants, which price was in effect during the period covered by the order. The same Board fixed wholesale prices from dealers to stores at eleven cents per quart, bottled in glass, in two rural districts, and twelve cents per quart, in glass, in three heavily populated districts, and fixed a minimum price to consumers out of stores in the two rural districts of twelve cents per quart and, in the more heavily populated districts, of thirteen cents per quart. No resale prices are fixed in the marketing area either from dealers to stores or from stores to consumers. The fair market value of "unpriced" Class I milk produced in the production area, and sold by handlers in New Jersey, during the period the order was in force, was $2.76 per cwt.

Whereas the uniform price for 3.5 milk fixed by the Administrator was, for September, $1.87, October, $1.91, and November, $2.10 per cwt., the Dairymen's League paid its producers a base price for the same milk, in the same zone, for September, $1.75, for October, $1.81, and, for November, $2.01 per cwt. Thus the difference between the value of Class I milk sold by the Dairymen's League in New Jersey, and the prices paid for the same to producers per cwt. was, in September, $1.01, in Oc-

tober, $.95, and, in November, $.75. $1.01 per cwt. on 10,208,500 pounds of milk sold in New Jersey by the Dairymen's League amounts to $103,105.85.

Sheffield Farms Company, a competitor of the appellees, utilized, in September, 1938, 40,083,075 pounds of Class I milk in New York State and 6,426,443 pounds of milk in New Jersey, as well as milk in other markets. For out of market or unpriced milk the company negotiated with its producers to pay the uniform order price for such out of market milk. The base price paid was, therefore, $1.87, or eighty-nine cents per cwt. less than the price fixed by the New Jersey Control Board. The difference amounted to $57,194.96, or 14.27 cents per cwt. on such milk and the price paid for Class I milk was reduced by that amount. Similar spreads are shown in the company's purchases for October, 1938.

Based upon these facts, the court further finds that prices paid to producers delivering to handlers, whether coöperative or proprietary, which sell fluid milk in the marketing area, and also in the State of New Jersey and other markets, are less than the actual value of the milk delivered, due to the process of blending prices for milk sold outside of the marketing area, which bear no true relation to the actual value thereof, with prices charged for milk sold in the area.

It is evident from the terms of the order, and the Secretary's construction of it, that handlers who use "unpriced" milk may fix any price they choose to fix for it. Thus, contrary to the requirement of § 8c (5) (A), of the statute, all producers do not receive a uniform price for milk. This is a necessary effect of the provision permitting the blending of the price paid producers for milk sold in the marketing area and an arbitrary price fixed for "unpriced" milk. The effect upon a handler whose trade is solely in the marketing area is disastrous. The lower price paid by those who are permitted to blend makes it possible for them to resell the milk in the mar-

keting area, in which no resale price is fixed, at a cut rate which is destructive of their competitors' business. And there is evidence that handlers, coöperative and proprietary, have taken advantage of the terms of the order to cut the price of milk to consumers in the marketing area to the disadvantage of their competitors.

The appellants make no answer to the appellees' attack on this feature of the order. The opinion of this court states that the detriment to the smaller handlers who sell milk for use only in the marketing area is the result of competitive conditions which the order does not affect. But it is evident that the order freezes the minimum price which is to be paid by many handlers and leaves the price of other handlers who compete with them open to reduction by the device of blending.

There is nothing in the Act which authorizes the discrimination worked by the order permitting handlers, whether proprietary or coöperative, to blend the prices of unpriced milk with that of milk, sold in the marketing area. Section 8c (5) (F), as I read it, prohibits such a practice by coöperatives. If the order had provided that milk sold in New Jersey should be accounted for to the pool at its actual value and had the milk so sold been accounted into the pool, competitors could not have obtained the advantage which so seriously injures the business of appellees. As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law.

I think that the decree should be affirmed.

The CHIEF JUSTICE joins in this opinion so far as it relates to the invalidity of the order on the ground stated; MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER also join in this opinion.

H. P. HOOD & SONS, INC. ET AL. *v.* UNITED STATES ET AL.*

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

No. 772. Argued April 25, 26, 1939.—Decided June 5, 1939.

1. Objections, on constitutional grounds, to the Agricultural Marketing Agreement Act of 1937, and to certain features of an order of the Secretary of Agriculture made thereunder, *overruled* upon the authority of the *Rock Royal* case, *ante*, p. 533. P. 595.
2. The finding and proclamation required of the Secretary of Agriculture by § 8 (e) of the Agricultural Marketing Agreement Act of 1937 to justify an order based on purchasing power during the post-war period specified in that section rather than upon the pre-war period mentioned in § 2—that is to say, a finding and proclamation that the purchasing power of the commodity regulated can not be satisfactorily determined for the pre-war period from available statistics of the Department of Agriculture—need not be repeated in connection with an amendment of the order which does not involve any change of the base period, although it is declared by § 8 (17) that the provisions of § 8 (e) applicable to orders "shall be applicable to amendments to orders." P. 595.
3. A referendum to producers, under § 8c (9) (B) and § 8c (19) of the above-mentioned Act, of amendments to an order regulating the handling of milk in the marketing area of Boston and vicinity, was properly restricted to producers who sold their fluid milk to handling plants licensed by the state law to distribute or sell fluid milk in the marketing area and which had shipped milk or cream to that area during the representative period. So *held*, in the light of the object of the regulation, which was to remedy marketing evils caused by a surplus of fluid milk. P. 597.

   The referendum election was not invalidated (a) by denying the vote to producers who sold to handlers not licensed to sell milk, but only cream, in the marketing area; (b) by allowing the vote to producers who sold their milk at plants which shipped only cream to the marketing area during the representative period,

*Together with No. 809, *Whiting Milk Co.* v. *United States et al.*, and No. 865, *Branon* v. *United States et al.*, also on writs of certiorari to the Circuit Court of Appeals for the First Circuit.

but which were licensed to sell fluid milk in that area and could have done so; (c) by allowing the vote to producers not registered as required by the state law but whose milk was sold in the marketing area by licensed handlers; or (d) by permitting the vote to producers who sold to stations which shipped less than 50 per cent. of the milk to the area during the representative period.

4. At such a referendum a coöperative association of producers may vote for its members. P. 599.
5. An order of the Secretary of Agriculture which regulated the prices of milk sold by producers to licensed handlers for a marketing area, and which required such handlers to pay through an equalization fund—*construed* as including milk bought of unregistered farms and sold in violation of the state law. P. 599.
6. Assuming that, under the Agricultural Marketing Agreement Act of 1937, reinstatement of a suspended order should be supported by a finding that the reinstatement will tend to effectuate the policy of the Act, the omission can be supplied by an appropriate finding on repromulgation of the order with amendments. P. 602.

21 F. Supp. 321; 26 F. Supp. 672, affirmed.

CERTIORARI, 306 U. S. 627, 629, to review decrees of a District Court granting mandatory injunctions in two suits brought by the United States and the Secretary of Agriculture to enforce a marketing order regulating prices of milk and milk products in an area comprising the City of Boston and adjacent settlements. The original defendants were three milk dealers. Two milk producers, one of whom is the petitioner in No. 865, intervened as defendants. Upon interlocutory appeal the Circuit Court of Appeals gave an opinion which is reported as *H. P. Hood & Sons, Inc.* v. *United States,* 97 F. 2d 677. The writs of certiorari were issued while the cases were pending in that court upon appeals from the final decrees.

Mr. Charles B. Rugg, with whom *Messrs. Edward F. Merrill, Warren F. Farr, H. Brian Holland,* and *Archibald Cox* were on the brief, for petitioners in Nos. 772 and 865.

Mr. John M. Raymond, with whom *Messrs. Lawrence Foster* and *Augustin H. Parker, Jr.* were on the brief, for petitioner in No. 809.

Solicitor General Jackson, with whom *Assistant Attorney General Arnold* and *Messrs. Hugh B. Cox, James C. Wilson,* and *Robert K. McConnaughey* were on a brief in Nos. 772 and 809, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

These cases involve the constitutionality of the Agricultural Marketing Agreement Act of 1937 [1] as applied in an order of the Secretary of Agriculture regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area.

The petitioners, H. P. Hood & Sons, Inc., and Noble's Milk Company of No. 772 and Whiting Milk Company of No. 809, original defendants below, are engaged in handling milk in the marketing area in the current of interstate commerce or in a manner which burdens that commerce. Producers intervened as defendants, petitioner E. Frank Branon on the side of H. P. Hood & Sons and Chester D. Noyes beside the Whiting Company. The respondents, plaintiffs below, are the United States of America and the Secretary of Agriculture. The parties will be referred to as defendants and plaintiffs, respectively.

It is unnecessary to detail the facts of each case. They are two of many instituted by the plaintiffs to secure obedience to the Order. On October 1, 1937, bills of complaint were filed in the District Court for the District of Massachusetts, 21 F. Supp. 321, for the purpose of enjoining Hood & Sons, Noble's Milk Company and

[1] Act of June 3, 1937, 50 Stat. 246.

Whiting Milk Company from violating the terms of Order No. 4 as amended. A temporary mandatory injunction issued on November 30, 1937. A supersedeas followed soon after, conditioned upon payment by the three handlers into the registry of the court of the amounts billed to them by the Market Administrator for equalization charges and marketing services under the Order. Answers to the bills asserted constitutional infirmities in the Act and fatal weaknesses in the Order as amended. A Special Master was charged with the duty of finding the facts in these and similar suits. His report was filed on January 27, 1939. Shortly thereafter, the District Court confirmed the report, sustained both the Act and the Order, and entered a decree for the plaintiffs. The defendants took an appeal to the Circuit Court of Appeals and, after the cases were docketed, filed petitions for writs of certiorari. The writs were granted because important questions of federal law undecided by this Court were involved and pending appeals in other cases with similar issues were ready for argument.

The pertinent provisions of the Marketing Act have been summarized in *United States* v. *Rock Royal Co-operative, ante,* p. 533. They will not be repeated here.

Order No. 4, as amended, which the plaintiffs seek to enforce, is the culmination of an extended effort by the Secretary to work out a plan to regulate the marketing of milk in the Boston area. Order No. 4 was originally issued on February 7, 1936, under the Agricultural Adjustment Act.[2] All steps leading to its issuance were taken. On November 30, 1935, the Secretary gave notice of a public hearing on a proposed marketing agreement and order. Hearings were held. A marketing agreement was tentatively approved which handlers failed to accept.

[2] Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750.

On January 25, 1936, the Secretary found and proclaimed that the purchasing power of milk could not be satisfactorily determined for the pre-war base period from available statistics in the Department of Agriculture, but could for the post-war period. August, 1919, to July, 1929, was declared the base period for the purpose of issuing an order. On February 5, 1936, the Secretary made a determination, as required by § 8c (9), as to the necessity for issuing an order. The President approved the determination, and the Order issued. It remained in effect until August 1, 1936, shortly after the District Court for the District of Massachusetts held that the Act under which the Order was issued was unconstitutional.[3] On that day the Secretary suspended the Order for an indefinite time.

After the passage of the Marketing Act, the Secretary, on June 24, 1937, gave notice of a hearing upon proposed amendments to Order No. 4. On the following day he terminated the suspension of the formal and administrative provisions as of July 1, and of the price-fixing provisions as of August 1. Hearings were held. A proposed marketing agreement failed of approval by the handlers. On July 17, 1937, a referendum took place. It will be discussed later at some length because of contentions which question its validity. On July 27, 1937, acting pursuant to § 8c (9), the Secretary determined that the failure of the handlers to sign tended to prevent effectuation of the declared policy of the Act; that issuance of the proposed amendments to the Order was the only practical means of advancing the interests of milk producers in the area; and that the issuance was approved by over 70 percent of the producers who during May, 1937, were engaged in the production of milk for sale in the area. The President approved the determina-

[3] *United States* v. *David Buttrick Co.*, 15 F. Supp. 655, reversed in 91 F. 2d 66.

tion. On July 28, 1937, "Order No. 4, Amendment No. 1" issued. In it the Secretary made findings upon the evidence introduced at the hearings upon the proposed amendments and ratified the original findings in so far as they were not in conflict with the new ones. He made no finding or proclamation, as he had in the original Order, that satisfactory statistics were not available for the pre-war period but were for the post-war period. It is not disputed that the latter was used as the base period for the purpose of computing the prices to be used in the amended Order.

This amended Order is based upon the same principles discussed in *United States* v. *Rock Royal Co-operative, ante,* p. 533, and companion cases, decided today. It establishes a comprehensive scheme for the regulation of milk handled in interstate or foreign commerce in an area which includes Boston and 36 other cities or towns. A Market Administrator, appointed by the Secretary of Agriculture, is in charge. Producers and handlers are defined, the first as any person producing milk in conformity with the health regulations applicable to milk sold for consumption as milk in the marketing area, the second as all, including producers or associations of producers, who engage "in such handling of milk, which is sold as milk or cream in the Marketing Area, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in milk and its products."

There are two use classifications, roughly, fluid and non-fluid. A price is stated for Class I or fluid milk; a formula, based primarily on the price of cream in Boston and casein in New York, is provided for the calculation of the Class II price for each delivery period. Minimum prices determine the value of all the milk delivered by all producers to all the handlers subject to the Order. Except to associations of producers for Class I milk, pay-

ment to producers is made at a blended price. The Administrator computes the value of milk for each handler by multiplying the quantities used by him in each class by the class price, and by adding the two results. Then the values for all handlers are combined into one total. Adjustments are made for differentials. The adjusted total is divided by the total quantity of milk. The result is a weighted average price somewhere between the two class prices, known as the "blended price." Each handler pays his producers at the blended price. The amount paid to producers may be less, or it may be more, than the value of the milk sold by the handler. Equalization is made among handlers. As the Order puts it, after paying his own producers, each handler pays "To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which payments made . . . are less than, or exceed, the value of milk as required to be computed for such handler. . . ."

The defendants urge that the decree of the District Court should be reversed because of error under the Constitution, under the statute, under the Order itself. It is contended that the equalization provisions of the amended Order violate the due process clause of the Fifth Amendment; that the price fixing features of the Act and Order constitute an invalid exercise of the power to regulate commerce and an invasion of the powers reserved to the states under the Tenth Amendment; [4] and that the Act involves delegation of legislative power. The amendments to the Order are said to be void because an essential finding required by the statute is lacking. The referendum among producers is assailed as improperly conducted. And the defendants in No. 772 raise the point that the Market Administrator failed to comply with the provisions of the amended Order.

[4] Only defendant in No. 809 makes this contention.

Constitutionality.—There is nothing to be added to the discussion of the constitutionality of the Act in *United States* v. *Rock Royal Co-operative, ante,* p. 533. The discussion there of the validity of the amended Order, in so far as similar issues are raised in this case, is also determinative.

Order Amended without Finding as to Base Period.—Order No. 4, as amended, is the controlling regulation in these cases. As authorized by § 8e [5] it used a post-war period as the base period to determine prices. The finding and proclamation by the Secretary as to the absence of statistics for the pre-war period, available for use, were made for the original issue of Order No. 4 but not for the amendments. Section 8c (17) makes certain sections, including 8e, applicable to amendments of orders. It reads thus: "The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders. . . ." Defendants contend that this requires a finding and proclamation under § 8e each time an order which includes a post-war base period is amended in any particular.

Ordinarily the base period of § 2 is to be used. It is only after a finding that the purchasing power of the commodity during the period fixed in § 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture that the Secretary by § 8e

[5] "Sec. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture."

is authorized to find and proclaim the post-war base period. By § 8c (1) the Secretary is authorized to issue "and from time to time amend" orders. Obviously, as a general clause to make all the provisions of §§ 8c, 8d and 8e applicable to amendments, § 8c (17) was adopted. Without it questions would have been pertinent as to the applicability to amended orders of various provisions in these sections. Doubt would arise as to the power to change the base period after it was once determined. There would seem to be no occasion to review the absence of satisfactory statistics, however, on a proposed amendment which does not involve any change in the base period. The requirement for finding and proclamation in adopting a base period is not intended to force the Secretary to go through a meaningless ritual. A determination of the necessity of using the post-war base period once made and proclaimed satisfies the conditions of §§ 8c (17) and 8e for amendments, so long as no amendment is made which involves a change in the base period. This has been the administrative construction [6] where amendments have been made to orders which had utilized a post-war base period. The plaintiffs show this by a series of references to the Federal Register which are not challenged.[7]

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[6] *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 329.

[7] "Order No. 2, amended June 5, 1936 (1 Fed. Reg. 549); Order No. 3, amended April 13, 1936 (1 Fed. Reg. 185), and March 29, 1937 (2 Fed. Reg. 616), and March 31, 1939 (4 Fed. Reg. 1404); Order No. 4, amended July 28, 1937 (2 Fed. Reg. 1331), and January 13, 1939 (4 Fed. Reg. 249); Order No. 5, amended March 29, 1937 (2 Fed. Reg. 614); Order No. 7, amended October 24, 1936 (1 Fed. Reg. 1662); Order No. 11, amended November 17, 1936 (1 Fed. Reg. 1979); Order No. 12, amended February 24, 1937 (2 Fed. Reg. 354); Order No. 15, proclamation dated September 10, 1938 (3 Fed. Reg. 2222), amendment dated September 10, 1938 (3 Fed. Reg. 2222); Order No. 20, amended August 15, 1938 (3 Fed. Reg. 2015)."

Validity of the Referendum.—The referendum is challenged as conducted contrary to the terms of the Act. Section 8c (9) (B) authorizes the Secretary of Agriculture to issue an order, notwithstanding the failure of handlers to approve a marketing agreement, if he makes certain determinations, one of them that the issuance is approved by at least two-thirds of the producers who, during a representative period, "have been engaged in the production of such commodity for sale in the marketing area. . . ."[8] Under § 8c (19) the Secretary "may conduct a referendum among producers" to ascertain whether two-thirds approve. He restricted voting in the referendum under scrutiny to producers who had delivered milk to a station approved for the shipment of milk to the marketing area and which had shipped milk or cream to the marketing area during the representative period.

It is said that the Secretary by this restriction disregarded the language of the statute as to producers eligible to vote and that the ballot was either accorded to producers not entitled to vote or denied to qualified producers. Specifically, the following errors are urged: (1) A large number of southern and western producers who delivered to stations shipping cream were not permitted to vote. (2) Many New England or Eastern New York producers voted who delivered to handlers at plants which shipped only cream in the representative period. (3) Many voted who produced milk on farms as to which no certificate of registration had been issued, as required by §§ 16A and 16C of the Massachusetts milk law.[9] (4) A number of approving producers delivered milk to stations which shipped less than 50 percent of their product to the Boston area. (5) Coöperatives cast votes in favor of the

[8] The alternative provisions may be disregarded in this case.

[9] Mass. Ann. Laws, c. 94, §§ 12–48.

amendments to the Order solely through ballots cast by their boards of directors. Inclusion of the southern and western shippers of cream or elimination of any one of the remaining groups might have changed the result of the referendum.

It does not seem profitable to expand each of the contentions of the defendants. The question is simply whether the statute was followed. It seems to us that it was.

The Act does not supply the Secretary with detailed directions as to the manner of holding a referendum. Its language is general. The Secretary "may conduct a referendum among producers." [10] What producers? Those "engaged in the production of [milk] for sale in the marketing area. . . ." [11] Every producer who voted was so engaged. Each delivered milk to the plant of a handler licensed [12] to distribute and sell fluid milk in the marketing area. The Order is aimed at the handling of milk marketed in the area. The problems to be solved are those engendered by the necessary, yet troublesome, surplus of fluid milk. Every handler to whom the voters delivered contributed to that surplus.

The milk of the southern and western producers outside the milk-shed could not be sent into the marketing area in fluid form, for their handlers were not licensed to sell milk in the area. The station in Indiana, used in the hearings as illustrative of the situation, held a license for the emergency shipments of sweet cream only. The exclusion of the southern and western producers, therefore, was proper. They are located outside the Boston milk-shed; they do not produce any part of the burdensome surplus of fluid milk.

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[10] § 8c (19).

[11] § 8c (9) (B) (i).

[12] Mass. Ann. Laws, c. 94, § 40.

There was no error in permitting the remaining groups of producers to vote. That some handlers to whom voting producers delivered milk shipped only cream during the representative period is immaterial. The farmers, it was found, cannot tell when they bring in their milk whether it will be sold by the handlers as milk or cream. As these handlers could have sent the fluid milk to the area, and in most instances did, at times other than the representative period, the milk delivered to them was a potential part of the surplus. The producers who lacked certificates of registration were properly included. Their milk was sold in the area by licensed handlers.[13] Nor can it make any difference that less than 50 percent of the milk of some stations was shipped to the marketing area during the representative period. There is nothing in the Act that compels adopting 50 percent as determinative. It was enough that the handlers of these producers did send some part, and could have sent all.

Two coöperatives voted for their members in favor of the amendments to the Order.[14] No poll was taken of the individual producer members. Nor was there any subsequent approval by them of the action taken on their behalf by the coöperatives. Section 8c (12) directs the Secretary to consider the approval or disapproval of cooperatives as the approval or disapproval of members. This is complete authority for the action of the Secretary. He need not require further referendums by coöperatives themselves. Presumably they will vote with an eye to the best interest of their members.

Violation of Order. The decree directs the defendants to pay to the Market Administrator for distribution to the producers through the equalization fund the amounts

[13] Compare the discussion under the next heading, *Violation of Order.*

[14] See *United States* v. *Rock Royal Co-operative, ante,* 533, 556.

which he had billed to them under the Order. The defendants H. P. Hood & Sons and Noble's Milk Company contend that the bills include in their computation milk plainly excluded by the terms of the Order because the product of dairies without the certificates of registration required by Massachusetts General Laws, Chapter 94, §§ 16A *et seq.* Under these sections no person may sell milk known to have been produced on unregistered farms. It is not disputed that milk from such farms figured in the operation of the equalization pool. The explanation of the plaintiffs is that the Order covers this milk.

The Administrator seeks payment on the basis of all milk received by licensed handlers for use in the Marketing Area. It was found that milk received at a country plant was included in the computation if the Administrator knew the plant was approved for shipment of fluid milk by a city or town of the marketing area. By statute handlers are required to have a license to handle milk in any town where an inspector of milk is appointed and a permit from the local board of health,[15] and they must register with the director of the dairying division of the state department of agriculture.[16]

As the action of handlers forms the ground for the initiation of regulation under the Act [17] and for classification,

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[15] Mass. Ann. Laws, c. 94, §§ 40, 43.

[16] *Id.*, § 16F.

[17] § 8c. "(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as 'handlers.' Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."

reports, calculation and payment under the Order,[18] we conclude that the milk received by handlers for use in the area is the proper basis of computation. True, the reports are based on the delivery of milk by defined producers but in view of the terms of the Order as a whole,

[18] Article III. "Section 1. *Sales and Use Classification.*—Milk purchased or handled by handlers shall be classified as follows:

"1. All milk sold or distributed as milk, chocolate milk, or flavored milk and all milk not specifically accounted for as Class II milk shall be Class I milk; and

"2. Milk specifically accounted for (a) as being sold, distributed, or disposed of other than as milk, chocolate milk, or flavored milk and (b) as actual plant shrinkage within reasonable limits shall be Class II milk."

Article V. "Section 1. *Periodic Reports.*—On or before the eighth day after the end of each delivery period, each handler shall, except as set forth in section 1 of article VI, with respect to milk or cream which was, during such delivery period, (a) received from producers, (b) received from handlers, or (c) produced by such handler, report to the Market Administrator in the detail and form prescribed by the Market Administrator, as follows:

"1. The receipts at each plant from producers who are not handlers;

"2. The receipts at each plant from any other handler, including any handler who is also a producer;

"3. The quantity, if any, produced by such handler; and

"4. The respective quantities of milk which were sold, distributed, or used, including sales to other handlers, for the purpose of classification pursuant to article III."

Article VII. "Section 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers, by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3, and 4 of article IV and (b) adding together the resulting value of each class."

Article VIII. "Section 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period each handler shall make payment, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during

we are of the opinion the milk from unregistered farms must also be reported. The Act and Order regulate marketing. In violating the state health laws by knowingly selling milk from unregistered farms, producers, and handlers may risk prosecution by the Massachusetts authorities. Nevertheless, the handlers must conform to the Order. It is the milk handled, not the milk produced, which is determinative. The Administrator was justified in using milk received at an approved plant for computation. It may be added that under the state and town regulations the municipalities in the marketing area, through their control over licenses and permits, have the power to supervise the handlers to see that they comply with the law forbidding sales from unlicensed farms.[19]

The further contention is made that the Secretary failed to make a finding as to the tendency of the rein-

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such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

"1. To each producer, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in section 4 of this article, for the quantity of milk delivered by such producer;

"2. To any producer, who did not regularly sell milk for a period of thirty days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

"3. To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1 and 2 of this section are less than, or exceed, the value of milk as required to be computed for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the twentieth day after the end of such delivery period."

[19] Mass. Ann. Laws, c. 6 and c. 94, §§ 16A, 16F, 40, 41, 43.

statement of the original Order to effectuate the policy of the Act. This is conceded. The Order was reinstated in part as of July 1, 1937. It was thereafter amended after hearings and on July 28, 1937, the Order as amended was promulgated with the finding "That the issuance of the amendment to the order and all of the terms and conditions of the order, as amended, will tend to effectuate the declared policy of the act." · We are of the view that this finding cured any omission, if such a finding prior to reinstatement were necessary, as to which we express no opinion. While Order No. 4 was partly in effect prior to this amendment, the finding covered the entire Order No. 4 as amended, and the language of the Order promulgating the amendments is an approval of Order No. 4 as amended, as tending to effectuate the declared policy of the Act.

Other contentions are made which have been considered but they do not seem to require any statement.

Affirmed.

MR. JUSTICE ROBERTS, dissenting.

I regret that I cannot concur in the Court's disposition of these cases. I find it unnecessary to consider whether the order complied with the terms of the Act or whether the Act or the order deprived the appellees of their property without due process. I am of opinion that the Act unconstitutionally delegates legislative power to the Secretary of Agriculture.

Valid delegation is limited to the execution of a law. If power is delegated to make a law, or to refrain from making it, or to determine what the law shall command or prohibit, the delegation ignores and transgresses the Constitutional division of power between the legislative and the executive branches of the government.

In my view the Act vests in the Secretary authority to determine, first, what of a number of enumerated com-

modities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of regulation, and, fourth, the character of regulation to be imposed; and, for these reasons, cannot be sustained.

The statute is an attempted delegation to an executive officer of authority to impose regulations within supposed limits and according to supposed standards so vague as in effect to invest him with uncontrolled power of legislation. Congress has not directed that the marketing of milk shall be regulated. Congress has not directed that regulation shall be imposed throughout the United States or in any specified portion thereof. It has left the choice of both locations and areas to the Secretary. Congress has not provided that regulation anywhere shall become effective at any specified date, or remain effective for any specified period. Congress has permitted such a variety of forms of regulation as to invest the Secretary with a choice of discrete systems each having the characteristics of an independent and complete statute.

Section 8c (2) provides that the Secretary may make orders in respect of eight specified agricultural products. It embodies no directions as to the specific conditions which shall move him to issue orders affecting each of the named commodities. The same section permits the promulgation of orders applicable to specified regions. It omits any restriction or direction as to the size or location of the area to be affected by a regional order. It leaves the Secretary free to determine when regulation shall become effective, when it shall be terminated throughout the United States or in any portion thereof.

The supposed standards by which the Secretary is to be governed turn out, upon examination, to be no standards whatever. All of the choices mentioned are, according to the Act, to be made if the Secretary has reason

to believe, or finds, that his proposed action will "tend to effectuate the declared policy" of the Act.*

We turn, therefore, to § 2, which declares the policy of the Congress to be: "through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period," which base period is defined as a period of years antedating the passage of the Act. The section further declares the policy to be worked out through the Secretary to be "To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

Assuming that any of these proposed ends or aims were in themselves capable of reasonable definition, it is, nevertheless, evident that the Secretary is to form a judgment by balancing a price raising policy against a consumer-protection policy, according to his views of feasibility and public interest.

If then the separate objects to be attained were matters susceptible of a definite finding there would still be

* See § 8c (3), 8c (4), 8c (16).

the inescapable result that, after such definite finding as to each proposed aim, there must be an exercise of judgment as to the extent to which that aim should be accomplished in the light of other and conflicting aims. And there would still remain the fact that the conclusion might be against any regulation by reason of the Secretary's unrestrained judgment that, in the circumstances, regulation is not "feasible."

Enough has been said to show that a law is to come into being on the basis of the Secretary's sole judgment as to its probable effect upon the milk industry, its probable effect upon the consumer, its probable consonance with the public interest, and its feasibility. The resolution of all such problems is of the essence of law making.

But if, as the Act discloses, the supposed standards whereby the Secretary is to ascertain the elements which are to determine his ultimate decision are themselves so vague that neither he nor anyone can accurately apply them, the unlimited nature of the delegation becomes even clearer.

The first thing the Secretary is permitted to accomplish by regulation, so the statute declares, is the parity in purchasing power of the price to be received by producers with that received in the base period. This parity is to be in terms of things farmers purchase. A moment's reflection will show that any calculation of such parity is impossible. The things farmers purchase, the relative quantities in which they purchase them, and their price in terms of milk, vary from month to month and from year to year. Moreover, the Secretary is not to establish a parity between two past periods but is to regulate the industry in such fashion as will, in his opinion, produce for the future a parity of the purchasing power of milk with its purchasing power in the base period. The Secretary's conclusion must lie in the realm of hope or opinion and not in that of ascertained fact. The major objective of

the Act is in truth to raise prices paid farmers for milk. The upward limit is really left to the Secretary's uncontrolled discretion.

Turn now to another alleged standard which is to control the Secretary's action. He is not to raise prices so fast as to injure the interest of the consumer but is to raise them gradually by correction of the current level at as rapid a rate as he deems to be in the public interest and feasible in view of consumptive demand. It is fair to ask whether this constitutes a standard at all. What is the public interest? Must not Congress ascertain and declare it? What is feasible in the way of regulation? Is not this a matter for legislative judgment. How is any one to tell whether the Secretary has disobeyed the mandate of Congress in these respects?

There is in the Act a further delegation of power. Congress might, although committing to the Secretary's will and judgment the matters above enumerated, have directed him how to regulate the industry if he determined so to do. It might have considered the possible modes of regulation and provided which of them the Secretary should adopt. The Act does no such thing. It leaves to the Secretary the choice of different and mutually exclusive methods of control.

Section 8c (5) applies to orders affecting milk and its products. Section 8c (7) refers to orders affecting any of the commodities named in the Act. The first requires that any order affecting milk must contain one, and may contain others, of seven specified conditions. The second requires that in any order there must be included one, and there may be included others, or four conditions. These sections give the Secretary the choice of three independent programs for raising the price of milk, namely, bargaining with handlers, stabilizing the retail price, or fixing prices to be paid producers. Within each, variation of the widest sort is allowed. Moreover, the Act permits alternative schemes for distributing amongst the

producers the dollar value of milk sold in the area to which the Secretary's order applies. The differences between the permissible schemes are not matters of mere detail but are basic and fundamental.

In respect of the choice of method, the only guide is the declaration of policy embodied in § 2. If the Secretary is of opinion that one method is more likely to raise prices than another he is at liberty to put into the form of an order what is tantamount to a statute prescribing the method of his choice. Thus the Secretary is to decide not only whether there is to be a law but, as well, the nature of the law to be enacted.

What was said concerning unconstitutional delegation of legislative power in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, applies with equal force here. Comparison of the provisions of the Act respecting flue-cured tobacco, which are summarized in *Mulford* v. *Smith, ante,* p. 38, with those applicable to milk, will disclose the fundamental difference between the administrative character of the powers delegated in the case of tobacco and the legislative character of those delegated in the case of milk. No authority cited by the Government presents a situation comparable to that here disclosed. It would not be profitable to analyze each of the cases because in each the question of the nature of the statutory standard and its application in the administration of the statute involved depended upon the field which the legislation covered. Where delegation has been sustained the court has been careful to point out the circumstances which made it possible to prescribe a standard by which administrative action was confined and directed. Such a standard, as respects milk marketing, is lacking in the Agricultural Marketing Agreement Act of 1937.

I think that the decree should be reversed.

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

DECISIONS PER CURIAM, ETC., FROM APRIL 18, 1939, THROUGH JUNE 5, 1939.*

No. —, original. Ex parte Harmon Metz Waley; and

No. —, original. Ex parte John F. Struthers. April 24, 1939. Motions for leave to file petitions for writs of habeas corpus denied.

No. 514. National Labor Relations Board *v.* Fainblatt et al. April 24, 1939. It is ordered that the entry in this case in the Journal of this Court for April 17, 1939, be amended by striking out the words "Mr. Justice Frankfurter took no part in the consideration or decision of this case."

Reported as amended, 306 U. S. 601.

No. 339. Long et al., Members of the State Tax Commission of Alabama, et al. *v.* Stokes, Commissioner of Finance and Taxation. Appeal from the Supreme Court of Tennessee. April 28, 1939. John C. Curry, State Tax Commissioner of Alabama, substituted as a party appellant in the place and stead of Henry S. Long, John P. Kohn, Sr., and W. W. Ramsey; and George F. McCanless, present Commissioner of Finance and Taxation of Tennessee, substituted as the party appellee in the place and stead of Walter Stokes, Jr., on motion of *Mr. Charles S. Trabue, Jr.,* for the appellants. *Ante,* p. 357.

No. 856. Hines *v.* Texas;

No. 857. Ryan *v.* Same;

* For decisions on applications for certiorari, see *post,* pp. 617, 621; for rehearing, p. 649. For cases disposed of without consideration by the Court, p. 648.

No. 858. BROWN *v.* SAME; and

No. 859. HUNTER *v.* SAME. Appeals from the Court of Criminal Appeals of Texas. Decided May 1, 1939. *Per Curiam:* The appeals are dismissed for want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, as required by § 237 (c) of the Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. The motions for leave to proceed further *in forma pauperis* are denied. Reported below: 136 Tex. Cr. R. 60, 94, 95, 140; 123 S. W. 2d 659–661.

No. 742. MISSISSIPPI EX REL. RICE, ATTORNEY GENERAL, ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Mississippi. Argued April 24, 1939. Decided May 1, 1939. *Per Curiam:* The decree is affirmed. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U. S. 541, 547–548; *Los Angeles Switching Case,* 234 U. S. 294, 311–312; *United States* v. *American Tin Plate Co.,* 301 U. S. 402, 411. *Messrs. E. R. Holmes, Jr.* and *Russell Wright,* with whom *Mr. Greek L. Rice,* Attorney General of Mississippi, was on the brief, for appellants. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Wendell Berge, Elmer B. Collins, Frank Coleman, J. Stanley Payne,* and *Daniel W. Knowlton* were on a brief for the United States et al. *Messrs. W. A. Northcutt* and *Elmer A. Smith* were on a brief for the railroad appellees. *Mr. Louis A. Schwartz* was on a brief for the New Orleans Joint Traffic Bureau, appellee.

No. —, original. EX PARTE JOSEPH PORESKY. May 1, 1939. Application denied.

No. —, original. Ex parte Mark O. Davis. May 1, 1939. Motion for leave to file petition for writ of mandamus denied.

No. —. Stoner *v.* Board of Commissioners of Boulder County. May 1, 1939. Motion for mandate denied.

No. 748. Ford Motor Co. *v.* Clark, Secretary of State of Texas, et al. May 1, 1939. Motion to substitute Tom L. Beauchamp, present Secretary of State, and Gerald Mann, present Attorney General, as parties respondent in place of Edward Clark and William McCraw, respectively, granted. Reported below: 100 F. 2d 515.

No. 532. Deppe *v.* General Motors Corp. May 1, 1939. Petition for reopening denied. *Mr. William P. Deppe, pro se.* No appearance for respondent. Reported below: 98 F. 2d 813.

No. 906. Rosehill Cemetery Co. *v.* Steele. Appeal from the Supreme Court of Illinois. Decided May 15, 1939. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for want of a properly presented substantial federal question. (1) *Willoughby* v. *Chicago,* 235 U. S. 45, 49; *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Mellon v. O'Neil,* 275 U. S. 212, 214–215; (2) *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120; *Ingraham* v. *Hanson,* 297 U. S. 378, 381; *Schenebeck* v. *McCrary,* 298 U. S. 36, 37. *Mr. Carroll J. Lord* for appellant. *Mr. Henry N. Shabsin* for appellee. Reported below: 370 Ill. 405; 19 N. E. 2d 189.

No. —, original. Ex parte John P. Goodman; and No. —, original. Ex parte Richard Bundy. May 15, 1939. Motions for leave to file petitions for writs of certiorari denied.

No. —, original. Ex parte Harper Blattenberger. May 15, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 11, original. Texas *v.* Florida et al. Decree entered May 15, 1939, reported in 306 U. S. 435.

No. 532. Deppe *v.* General Motors Corp. May 15, 1939. The petition filed May 6, 1939, is stricken from the files as scandalous.

No. 902. Carolene Products Co. *v.* Wallace, Secretary of Agriculture, et al. Appeal from the District Court of the United States for the District of Columbia. Decided May 22, 1939. *Per Curiam:* The motion of the appellees to affirm is granted and the order denying a temporary injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Gas Co.* v. *Public Service Commn,* 278 U. S. 322, 326–327; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 338. *Messrs. Frank K. Nebeker* and *George N. Murdock* for appellant. *Solicitor General Jackson* for appellees. Reported below: 27 F. Supp. 110.

No. 907. Maryland Jockey Club *v.* Spencer et al. Appeal from the Court of Appeals of Maryland. Decided May 22, 1939. *Per Curiam:* The motion of the appellees to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 521–523; *Thomas* v. *Gay,* 169 U. S. 264, 278–280; *Cincinnati*

Soap Co. v. *United States,* 301 U. S. 308, 313; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 584–587; (2) *Fort Smith Light Co.* v. *Paving District,* 274 U. S. 387, 391; *Missouri Ry. Co.* v. *Mackey,* 127 U. S. 205, 209; *Rapid Transit Corp.* v. *New York, supra,* at pp. 578–579. *Messrs. Stuart S. Janney* and *Frank B. Ober* for appellant. *Messrs. William C. Walsh, Wm. L. Henderson,* and *Randolph Barton, Jr.* for appellees. Reported below: 176 Md. 82; 4 A. 2d 124, 479.

No. —, original. Ex parte Richard Paul Billings; and

No. —, original. Ex parte Howard H. Higley. May 22, 1939. Motions for leave to file petitions for writs of habeas corpus denied.

No. —. In the Matter of Johnnie Caesar. May 22, 1939. Application for writ of prohibition denied.

No. 441. Electric Storage Battery Co. *v.* Shimadzu et al. May 22, 1939. The opinion is amended by striking out the word "them" at the end of the first full paragraph on page 11, and substituting "the claims in suit"; and by striking out the words "invalidity of" in the next to the last line of the opinion and substituting therefor the words "dismissal as to." The petitions for rehearing are denied.

Reported as amended, *ante,* p. 5.

No. 498. Bonet, Treasurer of Puerto Rico, *v.* Yabucoa Sugar Co. May 22, 1939. The opinion of the Court announced March 27, 1939, is amended in the following particulars:

In the first complete sentence on page 3, the word "refund" is stricken and the word "relief" inserted in lieu

thereof, and omission of quoted matter in the third complete sentence is indicated, so that the first three sentences will read: "Such a taxpayer can sue at law under these sections only if he has been denied relief by both the Treasurer and the Board of Review and Equalization of the Island. But these sections nowhere expressly authorize appeal from the Treasurer to the Board by one who paid taxes without protest. And § 76 (b), which the Circuit Court of Appeals interpreted as authorizing suit by a taxpayer who paid without protest, expressly prohibits suit in court 'until a claim for refund or credit has been duly filed with . . . the Board of Review and Equalization *on appeal*, according to the provisions of law in that regard, and the regulations established in pursuance thereof.' "

The petition for rehearing is denied.

Reported as amended, 306 U. S. 505.

No. —, original. Ex parte Edd. Potter;

No. —, original. Ex parte Ralph Mark; and

No. —, original. Ex parte Lloyd Rubin. May 29, 1939. Motions for leave to file petitions for writs of habeas corpus denied.

No. —, original. Ex parte Harmon Metz Waley. May 29, 1939. Application denied.

No. —. United States *v.* Nardone et al. May 29, 1939. Motion for bail denied.

No. 738. Gump *v.* California et al. May 29, 1939. Motion to vacate the order of denial and to reconsider the petition for writ of certiorari as amended denied. *Edgar Roy Gump, pro se.* No appearance for respondents.

No. 923. HOLLEY *v.* GENERAL AMERICAN LIFE INSURANCE CO. ET AL. May 29, 1939. Motion to substitute Ray B. Lucas, present Superintendent of the Insurance Department of the State of Missouri, as a party respondent in the place and stead of George A. S. Robertson, deceased, granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chelsea O. Inman* for petitioner. *Messrs. Fred L. Williams, Earl F. Nelson,* and *Allen May* for respondent. Reported below: 101 F. 2d 172.

No. 945. CITY AND COUNTY OF DENVER *v.* COLORADO. Appeal from the Supreme Court of Colorado. Decided June 5, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Williams* v. *Mayor,* 289 U. S. 36, 40. *Messrs. Malcolm Lindsey* and *Thomas H. Gibson* for appellant. No appearance for appellee. Reported below: 103 Colo. 565; 88 P. 2d 89.

No. 975. KANSAS FARMERS' UNION ROYALTY CO. ET AL. *v.* HUSHAW. Appeal from the Supreme Court of Kansas. Decided June 5, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *Jackson* v. *Lamphire,* 3 Pet. 280, 289–290; *Vance* v. *Vance,* 108 U. S. 514, 520; (2) *Davis* v. *Mills,* 194 U. S. 451, 456–457; *Montoya* v. *Gonzales,* 232 U. S. 375; (3) *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. *Messrs. B. I. Litowich, L. E. Clevenger,* and *S. H. King* for appellants. No appearance for appellee. Reported below: 149 Kan. 64; 86 P. 2d 559.

No. 982. NEVIN, SURVIVING EXECUTOR, ET AL. *v.* MARTIN, TAX COMMISSIONER, ET AL. Appeal from the

District Court of the United States for the District of New Jersey. Decided June 5, 1939. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292. MR. JUSTICE BUTLER dissents. The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case. *Mr. Alfred E. Driscoll* for appellants. *Mr. William A. Moore* for appellees. Reported below: 22 F. Supp. 836.

No. —. EX PARTE JOSEPH J. MCCARTHY. June 5, 1939. Application for an order allowing appeal denied.

No. —. PORESKY *v.* ELY. June 5, 1939. Petition for appeal denied.

No. —, original. EX PARTE FRED HARTZELL WEST. June 5, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 449. NEWARK FIRE INSURANCE CO. *v.* STATE BOARD OF TAX APPEALS ET AL.; and

No. 456. UNIVERSAL INSURANCE CO. ET AL. *v.* SAME. June 5, 1939. It is ordered that the opinion of MR. JUSTICE REED entered on May 29, 1939, be corrected by striking therefrom the words at the end thereof:

"The judgments in both cases are affirmed."

Reported as amended, *ante,* p. 313.

No. 441. ELECTRIC STORAGE BATTERY CO. *v.* SHIMADZU ET AL. June 5, 1939. Motion of the respondents for leave to file a second petition for modification of the decision and judgment of this Court and for recall and modification of its mandate granted. The opinion is amended by

striking out of the second full paragraph on page 12, in the first line, the word "that" and the words "is invalid," and inserting, after the word "decision," the words "as to." In other respects the petition is denied.

Reported as amended, *ante*, p. 5; see also, *ante*, p. 613.

DECISIONS GRANTING CERTIORARI, FROM APRIL 18, 1939, THROUGH JUNE 5, 1939.

Nos. 745 and 746. BOTELER, TRUSTEE, *v.* INGELS, DIRECTOR OF MOTOR VEHICLES OF CALIFORNIA, ET AL. April 24, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas S. Tobin* for petitioner. *Messrs. Earl Warren* and *Frank W. Richards* for respondents. Reported below: 100 F. 2d 915.

No. 767. NATIONAL LABOR RELATIONS BOARD *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Messrs. Fred H. Skinner, John Marshall, H. H. Rumble,* and *Percy Carmel* for respondents. Reported below: 101 F. 2d 841.

No. 867. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* BARTELS. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. John H. Bickett, Jr.* for petitioner. No appearance for respondent. Reported below: 100 F. 2d 813.

No. 847. CITIES SERVICE OIL CO. *v.* DUNLAP ET AL. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs.*

Clayton L. Orn, David D. Trammell, and *Hayes McCoy* for petitioner. *Mr. Angus G. Wynne* for respondents. Reported below: 100 F. 2d 294.

No. 854. UNITED STATES *v.* GLENN L. MARTIN CO. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Jackson* for the United States. *Mr. John T. Koehler* for respondent. Reported below: 100 F. 2d 793.

No. 838. F. H. E. OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. Harry C. Weeks* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 102 F. 2d 596.

No. 845. FRANKLIN ET AL. *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Sam Costen* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Aaron B. Holman* for the United States. Reported below: 101 F. 2d 459.

No. 881. ESTATE OF SANFORD *v.* COMMISSIONER OF INTERNAL REVENUE. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. John W. Davis, Montgomery B. Angell,* and *William A. Carr* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 103 F. 2d 81.

Nos. 817 and 818. CASE ET AL. *v.* LOS ANGELES LUMBER PRODUCTS CO. May 22, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Robert M. Clarke* for petitioners. *Messrs. David R. Faries* and *Woodward M. Taylor* for respondent. Reported below: 100 F. 2d 963.

No. 886. RETAIL FOOD CLERKS & MANAGERS UNION, LOCAL NO. 1357, ET AL. *v.* UNION PREMIER FOOD STORES, INC., ET AL. May 22, 1939. 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 and decision of this application. *Mr. Jos. A. Padway* for petitioners. *Mr. Harry Shapiro* for respondents. Reported below: 101 F. 2d 475.

No. 912. RASQUIN, COLLECTOR OF INTERNAL REVENUE, *v.* HUMPHREYS. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Sidney W. Davidson* and *Allin H. Pierce* for respondent. Reported below: 101 F. 2d 1012.

No. 913. NEIRBO COMPANY ET AL. *v.* BETHLEHEM SHIPBUILDING CORP. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Robert P. Weil* and *Laurence Arnold Tanzer* for petitioners. *Mr. Wm. D. Whitney* for respondent. Reported below: 103 F. 2d 765.

No. 940. UNITED STATES *v.* JOHN MCSHAIN, INC. June 5, 1939. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Jackson* for the United States. *Mr. A. M. Holcombe* for respondent. Reported below: 88 Ct. Cls. 284.

No. 943. McGOLDRICK, COMPTROLLER, *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. June 5, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. William C. Chanler, Paxton Blair,* and *Sol Charles Levine* for petitioner. *Messrs. Harold S. Deming* and *Donald Havens* for respondent. Reported below: 279 N. Y. 192; 254 App. Div. 237; 18 N. E. 2d 28; 4 N. Y. S. 2d 661.

No. 944. McGOLDRICK, COMPTROLLER, *v.* FELT & TARRANT MFG. CO. June 5, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. William C. Chanler, Paxton Blair,* and *Sol Charles Levine* for petitioner. *Mr. Newton K. Fox* for respondent. Reported below: 279 N. Y. 678; 254 App. Div. 246; 18 N. E. 2d 311; 4 N. Y. S. 2d 615.

No. 951. UNITED STATES *v.* STONE, U. S. DISTRICT JUDGE. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* for the United States. *Mr. Weymouth Kirkland* for respondent. Reported below: 101 F. 2d 870.

No. 914. PEPPER *v.* LITTON. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Robert Burrow* for petitioner. *Mr. Henry Roberts* for respondent. Reported below: 100 F. 2d 830.

No. 998. INTERSTATE NATURAL GAS CO. ET AL. *v.* STONE, COMMISSIONER OF FRANCHISE TAX, ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Marcellus Green, Garner W. Green,* and *Wm. A. Dough-*

erty for petitioners. *Messrs. Greek L. Rice,* Attorney General of Mississippi, and *J. A. Lauderdale* for respondents. Reported below: 103 F. 2d 544.

No. 939. WEISS ET AL. *v.* UNITED STATES. June 5, 1939. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question whether the trial court properly received in evidence intercepted telephone communications. *Messrs. Theodore Kiendl, Lloyd Paul Stryker,* and *Jacob W. Friedman* for petitioners. *Solicitor General Jackson,* and *Messrs. William W. Barron, George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 103 F. 2d 348.

No. 993. UNITED STATES *v.* SPONENBARGER ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Jackson* for the United States. No appearance for respondents. Reported below: 101 F. 2d 506.

DECISIONS DENYING CERTIORARI, FROM APRIL 18, 1939, THROUGH JUNE 5, 1939.

No. 862. FLETCHER *v.* WHEAT ET AL. April 24, 1939. 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. *Edmond C. Fletcher, pro se.* No appearance for respondents. Reported below: 69 App. D. C. 259; 100 F. 2d 432.

No. 722. OLSSON *v.* UNITED STATES. April 24, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Luther E. Morrison* and *C. B. Des Jardins*

for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Paul A. Freund* for the United States. Reported below: 87 Ct. Cls. 642.

No. 751. JENSEN ET AL. *v.* CANADIAN INDEMNITY CO. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Denver S. Church* for petitioners. *Mr. Norman S. Sterry* for respondent. Reported below: 98 F. 2d 469.

No. 760. LOTSCH *v.* UNITED STATES. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur L. Burchell* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for the United States. Reported below: 102 F. 2d 35.

No. 761. ARDENGHI *v.* COMMISSIONER OF INTERNAL REVENUE. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles M. Lyman* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 100 F. 2d 406.

No. 762. GOLDBERG *v.* COMMISSIONER OF INTERNAL REVENUE. April 24, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. McDermott* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Charles A. Horsky* for respondent. Reported below: 100 F. 2d 601.

No. 763. BLACK RIVER VALLEY BROADCASTS, INC. *v.* MCNINCH ET AL. April 24, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Eliot C. Lovett* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert M. Cooper, William J. Dempsey, William C. Koplovitz,* and *Andrew G. Haley* for respondents. Reported below: 69 App. D. C. 311; 101 F. 2d 235.

Nos. 764 and 765. DRUSILLA CARR LAND CORP. ET AL. *v.* GARY LAND CO. April 24, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George E. Billett* for petitioners. *Messrs. Kemper K. Knapp* and *Frank B. Pattee* for respondent. Reported below: 101 F. 2d 897.

No. 856. HINES *v.* TEXAS;
No. 857. RYAN *v.* SAME;
No. 858. BROWN *v.* SAME; and
No. 859. HUNTER *v.* SAME. See *ante,* p. 609.

No. 815. WILLIAMSON *v.* COMMISSIONER OF INTERNAL REVENUE. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. Murray Seasongood* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 100 F. 2d 735.

No. 844. RASH, ADMINISTRATOR, *v.* NORFOLK & WESTERN RY. CO. May 1, 1939. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied

for the want of a final judgment. *Mr. A. A. Lilly* for petitioner. *Messrs. Whitwell W. Coxe, Joseph M. Sanders,* and *A. W. Reynolds* for respondent. Reported below: 120 W. Va. 540; 200 S. E. 583.

No. 721. CITY OF ROCKFORD *v.* LA PARR ET AL.; and No. 811. LA PARR ET AL. *v.* CITY OF ROCKFORD. May 1, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David D. Madden* for the City of Rockford. *Messrs. R. P. Lichtenwalner* and *George P. Barse* for La Parr et al. Reported below: 100 F. 2d 564.

No. 738. GUMP *v.* CALIFORNIA ET AL. May 1, 1939. Petition for writ of certiorari to the Supreme Court of California denied. *Edgar Roy Gump, pro se.* No appearance for respondents.

No. 754. TWENTIETH CENTURY BUS OPERATORS, INC., ET AL. *v.* UNITED STATES. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving E. Burdick* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 101 F. 2d 700.

No. 768. NATIONAL LIFE & ACCIDENT INSURANCE CO. *v.* HOLBROOK. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. N. Bonner* for petitioner. No appearance for respondent. Reported below: 100 F. 2d 780.

No. 775. ANDERSON *v.* UNITED STATES;
No. 776. BANCA *v.* SAME;
No. 777. CHANDLER *v.* SAME;
No. 778. CHUNES *v.* SAME;
No. 779. COSTELLO *v.* SAME;
No. 780. CROMPTON *v.* SAME;
No. 781. DOAH *v.* SAME;
No. 782. EVANS *v.* SAME;
No. 783. FANCHER *v.* SAME;
No. 784. GENT *v.* SAME;
No. 785. GRAMLICH *v.* SAME;
No. 786. HARRISON *v.* SAME;
No. 787. HEINE *v.* SAME;
No. 788. JOHNSON *v.* SAME;
No. 789. LAVERSO *v.* SAME;
No. 790. LEE *v.* SAME;
No. 791. LOWE *v.* SAME;
No. 792. MADDOX *v.* SAME;
No. 793. MATAYA *v.* SAME;
No. 794. MCGILL *v.* SAME;
No. 795. MELTON *v.* SAME;
No. 796. NEWMAN *v.* SAME;
No. 797. ANTHONY PROFETA *v.* SAME;
No. 798. SALVADORE PROFETA *v.* SAME;
No. 799. RUDOLPH *v.* SAME;
No. 800. SCHNEIDER *v.* SAME;
No. 801. STANLEY *v.* SAME;
No. 802. STEWART *v.* SAME;
No. 803. TARRO *v.* SAME;
No. 804. TATMAN *v.* SAME;
No. 805. TAYLOR *v.* SAME;
No. 806. THOMPSON *v.* SAME;
No. 807. TOMBAZZI *v.* SAME; and
No. 808. WAGNER *v.* SAME. May 1, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for

the Seventh Circuit denied. *Messrs. George I. Haight, A. M. Fitzgerald,* and *Benjamin F. Goldstein* for petitioners. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Fred E. Strine, Paul M. Plunkett,* and *W. Marvin Smith* for the United States. Reported below: 101 F. 2d 325.

No. 819. CITIZENS NATIONAL BANK *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. C. Fulbright* for petitioner. *Mr. Albert B. Hall* for respondent. Reported below: 100 F. 2d 807; 101 *id.* 974.

No. 824. MCCOY *v.* SOUTHERN PACIFIC CO. May 1, 1939. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. Herbert W. Erskine* for petitioner. *Mr. Arthur B. Dunne* for respondent. Reported below: 29 Cal. App. 2d 16; 83 P. 2d 970.

No. 831. GREEN *v.* CITY OF STUART. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. T. Oughterson* for petitioner. *Mr. George W. Coleman* for respondent. Reported below: 101 F. 2d 309.

No. 848. SCHOOL DISTRICT OF HAVERFORD TOWNSHIP *v.* AMERICAN SURETY CO. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Albert J. Williams* for petitioner. *Mr. Wm. A. Schnader* for respondent. Reported below: 101 F. 2d 300.

No. 853. DAYTON RUBBER MANUFACTURING CO. ET AL. *v.* STAGNARO, TRADING AS CINCINNATI BELTING CO., ET AL. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.* for petitioners. *Messrs. Edwin S. Clarkson* and *Humbert B. Powell* for respondents. Reported below: 101 F. 2d 808.

No. 766. DEMUTH *v.* COMMISSIONER OF INTERNAL REVENUE. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Helen R. Carloss* for respondent. Reported below: 100 F. 2d 1012.

No. 876. SWEET ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 1, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Malcolm Donald* for petitioners. No appearance for respondent. Reported below: 102 F. 2d 103.

No. —, original. EX PARTE JOHN P. GOODMAN; and

No. —, original. EX PARTE RICHARD BUNDY. See *ante,* p. 612.

No. 918. RODRIQUEZ ET AL. *v.* WARD. May 15, 1939. Petition for writ of certiorari to the Supreme Court of New Mexico, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. J. H. Paxton* for petitioners. No appearance for respondent. Reported below: 43 N. M. 191; 88 P. 2d 277.

No. 919. KAMMERER *v.* NEW YORK. May 15, 1939. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Fred Kammerer, pro se.* No appearance for respondent. Reported below: 278 N. Y. 703; 16 N. E. 2d 851.

No. 874. FLETCHER *v.* BOOTH ET AL. May 15, 1939. 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. *Edmond C. Fletcher, pro se.* No appearance for respondents. Reported below: 69 App. D. C. 351; 101 F. 2d 676.

No. 884. MORROW *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Jackson,* and *Messrs. Julius C. Martin, Wilbur C. Pickett, W. Marvin Smith,* and *Fendall Marbury* for the United States. Reported below: 101 F. 2d 654.

No. 713. SAENGER ET AL. *v.* ADAM. May 15, 1939. Petition for writ of certiorari to the Court of Civil Appeals, Ninth Supreme Judicial District, of Texas, denied for the want of a final judgment. *Mr. Oliver J. Todd* for petitioners. *Mr. M. G. Adams* for respondent. Reported below: 119 S. W. 2d 687.

No. 861. RICEBAUM ET AL. *v.* UNITED STATES; and

No. 871. MENDELSON ET AL. *v.* SAME. May 15, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR.

JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Messrs. A. Walton Nall* and *George F. Callaghan* for petitioners in No. 861. *Mr. John M. Slaton* for petitioners in No. 871. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, J. Albert Woll,* and *William J. Connor* for the United States. Reported below: 101 F. 2d 628.

Nos. 821 and 822. AMERICAN EMPLOYERS' INSURANCE CO. *v.* MONTGOMERY; and

No. 823. UNITED STATES CASUALTY CO. *v.* SAME. May 15, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. R. Randolph Hicks* for petitioners. *Messrs. Robert H. Richards, Aaron Finger,* and *Thomas J. Crawford* for respondent. Reported below: 101 F. 2d 1005.

No. 812. UNITED STATES EX REL. FORADIS *v.* REIMER, COMMISSIONER OF IMMIGRATION. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John S. Wise, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 101 F. 2d 1022.

No. 816. ROSENBAUM GRAIN CORP. ET AL. *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Delbert A. Clithero* for petitioners. *Solicitor General Jackson* and *Mr. John R. Benney* for the United States. Reported below: 26 C. C. P. A. (Customs) 202.

No. 820. UNITED STATES FOR THE USE AND BENEFIT OF F. B. SPEARS & SONS *v.* ARTHUR STORM CO. ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. P. J. J. Nicolaides* and *William F. Kelly* for petitioner. *Mr. Samuel Shapero* for respondents. Reported below: 101 F. 2d 524.

No. 830. VIRGINIA IRON, COAL & COKE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Horace M. Fox, Lewis A. Nuckols, Karl D. Loos,* and *Preston B. Kavanagh* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 99 F. 2d 919.

No. 836. CONTINENTAL CASUALTY CO. *v.* FIRST NATIONAL BANK OF TEMPLE. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Allen Wight* and *O. O. Touchstone* for petitioner. *Messrs. Walker Saulsbury* and *David B. Trammell* for respondent. Reported below: 100 F. 2d 308.

No. 837. CROOK *v.* ZORN, TRUSTEE IN BANKRUPTCY. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. M. Crook, pro se.* No appearance for respondent. Reported below: 100 F. 2d 792.

No. 841. CURTIS *v.* WATSON. May 15, 1939. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Knowlton Durham* for petitioner.

Mr. Hyman W. Gamso for respondent. Reported below: 254 App. Div. 861; 168 Misc. 246; 5 N. Y. S. 562, 563.

No. 842. FEDERAL RESERVE BANK *v.* ALGAR ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Yale L. Schekter* and *Clarence L. Cole* for petitioner. *Mr. Leonard D. Algar, pro se.* Reported below: 100 F. 2d 941.

No. 846. AUGUSTUS *v.* NEW AMSTERDAM CASUALTY CO. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. V. Russell Donaghy* for petitioner. No appearance for respondent. Reported below: 100 F. 2d 581.

No. 850. FALSTAFF BREWING CORP. *v.* THOMPSON. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Isidor Ziegler* and *W. C. Fraser* for petitioner. No appearance for respondent. Reported below: 101 F. 2d 301.

No. 851. FRANKLIN, ADMINISTRATRIX, *v.* WUNDERLICH ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard T. Rives* for petitioner. *Mr. Dempsey M. Powell* for respondents. Reported below: 100 F. 2d 164.

No. 855. CAMPBELL, ADMINISTRATOR, *v.* BEEDLE ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Samuel A. Mitchell* for petitioner. *Mr. Albert E. L.*

Gardner for respondents. Reported below: 100 F. 2d 798.

No. 866. FALVEY *v.* FOREMAN-STATE NATIONAL BANK ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Patrick J. Falvey, pro se. Messrs. Weymouth Kirkland, Howard Ellis, Herman Waldman, Edward R. Adams,* and *James F. Oates, Jr.* for respondents. Reported below: 101 F. 2d 409.

No. 832. MONTGOMERY *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs J. Marvin Haynes, Thomas G. Haight,* and *James O. Wynn* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* and *Louise Foster* for the United States. Reported below: 87 Ct. Cls. 218; 23 F. Supp. 919.

No. 839. WARD ET AL. *v.* SHELL PETROLEUM CORP. ET AL. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Oliver J. Todd* for petitioners. No appearance for respondents. Reported below: 100 F. 2d 778.

No. 868. GLENMORE DISTILLERIES CO. *v.* NATIONAL DISTILLERS PRODUCTS CORP. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Guy B. Hazelgrove* and *Ralph T. Catterall* for petitioner. *Messrs. Thomas B. Gay, Gerald J. Craugh, Edward A. Craighill, Jr.,* and *Lewis F. Powell, Jr.* for respondent. Reported below: 101 F. 2d 479.

No. 872. CONWAY, TRUSTEE, *v.* BONNER. May 15, 1939. Petition for writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. John McGlasson* for petitioner. *Messrs. Walker Saulsbury* and *David B. Trammell* for respondent. Reported below: 100 F. 2d 786.

No. 875. SOUTHERN PACIFIC CO. *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Henley Clifton Booth, W. I. Gilbert,* and *W. I. Gilbert, Jr.* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Charles A. Horsky,* and *M. Joseph Matan* for the United States. Reported below: 100 F. 2d 984.

No. 879. L. A. SALOMON & BRO. *v.* UNITED STATES. May 15, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Dean Hill Stanley* and *John Q. Tilson* for petitioners. *Solicitor General Jackson* and *Mr. John R. Benney* for the United States. Reported below: 26 C. C. P. A. (Customs) 302.

No. 833. UNITED STATES TRUST CO., EXECUTOR, *v.* UNITED STATES. May 22, 1939. Motion to remand, and petition for writ of certiorari to the Court of Claims, denied. *Messrs. Simon Lyon, R. B. H. Lyon,* and *Earl W. Shinn* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Warner W. Gardner* for the United States. Reported below: 87 Ct. Cls. 721; 23 F. Supp. 476.

No. 900. CVELICH, ADMINISTRATRIX, *v.* ERIE RAILROAD CO. May 22, 1939. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied for

the want of a final judgment. *Mr. Alex Simpson* for petitioner. *Mr. Edward A. Markley* for respondent. Reported below: 122 N. J. L. 26; 4 A. 2d 271.

No. 834. SEIBERLING ET AL., EXECUTORS, *v.* UNITED STATES; and

No. 835. LEHIGH VALLEY TRUST CO. ET AL. *v.* SAME. May 22, 1939. Petition for writs of certiorari to the Court of Claims denied. *Mr. Arthur E. Otto* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Charles A. Horsky* for the United States. Reported below: 87 Ct. Cls. 611, 631; 22 F. Supp. 397, 407.

No. 840. BERRY OIL CO. *v.* UNITED STATES. May 22, 1939. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert A. Littleton* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Robert K. McConnaughey* for the United States. Reported below: 87 Ct. Cls. 546; 25 F. Supp. 97.

No. 864. IN THE MATTER OF SIDEBOTHAM. May 22, 1939. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Michael G. Luddy* for petitioner. *Mr. Earl Warren,* Attorney General of California, for Thornton, Sheriff, respondent. Reported below: 12 Cal. 2d 434; 85 P. 2d 453.

No. 869. GOMILLION *v.* UNION BRIDGE & CONSTRUCTION CO. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. G. Adams* for petitioner. *Mr. Major T. Bell* for respondent. Reported below: 100 F. 2d 937.

No. 870. WAYNE, TRUSTEE IN BANKRUPTCY, *v.* CUTLER-HAMMER, INC. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marion Smith* and *Harold Hirsch* for petitioner. *Mr. E. Harold Sheats* for respondent. Reported below: 101 F. 2d 823.

No. 873. CHESAPEAKE & OHIO RY. CO. *v.* VIGOR, ADMINISTRATRIX. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert H. Cole* for petitioner. *Mr. James N. Beery* for respondent. Reported below: 101 F. 2d 865.

No. 882. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HAWAIIAN PHILIPPINE CO. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Jackson* for petitioner. *Mr. George E. Cleary* for respondent. Reported below: 100 F. 2d 988.

No. 883. JACKSKION *v.* UNITED STATES. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Jackson, Assistant Attorney General McMahon,* and *Messrs. William W. Barron, Benjamin M. Parker,* and *W. Marvin Smith* for the United States. Reported below: 102 F. 2d 683.

No. 885. PROVUS BROTHERS, INC. *v.* HOLMAN ET AL. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lewis F. Jacobson* for petitioner. *Mr. Reuben L. Freeman* for respondents. Reported below: 99 F. 2d 212.

No. 887. EATON *v.* COMMISSIONER OF INTERNAL REVENUE. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank J. Maguire* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 100 F. 2d 1013.

No. 889. MISSOURI-KANSAS-TEXAS RAILROAD *v.* HAMARSTROM. May 22, 1939. Petition for writ of certiorari to the Kansas City Court of Appeals, of Missouri, denied. *Messrs. Ellison A. Neel* and *Armwell L. Cooper* for petitioner. *Messrs. Walter A. Raymond* and *Fenton Hume* for respondent. Reported below: 233 Mo. App. 1103.

No. 890. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO. *v.* KULP, ADMINISTRATOR. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Warren Newcome* and *William T. Faricy* for petitioner. *Mr. Mortimer H. Boutelle* for respondent. Reported below: 102 F. 2d 352.

No. 892. JENKINS ET AL., EXECUTORS, *v.* BITGOOD, FORMERLY ACTING COLLECTOR OF INTERNAL REVENUE. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Curtiss K. Thompson* and *John H. Weir* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Warner W. Gardner* for respondent. Reported below: 101 F. 2d 17.

No. 893. RUSHMORE ET AL. *v.* LANE. May 22, 1939. Petition for writ of certiorari to the Court of Errors and

Appeals of New Jersey denied. *Mr. Jay Leo Rothschild* for petitioners. *Mr. Samuel Kaufman* for respondent. Reported below: 125 N. J. Eq. 310; 4 A. 2d 55.

No. 896. HARDEE, RECEIVER, *v.* MURPHY, ATTORNEY GENERAL. May 22, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Swagar Sherley, Charles P. Wilson, H. B. Weaver, Jr., George B. Springston,* and *George P. Barse* for petitioner. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Harry LeRoy Jones* for respondent. Reported below: 102 F. 2d 622.

No. 898. AMICK, TRUSTEE IN BANKRUPTCY, *v.* HOTZ, TRUSTEE. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Dupuy G. Warrick* and *Leland Hazard* for petitioner. No appearance for respondent. Reported below: 101 F. 2d 311.

No. 904. RICE, TRUSTEE IN BANKRUPTCY, *v.* SMITH ENGINEERING CO.; and

No. 905. SAME *v.* SMITH ENGINEERING CO. ET AL. May 22, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Adolphus E. Graupner* and *M. S. Gunn* for petitioner. *Messrs. Sterling M. Wood* and *Wallace Sheehan* for respondents. Reported below: 102 F. 2d 492.

No. 942. MIN-A-MAX CO., INC. *v.* SUNDHOLM. May 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Elwood Hansmann, Albin C. Ahlberg,* and *H. C. Shull* for petitioner. No appearance for respondent. Reported below: 102 F. 2d 187.

No. 971. BECKER *v.* WALKER, WARDEN. May 29, 1939. Petition for writ of certiorari to the Superior Court, County of Hartford, Connecticut, and motion for leave to proceed further *in forma pauperis,* denied. *Arthur Matthew Becker, pro se.* No appearance for respondent.

No. 923. HOLLEY *v.* GENERAL AMERICAN LIFE INS. CO. ET AL. See *ante,* p. 615.

No. 961. SEARS, ROEBUCK & CO., INC. *v.* SAMSON-UNITED CORP. May 29, 1939. 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. Joseph H. Milans* and *Max W. Zabel* for petitioner. *Mr. W. Brown Morton* for respondent. Reported below: 103 F. 2d 312.

No. 895. CHASE *v.* AVERY. May 29, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Robert C. Watson* and *George M. Anderson* for petitioner. *Messrs. Leonard S. Lyon* and *Theodore H. Lassagne* for respondent. Reported below: 26 C. C. P. A. (Patents) 823; 101 F. 2d 205.

No. 897. TOUCEY *v.* NEW YORK LIFE INSURANCE CO. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arthur Miller* for petitioner. *Messrs. Samuel W. Sawyer* and *Louis H. Cooke* for respondent. Reported below: 102 F. 2d 16.

No. 899. BIG LAKE OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third

Circuit denied. *Messrs. S. Leo Rushlander* and *Edgar J. Goodrich* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key, L. W. Post,* and *Charles A. Horsky* for respondent. Reported below: 95 F. 2d 573.

No. 903. SHEPARD *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leland K. Neeves* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 101 F. 2d 595.

No. 908. HUDSON *v.* MOONIER; and

No. 909. FITCH, EXECUTRIX, *v.* SAME. May 29, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Lon O. Hocker,* and *James C. Jones, Jr.* for petitioners. *Messrs. Roberts P. Elam* and *Mark D. Eagleton* for respondent. Reported below: 102 F. 2d 96.

No. 910. DITTO, INC. *v.* STANDARD MAILING MACHINES CO. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Joseph H. Milans* and *Max W. Zabel* for petitioner. *Mr. George P. Dike* for respondent. Reported below: 100 F. 2d 446.

No. 911. DEMPSEY *v.* PINK, SUPERINTENDENT OF INSURANCE. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Bruce Fuller* and *S. Wallace Dempsey* for petitioner. *Mr. Alfred C. Bennett* for respondent. Reported below: 101 F. 2d 72.

No. 916. CHICAGO GREAT WESTERN R. CO. ET AL. *v.* ROBINSON. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Norris Brown* for petitioners. *Mr. Byron G. Burbank* for respondent. Reported below: 101 F. 2d 994.

No. 917. WHITESIDE, TRUSTEE, *v.* ROCKY MOUNTAIN FUEL CO. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. G. Dexter Blount* for petitioner. *Mr. Albert L. Vogl* for respondent. Reported below: 101 F. 2d 765.

No. 920. HIRSCH ET AL. *v.* MURPHY, ATTORNEY GENERAL, ET AL. May 29, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Dean Hill Stanley* and *Otto C. Sommerich* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney, Harry LeRoy Jones,* and *Fred Esch* for respondents. Reported below: 70 App. D. C. 1; 102 F. 2d 269.

No. 924. BROWN *v.* GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE M. B. H. May 29, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Stanton C. Peelle, Paul E. Lesh, Dale D. Drain,* and *Jerome F. Barnard* for petitioner. *Messrs. G. Thomas Dunlop, Geo. Whiteford Betts, Jr.,* and *Frank J. Hogan* for respondent. Reported below: 104 F. 2d 227.

No. 925. HUDSON & MANHATTAN R. CO. *v.* CAHILL ET AL. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Mr. William D. Whitney* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Charles A. Horsky,* and *Daniel W. Knowlton* for Cahill et al., respondents. *Messrs. Ezra Brainerd, Jr.* and *Alex. M. Bull* for the Brotherhood of Locomotive Engineers et al., intervening-respondents. Reported below: 103 F. 2d 327.

No. 929. First National Bank, Administrator, *v.* United States. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John E. Hughes* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *James E. Murphy* for the United States. Reported below: 102 F. 2d 907.

No. 931. Baltimore & Ohio R. Co. *v.* Spotts. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward W. Rawlins* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent. Reported below: 102 F. 2d 160.

No. 936. Speck *v.* Lavino Shipping Co., Agent. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Abraham E. Freedman* for petitioner. No appearance for respondent. Reported below: 101 F. 2d 716.

No. 963. Flicker et al., Co-administrators, *v.* Rabinovich. May 29, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William A. Monten* for petitioners. No appearance for respondent. Reported below: 101 F. 2d 857.

No. 947. PARKER ET AL. *v.* UNITED STATES. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Harry Green, J. Mercer Davis,* and *George S. Silzer* for petitioners. No appearance for the United States. Reported below: 103 F. 2d 857.

No. 957. ZAHN *v.* HUDSPETH, WARDEN. June 5, 1939. 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. *Joseph A. Zahn, pro se.* No appearance for respondent. Reported below: 102 F. 2d 759.

No. 962. MARTINI *v.* JOHNSTON, WARDEN. June 5, 1939. 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. *Louis Martini, pro se.* No appearance for respondent. Reported below: 103 F. 2d 597.

No. 974. FARNSWORTH *v.* SANFORD, WARDEN. June 5, 1939. 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. George S. Hawke* for petitioner. No appearance for respondent. Reported below: 103 F. 2d 888.

No. 980. HARGIS *v.* SWOPE, JUDGE, ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *A. H. Hargis, pro se.* No appearance for respondents. Reported below: 98 F. 2d 1006; 103 *id.* 1012.

No. 984. CARRUTHERS ET AL. *v.* REED, KEEPER. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leon H. Ransom* for petitioners. No appearance for respondent. Reported below: 102 F. 2d 933.

No. 989. ENGLER *v.* UNITED STATES. June 5, 1939. 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. *Richard A. Engler, pro se.* No appearance for the United States.

No. 1004. JURGENSEN *v.* NEBRASKA. June 5, 1939. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles E. Foster* for petitioner. No appearance for respondent. Reported below: 135 Neb. 136; 280 N. W. 886.

No. 891. GRAHAM ET AL. *v.* UNITED STATES; and

No. 901. HEED ET AL. *v.* SAME. June 5, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Polakoff* for petitioners in No. 891. *Mr. Lewis Landes* for petitioners in No. 901. *Solicitor General Jackson,* and *Messrs. William W. Barron, J. Albert Woll, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 102 F. 2d 436.

No. 894. LOOMIS, TRUSTEE IN BANKRUPTCY, *v.* COUNTY OF GILA ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Welburn Mayock* for petitioner.

Mr. Charles L. Strouss for respondents. Reported below: 101 F. 2d 827; 103 *id.* 312.

No. 915. CITY OF LOS ANGELES *v.* BORAX CONSOLIDATED, LTD. ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ray L. Chesebro* and *Loren A. Butts* for petitioner. *Messrs. Gurney E. Newlin* and *A. W. Ashburn* for respondents. Reported below: 102 F. 2d 52.

No. 921. MARSHALL COUNTY BANK *v.* CROWTHER. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Marshall County, West Virginia, denied. *Messrs. Karl Michelet* and *Martin Brown* for petitioner. No appearance for respondent.

No. 922. BELK BROTHERS CO. *v.* MAXWELL, COMMISSIONER OF REVENUE. June 5, 1939. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Thomas C. Guthrie* for petitioner. *Mr. Harry McMullan* for respondent. Reported below: 215 N. C. 10; 200 S. E. 915.

No. 926. PARTRIDGE ET AL. *v.* MARTIN ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *June C. Smith* for petitioners. No appearance for respondents. Reported below: 102 F. 2d 284.

No. 927. GLIWA ET AL. *v.* UNITED STATES STEEL CORP. ET AL. June 5, 1939. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Agnes Gliwa, pro se. Mr. William Wallace Booth* for respondents. Reported below: 332 Pa. 515; 3 A. 2d 778.

No. 928. PARK & TILFORD IMPORT CORP. *v.* UNITED STATES. June 5, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. B. A. Levett* for petitioner. *Solicitor General Jackson* and *Mr. John R. Benney* for the United States. Reported below: 26 C. C. P. A. (Customs) 342.

No. 933. BETHLEHEM SHIPBUILDING CORP. ET AL. *v.* CARDILLO ET AL. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Elias Field* and *La Rue Brown* for petitioners. *Solicitor General Jackson, Assistant Attorney General Whitaker,* and *Messrs. Paul A. Sweeney* and *Henry A. Julicher* for respondents. Reported below: 102 F. 2d 299.

No. 935. COURT LINE, LTD. *v.* ISTHMIAN STEAMSHIP CO. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Griffin, David Corbin,* and *Wharton Poor* for petitioner. *Messrs. Henry N. Longley* and *L. deGrove Potter* for respondent. Reported below: 102 F. 2d 916.

No. 937. MOHAWK RUBBER CO. *v.* UNITED STATES. June 5, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Allen H. Gardner* and *Frederick L. Pearce* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Charles A. Horsky* for the United States. Reported below: 88 Ct. Cls. 50; 25 F. Supp. 228.

No. 938. DONNELLEY *v.* COMMISSIONER OF INTERNAL REVENUE. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit

denied. *Mr. John S. Miller* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 101 F. 2d 879.

No. 941. FRUIT INDUSTRIES, LTD. *v.* BISCEGLIA BROTHERS CORP. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mabel Walker Willebrandt* for petitioner. *Messrs. Joseph W. Henderson* and *Thomas F. Mount* for respondent. Reported below: 101 F. 2d 752.

No. 948. TOWNSHEND, TRUSTEE *v.* UNION TRUST CO. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Rolla D. Campbell* and *Selden S. McNeer* for petitioner. *Mr. Walter H. Buck* for respondent. Reported below: 101 F. 2d 903.

No. 956. TRUSCON STEEL CO. ET AL. *v.* SIMS. June 5, 1939. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Henry N. Ess, Elton L. Marshall,* and *Paul Barnett* for petitioners. No appearance for respondent. Reported below: 343 Mo. 1216; 126 S. W. 2d 204.

No. 973. SCHUMACHER ET AL., TRUSTEES, ET AL. *v.* SMITH. June 5, 1939. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Mr. Allan P. Matthew* for petitioners. *Mr. Louis E. Goodman* for respondent. Reported below: 30 Cal. App. 2d 251; 85 P. 2d 967.

No. 880. CHICKASAW NATION *v.* UNITED STATES. June 5, 1939. Petition for writ of certiorari to the Court

of Claims denied. *Messrs. Melven Cornish* and *William H. Fuller* for petitioner. *Solicitor General Jackson, Assistant Attorney General Collett,* and *Mr. C. W. Leaphart* for the United States. Reported below: 87 Ct. Cls. 91.

No. 960. TRUSTEES OF LUMBER INVESTMENT ASSN. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William S. Bennet* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 100 F. 2d 18.

No. 966. STEPHENSON *v.* COMMISSIONER OF INTERNAL REVENUE. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. Ralph Burton* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 101 F. 2d 33.

No. 964. SCHERMANN *v.* YELLOW CAB CO. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles V. Falkenberg* for petitioner. *Mr. John A. Bloomingston* for respondent. Reported below: 101 F. 2d 363.

No. 946. PRICE-WILLIAMS *v.* NEW YORK LIFE INSURANCE CO. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James M. Carson* for petitioner. *Messrs. Louis H. Cooke* and *J. L. Doggett* for respondent. Reported below: 101 F. 2d 482.

No. 986. RITHOLZ ET AL. *v.* AMERICAN OPTOMETRIC ASSN. June 5, 1939. Petition for writ of certiorari to

the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John E. Borden* for petitioners. *Mr. John J. Yowell* for respondent. Reported below: 101 F. 2d 986.

No. 965. SLATTERY ET AL. *v.* ILLINOIS BELL TELEPHONE CO. June 5, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *Messrs. John E. Cassidy, Montgomery S. Winning,* and *Harry R. Booth* for petitioners. *Messrs. Kenneth F. Burgess, Leslie N. Jones,* and *W. Clyde Jones* for respondent. Reported below: 102 F. 2d 58.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 18, 1939, THROUGH JUNE 5, 1939.

No. 773. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* STILWELL. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. April 24, 1939. Dismissed on motion of counsel for the petitioner. *Solicitor General Jackson* for petitioner. *Mr. Herbert Pope* for respondent. Reported below: 101 F. 2d 588.

No. 829. MINNESOTA TAX COMMISSION ET AL. *v.* GEERY. On petition for writ of certiorari to the Supreme Court of Minnesota. April 24, 1939. Dismissed on motion of counsel for the petitioner. *Messrs. Alfred W. Bowen* and *Chester S. Wilson* for petitioners. No appearance for respondent. Reported below: 204 Minn. 107; 282 N. W. 673.

No. 877. ESSLEY SHIRT CO., INC. *v.* CELANESE CORPORATION; and

No. 878. TRUBENIZING PROCESS CORP. *v.* JACOBSON ET AL. On petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. May 15, 1939. Dismissed on motion of counsel for the petitioners. *Mr. Merrell E. Clark* for petitioners. No appearance for respondents. Reported below: 98 F. 2d 895, 899.

No. 934. SOUTHERN PHOSPHATE CORP. *v.* PHOSPHATE RECOVERY CORP. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. May 29, 1939. Dismissed, per stipulation, on motion of counsel for the petitioner. *Messrs. William H. Davis* and *George E. Faithfull* for petitioner. *Messrs. Hugh M. Morris* and *Henry D. Williams* for respondent. Reported below: 102 F. 2d 791.

PETITIONS FOR REHEARING DENIED, FROM APRIL 18, 1939, THROUGH JUNE 5, 1939.*

No. 342. LOWDEN, ET AL., TRUSTEES, *v.* SIMONDS-SHIELDS-LONSDALE GRAIN CO. April 24, 1939. 306 U. S. 516.

No. 432. UNITED STATES ET AL. *v.* MAHER, DOING BUSINESS AS INTERSTATE BUSSES. May 15, 1939. *Ante*, p. 148.

No. 462. HIGGINBOTHAM *v.* CITY OF BATON ROUGE. May 15, 1939. 306 U. S. 535.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 509. DRISCOLL ET AL. *v.* EDISON LIGHT & POWER CO. May 15, 1939. *Ante,* p. 104.

No. 731. MINNESOTA MINING & MFG. CO. *v.* COE, COMMISSIONER OF PATENTS. May 15, 1939. 306 U. S. 662.

No. 813. JOHNSON ET AL. *v.* TOWN OF DEERFIELD ET AL. May 15, 1939. 306 U. S. 621.

No. 441. ELECTRIC STORAGE BATTERY CO. *v.* SHIMADZU ET AL. See *ante,* p. 613.

No. 498. BONET, TREASURER OF PUERTO RICO, *v.* YABUCOA SUGAR CO. See *ante,* p. 613.

No. 722. OLSSON *v.* UNITED STATES. May 22, 1939.

No. 625. TRUSTEES OF LUMBER INVESTMENT ASSN. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 29, 1939. 306 U. S. 647.

No. 591. BETHLEHEM STEEL CO. *v.* ANGLO-CONTINENTALE TREUHAND, A. G., ET AL. June 5, 1939. *Ante,* p. 265.

No. 743. RANDOLPH LUMBER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 5, 1939. 306 U. S. 663.

No. 676. RORICK *v.* DEVON SYNDICATE, LTD. June 5, 1939. *Ante,* p. 299.

No. 852. SWAIN *v.* INDIANA. May 15, 1939. Motion for leave to file an amended petition for writ of certiorari, and petition for rehearing, denied. 306 U. S. 660.

No. 376. COOPER *v.* O'CONNOR ET AL. May 22, 1939. Motion for leave to file a second petition for rehearing denied. 305 U. S. 673.

Nos. 614 and 615. FARMERS' LOAN & TRUST CO., TRUSTEE, ET AL. *v.* BOWERS, EXECUTOR. May 29, 1939. Motion of the petitioners for a further extension of time within which to file petition for rehearing denied. MR. JUSTICE REED took no part in the consideration or decision of this application. See 306 U. S. 648.

No. 510. JENKINS PETROLEUM PROCESS CO. *v.* SINCLAIR REFINING CO. May 29, 1939. Motion for leave to file a second petition for rehearing denied. 306 U. S. 667.

No. 303. ARTHUR C. HARVEY CO. *v.* UNITED STATES. May 29, 1939. Motion for leave to file a second petition for rehearing denied. 305 U. S. 673.

No. 377. COOPER *v.* O'CONNOR ET AL. May 29, 1939. Motion for leave to file a second petition for rehearing denied. 305 U. S. 673.

No. 899. BIG LAKE OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 5, 1939. Motion of petitioner for an extension of time within which to file petition for rehearing denied.

No. 52. LILLY *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. June 5, 1939. Motion for leave to file petition for rehearing denied. 305 U. S. 604.

AMENDMENT OF COPYRIGHT RULES.

Rule 1 of the Copyright Rules heretofore promulgated by this Court (214 U. S., Appendix) is amended, effective September 1, 1939, to read as follows:

"Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled 'An Act to amend and consolidate the acts respecting copyright', including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, insofar as they are not inconsistent with these rules."

MR. JUSTICE BLACK does not agree with this action of the Court.

JUNE 5, 1939.

AMENDMENTS OF ADMIRALTY RULES.*

It is ordered that the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction be, and they hereby are, revised, effective September 1, 1939, by substituting for present Rules 31 and 32 five new Rules numbered 31, 32, 32A, 32B, and 32C, and by adding two new Rules numbered 46A and 46B, as follows:

31.

INTERROGATORIES TO PARTIES.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

32.

DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which

*Admiralty Rules, 254 U. S. Appendix. Earlier amendments, 281 U. S. 773; 286 U. S. 572.

an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

32A.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) ORDER FOR EXAMINATION. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF FINDINGS.

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical

condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

32B.

ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(b) EFFECT OF ADMISSION. Any admission made by a party pursuant to such request is for the purpose of

the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

32C.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) REFUSAL TO ANSWER. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under any provision of law, or upon the refusal of a party to answer any interrogatory submitted under Rule 31, the proponent of the interrogatory may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 32 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 32A requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) EXPENSES ON REFUSAL TO ADMIT. If a party, after being served with a request under Rule 32B to admit the

genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 31, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) FAILURE TO RESPOND TO LETTERS ROGATORY. A subpoena may be issued as provided in the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U. S. C., Title 28, § 711, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

46A.

SCOPE OF EXAMINATION AND CROSS-EXAMINATION.

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and

the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

46B.

RECORD OF EXCLUDED EVIDENCE.

If an objection to a question propounded to a witness is sustained by the court, the latter upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

May 22, 1939.

HAGUE *v.* C. I. O., 307 U. S. 496.

The following summaries of the briefs in the case of *Hague* v. *C. I. O., ante,* p. 496, will be of interest to the profession.

Messrs. Charles Hershenstein and *Edward J. O'Mara,* with whom *Messrs. James A. Hamill* and *John A. Matthews* were on the brief, for petitioners.

The State has absolute control over the use of the streets and public places, for the benefit of the public at large, which it may delegate to a municipality. Under the law of New Jersey no one has the right to hold a public meeting in the streets or public places of a municipality without the consent of the local authorities. *Commonwealth* v. *Davis,* 162 Mass. 510, affirmed, *Davis* v. *Commonwealth,* 167 U. S. 43; *West* v. *Monmouth Beach,* 107 N. J. L. 445; *Burlington* v. *Pennsylvania Railroad,* 56 N. J. Eq. 259, 261; *Long* v. *Jersey City,* 37 N. J. L. 348, 352; *Harwood* v. *Trembley,* 97 N. J. L. 173, 175; Dillon, Municipal Corporations, 5th ed., § 1163; *Mettler* v. *Ottumwas,* 197 Iowa 187; *Glasgow* v. *St. Louis,* 87 Mo. 678; *In re Unger,* 1 Okla. Cr. 222; cf. *Commonwealth* v. *McCafferty,* 145 Mass. 384; *Fifth Avenue Coach Co.* v. *New York,* 194 N. Y. 19; *Denny* v. *Muncie,* 197 Ind. 28; *Stevens Point* v. *Bocksenbaum,* 225 Wis. 373; *Sproles* v. *Binford,* 286 U. S. 374; *Chicago Park District* v. *Lattipee,* 364 Ill. 182; *Garneau* v. *Eggers,* 113 N. J. L. 245; *Wilbur* v. *Newton,* 16 N. E. 2d 86. See *Thomas* v. *Casey,* 121 N. J. L. 185.

Jersey City has properly enacted its ordinance requiring that a permit be obtained, issuable in the discretion of the Commissioner of Public Safety, where no riot, disorder or disorderly assemblage is likely to ensue from

the holding of such meeting. *Davis* v. *Commonwealth,* 167 U. S. 43; s. c. 162 Mass. 510; cf. *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, 95; *Allen & Reed, Inc.* v. *Presbrey,* 50 R. I. 53, 56.

Near v. *Minnesota,* 283 U. S. 697, and kindred cases are not applicable and do not overrule or modify the *Davis* decision. *Lovell* v. *Griffin,* 303 U. S. 444, makes clear that the prevention of disorder is a proper, constitutional test. In that case it was merely held that there is freedom to distribute written matter in whatever orderly manner may be necessary or expedient for the purpose. The distribution there in question was of a religious tract. This kind of distribution is commonly from house to house, only incidentally involving use of the streets. And even were it on the street, there was no indication that such distribution would involve an expropriation of the entire street area such as ordinarily ensues when a mass meeting is there held, with its obstruction of traffic, littering of streets, and general disorder, if not riot. The clear implication from that case is that maintenance of public order is a proper ground for regulation.

If the right of free speech and assembly is sought to be exercised in public streets and places in conflict with the right of the public at large to free and untrammeled use of such places, and in contravention of the discretion of the public officials entrusted with their administration, the right is necessarily dissipated; not because it is any the less intrinsically a fundamental right, but because, under the circumstances, its exercise becomes a perversion, and an invasion of the rights of the community generally. The liberty referred to in the Fourteenth Amendment, is, in the language of Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319, 325, "a concept of ordered liberty." Distinguishing *DeJonge* v. *Oregon,* 299 U. S. 353.

The doctrine of unconstitutional conditions is not properly applicable to the present situation. Distinguishing *Frost* v. *Railroad Commission,* 271 U. S. 583; *Michigan Commission* v. *Duke,* 266 U. S. 570.

The weight of authority is in accord with the decision in *Davis* v. *Commonwealth, supra.*

In accord with the Davis case: *People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96; *People* v. *Smith,* 263 N. Y. 255; *Duquesne* v. *Fincke,* 269 Pa. 112; *Wilson* v. *Eureka,* 173 U. S. 32; *State ex rel. Liberman* v. *Van De Carr,* 199 U. S. 552; *Barker* v. *Commonwealth,* 19 Pa. 412; *Commonwealth* v. *Egan,* 113 Pa. Super. 375; *Fitts* v. *Atlanta,* 121 Ga. 567; *Bloomington* v. *Richardson,* 38 Ill. App. 60; *Love* v. *Phelan,* 128 Mich. 545; *Tacoma* v. *Roe,* 190 Wash. 444; *State* v. *Sugarman,* 126 Minn. 477, 479; *Benson* v. *Norfolk,* 163 Va. 1037; *Coughlin* v. *Chicago Park District,* 364 Ill. 90.

As for public meetings in parks, there is no proof of discrimination in the record. Furthermore, such a use is repugnant to the uses to which the parks are dedicated,—namely, recreation and refreshment of the people. *Davis* v. *Commonwealth, supra; Coughlin* v. *Chicago Park District, supra; Commonwealth* v. *Abrahams,* 156 Mass. 57, 60; *Williams* v. *Gallatin,* 229 N. Y. 248, 253, 254. See also *Williams* v. *Hylan,* 223 App. Div. 48, affirmed, 248 N. Y. 616; *In re Central Parkway, City of Schenectady,* 140 Misc. 727; *Dieppe Corp.* v. *City of New York,* 246 App. Div. 279.

Under the New Jersey law as expressed in the case of *West* v. *Monmouth Beach,* 107 N. J. L. 445, a diversion of park property by a municipality for any purpose not expressly sanctioned by statute, is illegal. The decree below disregards the rights of the residential public to peace and quiet. *Billington* v. *Miller,* 75 N. J. L. 415.

The Director of Public Safety did not abuse the discretion vested in him when he denied applications for

permits for street meetings. His determination can not be upset in the absence of a clear and convincing showing that there was an abuse of such discretion. *Gaines* v. *Thompson,* 74 U. S. 347; *Ness* v. *Fisher,* 223 U. S. 683; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175, 183; *Procter & Gamble Co.* v. *Coe,* 96 F. 2d 518, 520; *Garneau* v. *Eggers,* 113 N. J. L. 245; *Sullivan* v. *Shaw,* 6 F. Supp. 112.

The injunction is vague, uncertain and impracticable. *National Labor Relations Board* v. *Bell Gas & Oil Co.,* 98 F. 2d 405, 406; *Evening Times Printing & Publishing Co.* v. *American Newspaper Guild,* 124 N. J. Eq. 71, 75; *Collins* v. *Wayne Iron Works,* 227 Pa. 326. See *Louisville* v. *Lougher,* 209 Ky. 299; *Robert E. Hicks Corp.* v. *National Salesmen's Training Assn.,* 19 F. 2d 963, 965; *Ex parte Heffron,* 179 Mo. App. 639; *Magel* v. *Gruetli Benevolent Society,* 203 Mo. App. 335; *Fort Worth Acid Works* v. *Fort Worth,* 248 S. W. 822; *Ballantine* v. *Webb,* 84 Mich. 38; *Earl* v. *Brewer,* 248 App. Div. 314; *Lone Star Salt Co.* v. *Blount,* 49 Tex. Civ. App. 138; *L. H. Henry & Sons* v. *Rhinesmith,* 219 Iowa 1088, 1093.

The vagueness of the decree has the effect of preventing petitioners, at peril of criminal liability, from drafting a new ordinance.

No proof of the value of the matters in controversy was offered. Therefore there was no jurisdiction under Jud. Code § 24 (1). The rights claimed did not have a pecuniary value or consequence, *i. e.,* calculable in money and immediately, not remotely or contingently, dependent on the litigation. *Smith* v. *Adams,* 130 U. S. 167, 175; *Wheless* v. *St. Louis,* 180 U. S. 379, 382; *Kurtz* v. *Moffitt,* 115 U. S. 487; *Barry* v. *Mercein,* 5 How. 103, 120; *Oregon R. & Nav. Co.* v. *Shell,* 125 F. 979; *Greenough* v. *Independence Lead Mines Co.,* 45 F. 2d 659, 660; *Healy* v. *Ratta,* 292 U. S. 263; *Youngstown Bank* v. *Hughes,* 106 U. S. 523; *New England Mortgage Security Co.* v. *Gay,*

145 U. S. 123; *Elliott* v. *Empire Natural Gas Co.*, 4 F. 2d 493, 500.

Wiley v. *Sinkler*, 179 U. S. 58 and *Nixon* v. *Herndon*, 273 U. S. 536, dealt with common law action for damages due to interference with the right to vote. The broad proposition that any social, political or civil rights are presumably of a value in excess of $3,000 would render needless several of the other subdivisions of § 24, such as (12) and (14), which dispense with the jurisdictional minimum in certain specific types of action for particular civil deprivations. *Smith* v. *Adams*, 130 U. S. 167; *Ohio* v. *Cox*, 257 F. 334.

In *Truax* v. *Raich*, 239 U. S. 33, jurisdiction was assumed without reference to the amount in controversy, because of the interference with rights secured by laws of the United States providing for equal rights of all persons within the jurisdiction of the United States, under the predecessor section to Jud. Code, § 24 (14), which is one of the fixed exceptions to the requirement of a showing of jurisdictional amount. See *Marcus Brown Holding Co.* v. *Pollak*, 272 F. 137.

Distinguishing *International News Service* v. *Associated Press*, 248 U. S. 215; *KVOS* v. *Associated Press*, 299 U. S. 269, 279.

In a proceeding in the federal courts, where a requirement of jurisdictional minimum is necessary, the right of freedom from unlawful incarceration is not, *per se*, a right susceptible of pecuniary valuation for jurisdictional purposes. *Kurtz* v. *Moffitt, supra; Barry* v. *Mercein, supra.* The rule of presumptive jurisdictional amount applies only in a technical action at law for damages for false imprisonment. *Hynes* v. *Briggs*, 41 F. 468.

The claim that the bill alleges a "conspiracy," presumptively within the jurisdictional minimum, is without merit.

The rights involved are not "secured" by the Constitution, within Jud. Code § 24 (14). On the contrary, they are fundamental rights having their inception in the several States before the adoption of the Constitution and are merely guaranteed by it, or by the Fourteenth Amendment as judicially construed, from invasion by the States. *Slaughter House Cases,* 16 Wall. 36; *United States* v. *Cruikshank,* 92 U. S. 542; *United States* v. *Wheeler,* 254 U. S. 281; *United States* v. *Langes,* 48 F. 78; 144 U. S. 310; *Holt* v. *Indiana Mfg. Co.,* 176 U. S. 68; *Simpson* v. *Geary,* 204 F. 507; *Marcus Brown Holding Co.* v. *Pollak, supra,* 141; *Gobitis* v. *Minersville School District,* 21 F. Supp. 581.

Privileges and immunities protected by the Fourteenth Amendment are those that belong to citizens of the United States as such, as contrasted with those derived from other sources, and the clear intent of subdivision (14) is limited to those rights strictly which fall within the privileges and immunities clause or other provisions of the Constitution proper. Distinguishing *Smith* v. *United States,* 157 F. 721, 724, 725. The word "secured" in subdivision (14) is used as a word of art.

The claimed right of peaceable assembly is not a right secured by the Federal Constitution. *United States* v. *Cruikshank, supra; DeJonge* v. *Oregon, supra,* 364.

The rights of free speech and a free press were attributes of national citizenship before the Fourteenth Amendment. *Patterson* v. *Colorado,* 205 U. S. 454, 464 (dissent). The right of free speech was one of those fundamental rights brought into the Colonies from England antedating the Federal Constitution. 4 Blackstone's Comm. 151, 152; 4 Madison's Wks. 543, Report on the Virginia Resolutions.

As for freedom from unreasonable searches and seizures, from physical molestation or detention unless in pursuance of a lawful arrest accompanied by immediate

arraignment, and from forcible removal or deportation from one State to another, it is elementary that the first two of these are protected by the Federal Constitution only against invasion by Congress. So far as unlawful acts in these respects by state officers are concerned, the remedies are exclusively a matter of state action.

The right to be immune from the alleged deportations is not a privilege or immunity secured to a United States citizen, within the conspiracy statute construed by the Court in *United States* v. *Cruikshank, supra; United States* v. *Wheeler,* 254 U. S. 281, affirming 254 F. 611. Of course, state action of the nature complained of might call for federal protection within Art. IV, § 2 of the Federal Constitution, as constituting a denial to citizens of other States of rights and privileges of citizens of New Jersey, 254 U. S. 299; *United States* v. *Harris,* 106 U. S. 629, 645.

The rights involved in this case are in no instance secured by any law of the United States providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States, and therefore no such law brings them within the alternative provisions of Jud. Code § 24 (14).

Jurisdiction can not be derived from Jud. Code, § 24 (12).

The equal protection clause of the Fourteenth Amendment constitutes no basis for jurisdiction under (14). *United States* v. *Cruikshank, supra,* 554; 1 Woods 308, 314–316; *Logan* v. *United States,* 144 U. S. 263; *Holt* v. *Indiana Mfg. Co., supra; State* v. *Leavitt,* 105 Me. 76, 83. Distinguishing *Truax* v. *Raich,* 239 U. S. 33.

Article IV, § 2 of the Constitution does not create a basis for jurisdiction under subdivision (14). *Corfield* v. *Coryell,* 4 Wash. 371, 380; *Slaughter House Cases,* 16 Wall. 36, 77; *Hamilton* v. *University of California,* 293 U. S. 245; *Marcus Brown Holding Co.* v. *Pollak,* 272 F.

137. Such rights as may be said to flow from Art. IV, § 2, do not arise from the Constitution and laws of the United States as contrasted with those that spring from other sources.

The alleged deprivation of the "privilege," under the Fourteenth Amendment, of passing freely from State to State is no basis for jurisdiction under subdivision (14). Jurisdiction can not flow from the commerce clause and the Interstate Commerce Act.

Those respondents which are artificial entities have no constitutional rights, either under the "liberty" concept of the due process clause, or under the "privileges and immunities" clause of the Fourteenth Amendment.

No case is made for jurisdiction under Jud. Code § 24 (14) as to the individual respondents, since there is no allegation or proof that any of them ever made any attempt either to secure a permit, or to hold a meeting on the public streets.

Jud. Code, § 24 (14) deals with deprivation of certain rights under color of a statute, law, ordinance, etc., of any State, and therefore does not extend to such of the respondents' grievances as were not imputable to the State of New Jersey. Nor may jurisdiction be predicated under Jud. Code, § 24 (1) (dealing with controversies arising under the Constitution and laws of the United States) so far as grievances are based upon deprivations under the Fourteenth Amendment, since that Amendment is likewise limited to state action.

Messrs. Morris L. Ernst and *Spaulding Frazer,* with whom *Messrs. Lee Pressman* and *Benjamin Kaplan* were on the brief, for respondents.

The Jersey City policy of deportation violates the privileges and immunities clause of the Fourteenth Amendment.

Freedom to pass without molestation throughout the United States is an attribute of national citizenship protected against state interference.

The policy of deportation likewise offends against the interstate commerce clause.

It violates the due process clause of the Fourteenth Amendment, as does the policy respecting search and seizure. The New Jersey Constitution forbids such unreasonable searches and seizures. As the unlawful searches and seizures are part of a scheme or conspiracy hostile to federal constitutional guaranties, jurisdiction to enjoin them would exist in any event.

Police interference with peaceful picketing violates due process. In any event, there must be arrest and fair trial.

The municipal ordinances are void. *Lovell* v. *Griffin,* 303 U. S. 444. Distribution of literature is the substance of the right of free press so far as labor unions are concerned. The Jersey City ordinances, unlike that of the City of Griffin, are absolute prohibitions, not merely previous restraints by license or permit.

The standard of anticipated disorder is unconstitutional. It was unconstitutionally applied to the respondents.

The concurrent findings of arbitrary and discriminatory enforcement are supported by ample evidence. Respondents could obtain no private halls in Jersey City. If the public places of the City were denied them, they would be without a voice in the City.

The standard set up by the ordinance imposes a previous restraint and is void. Freedom of speech and of the press are secured by the due process clause of the Fourteenth Amendment against invasion by the States and their governmental agencies. *Near* v. *Minnesota,* 283 U. S. 697, 707; *DeJonge* v. *Oregon,* 299 U. S. 353,

364; *Lovell* v. *Griffin,* 303 U. S. 444, 450. And just as freedom of the press embraces the right to circulate as well as the right to publish (*Lovell* v. *Griffin, supra*), so freedom of speech embraces the right to address an audience as well as the right merely to talk. See *Whitney* v. *California,* 274 U. S. 357; *DeJonge* v. *Oregon, supra;* and *Palko* v. *Connecticut,* 302 U. S. 319, 324.

Primarily, freedom of speech and freedom of the press mean freedom from previous restraint.

Under the ordinance a man may be forbidden in advance the right to address the public on the ground that his words will, in the opinion of the Director of Public Safety, provoke disorder. Under the Constitution a speaker may not be barred upon a guess that he will be lawless, or that others will be lawless and riot in resentment against him or what he may choose to say.

The respondents do not contend that there is, nor did the courts below find, any constitutional or social objection to the requirement of permits for public meetings. Permits must be applied for three days in advance; so said the ordinance and so says the decree. The City is thus given notice of the gatherings that are to be held, and is enabled to take whatever precautions it deems necessary. Furthermore, under the decree, the City is properly given the right to refuse permits on the ground of traffic conditions or conflicting recreational schedules—to this extent the exercise of the right of free speech is reasonably accommodated to other uses of the streets and parks. What petitioners are precluded from doing is anticipating a riot before the applicant has opened his mouth, and denying him the right to speak in public places on the basis of such a guess. *Near* v. *Minnesota, supra; Dearborn Pub. Co.* v. *Fitzgerald,* 271 F. 479; *American League of the Friends of New Germany* v. *Eastmead,* 116 N. J. Eq. 487; *Hudson County Committee* v. *Hague,* N. J. Chancery, Jan. 19, 1937.

Undoubtedly general police regulations having nothing to do with speech or the press as such are not considered to be previous restraints. Thus ordinances and statutes may constitutionally be passed, which require that permits be obtained from the building, health and fire departments before a building is used to house a newspaper plant. Newspapers may likewise be compelled to pay a social security tax, to enter into collective bargaining with their employees, and the like. *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 132–133.

These regulations find their origin, not in the subject matter of the constitutional guaranty, but in the exigencies of communal life which make general rules on fire, sanitation and the like indispensable. These rules, because they have no relation whatever to the impartial distribution of the written word as such, are not regarded as previous restraints. The same reasoning applies to the right of speech; a speaker, like a newspaper, has no special immunity from the application of general laws. Certainly a speaker may be required to conform with non-discriminatory regulations based on traffic conditions and proper regard for public recreation other than public meetings. *Anderson* v. *Wellington,* 40 Kan. 173, 180.

Davis v. *Massachusetts,* 167 U. S. 43, is not in point here, and in any event does not represent good law today.

In so far as the ordinance in the *Davis* case required that a permit be obtained, there could be no constitutional objection to it. The fact that Davis spoke without even applying for a permit marks one controlling distinction between that case and the present. Moreover, unlike the Jersey City ordinance, which conditions refusal of permits upon an anticipation of disorder, the Boston ordinance did not in terms prescribe any standard for refusal. This Court naturally assumed that in enforcing it the administrative authority was free to apply constitutional criteria,

such as traffic conditions, etc., and had done so. The present ordinance leaves the official no room for applying a constitutional standard.

The *Davis* case does not qualify or rebut the conclusion that the standard of anticipated disorder is unconstitutional. It is a holding that the right to speak may be constitutionally conditioned—a point which is conceded. This Court took the view that Davis had been validly convicted and punished because he violated a law which could have been constitutionally applied (and Davis made no effort to show that it had been unconstitutionally applied as to him). Distg. *People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96; *People* v. *Smith,* 263 N. Y. 255; *Duquesne* v. *Fincke,* 269 Pa. 112.

The decision in the *Davis* case is inconsistent with more recent authorities.

In England the use of public places for speaking purposes is taken for granted. *Cobbett's Case,* 29 How. St. Trials 49 (1804); *Liberty of the Press, Speech and Public Worship,* (1800) by James Paterson; A. V. Dicey, *The Law of the Constitution,* (1915, 8th ed.). Of course, the right may not be exercised at all times in all places. Highways may not be rendered useless or public squares be clogged by public assemblages. *R.* v. *Carlile,* 6 C. & P. 636; *Ex parte Lewis,* 21 Q. B. D. 191. See Jennings, *The Law and the Constitution* (1933), p. 242. Public parks may not be cluttered with public meetings. But the necessity that there be some adequate places where the right can be exercised has never been questioned. Paterson, *op cit., supra,* 23; Dicey, *op. cit., supra,* 498.

The rights of free speech and free assembly are essential parts of American heritage. Traditionally in the United States, freedom of speech means freedom to speak in public places. *State* v. *Butterworth,* 104 N. J. L. 579, 581, reversing 104 N. J. L. 43. Obviously, cases sustaining license ordinances do not hold that the municipality

could prohibit public speaking entirely. They establish only that licenses may be required if proper criteria for their issuance are adhered to. Of such a nature are the *Davis, Atwell, Smith, Fincke* and other cases relied upon by the petitioners. See, also, *State* v. *Coleman,* 96 Conn. 190; *Anderson* v. *Tedford,* 85 So. 673; *Bloomington* v. *Richardson,* 38 Ill. App. 60; *Rich* v. *Naperville,* 42 Ill. App. 222; *Chicago* v. *Trotter,* 136 Ill. 430, 433; *Anderson* v. *Wellington,* 40 Kan. 173, 178; *Matter of Frasee,* 63 Mich. 396, 405; *State ex rel. Garrabad* v. *Dering,* 84 Wisc. 585, 594–5.

Viewed even as a general police regulation (as distinguished from a previous restraint prohibited under any circumstances), the ordinance is void because unreasonable in the light of the underlying facts, which in this instance demonstrate the lack of necessity for conditioning the right to speak in public places upon prevision of disorder. See *Whitney* v. *California,* 274 U. S. 357.

The ordinance has been so applied to and enforced against the respondents as to violate the equal protection and due process clauses of the Fourteenth Amendment.

Jurisdiction existed under Jud. Code § 24 (1). The concurrent findings of minimal amount as a fact should not be disturbed.

In cases seeking injunctive relief, the value in dispute is that of the object of the bill. The value of social or political rights is presumptively in excess of the jurisdictional amount. *McNichols* v. *International Typ. Union,* 21 F. 2d 497, 498.

The rights of which respondents were deprived were by them attempted to be exercised in pursuance of a federally declared policy incorporated in the National Labor Relations Act (29 U. S. C. §§ 151–166).

Denial of the rights here involved meant destruction of the opportunity to work or to pursue a calling. That such rights have an economic aspect is settled by *Truax* v.

Raich, 239 U. S. 33. See also *International News Service* v. *Associated Press,* 248 U. S. 215, 236.

Had respondents brought actions for damages on the law side, each could in good faith have alleged compensatory and exemplary damages in excess of $3,000 and jurisdiction would have definitely attached. *Barry* v. *Edmunds,* 116 U. S. 550; *Ragsdale* v. *Rudick,* 293 F. 182. See *Hynes* v. *Briggs,* 41 F. 468.

It is immaterial that respondents joined in a suit to restrain the repeated and continuous trespasses and other tortious acts rather than filed actions for damages. They sought to vindicate their right to be free from unlawful interferences, and the value of that right is determinative of amount in controversy. Past acts and future or threatened probabilities enter into such calculation. *Fidler* v. *Roberts,* 41 F. 2d 305.

The rule of aggregation to establish jurisdictional amount is applicable. *Troy Bank* v. *Whitehead,* 222 U. S. 39; *International News Service* v. *Associated Press, supra; Local No. 7 B. M. P. I. U.* v. *Bowen,* 278 F. 271; *Local Union A. A. S. E. R. E.* v. *Joplin & P. R. Co.,* 287 F. 473; *Sovereign Camp* v. *O'Neill,* 266 U. S. 292.

Rights distinctively civil in character are "secured" by each of the three principal clauses of the first section of the Fourteenth Amendment. Jud. Code § 24 (14) and 8 U. S. C. § 43 cover the rights so secured. *Raich* v. *Truax,* 219 F. 273; affirmed 239 U. S. 33; *Giles* v. *Harris,* 189 U. S. 475; *Nixon* v. *Herndon,* 273 U. S. 536; *Holt* v. *Indiana Mfg. Co.,* 176 U. S. 68; *Crane* v. *Johnson,* 233 F. 334, affirmed 242 U. S. 339. [Citing many cases in the lower federal courts.]

Thus the right of free passage through the United States is secured by the privileges or immunities clause and the due process clause; the right to be free of physical restraint without arrest according to law, etc., is secured by the due process clause; the right to be free of

unreasonable search and seizure is secured by the due process clause (and perhaps also by the privileges or immunities clause); the rights of free speech, free press and peaceable assembly are secured by the due process clause (and perhaps also by the privileges or immunities clause). To the extent that discrimination was shown—and discrimination pervades the case and the findings—the equal protection clause is also involved.

Since *Gitlow* v. *New York,* 268 U. S. 652, and *Fiske* v. *Kansas,* 274 U. S. 380, it is no longer open to question that these civil rights are as much within the ambit of the due process clause as vested rights of property, which were likewise brought within this clause only as the result of a lengthy and tortuous development. See *Allgeyer* v. *Louisiana,* 165 U. S. 578.

The contention that the provisions of the Civil Rights Act cover only such rights protected by the Fourteenth Amendment as originated in or were created by provisions of the Constitution other than the Fourteenth Amendment itself—thus confining the provisions of the Civil Rights Act to so-called rights of national citizenship and unwarrantably reading the word "secured" in the Civil Rights Act as meaning "created,"—is erroneous.

Slaughter House Cases, 16 Wall. 36, and *United States* v. *Cruikshank,* 92 U. S. 542, reflect a narrow view of the scope of the Fourteenth Amendment long since discountenanced by this Court.

As to the due process clause, rights of property are now plainly protected. See *Butchers Union Slaughter-House Co.* v. *Crescent City Slaughter-House Co.,* 111 U. S. 746; *Barbier* v. *Connolly,* 113 U. S. 27; *Mugler* v. *Kansas,* 123 U. S. 623; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Minneapolis & St. Louis Ry.* v. *Beckwith,* 129 U. S. 26; Pound, *Liberty of Contract,* 18 Yale L. J. 454, 470. It covers also the civil rights involved in this case. See *Gitlow* v. *New York,* 268 U. S. 652; *Fiske* v. *Kansas,* 274 U. S.

380; *Near* v. *Minnesota,* 283 U. S. 697; *Lovell* v. *Griffin,* 303 U. S. 444; *DeJonge* v. *Oregon,* 299 U. S. 353; Warren, *The New Liberty under the Fourteenth Amendment,* 39 Harv. L. R. 431. As for the equal protection clause, it is obvious that the majority opinion in the *Slaughter House Cases* has been entirely superseded. As for the privileges or immunities clause, it is still of indefinite intent, although it seems due for extension in view of *Colgate* v. *Harvey,* 296 U. S. 404; but it has always been understood as including the right of free passage throughout the United States.

Compare *Slaughter House Cases* and *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402; *Liggett Co.* v. *Baldridge,* 278 U. S. 105.

There is no conceivable basis in the authorities upon which the petitioners principally rely, for their conception that rights protected by the Fourteenth Amendment may be summarily categorized as, on the one hand, rights "secured" because originating in or created by other provisions of the Constitution and thereupon guaranteed by the Fourteenth Amendment (rights of national citizenship), and, on the other hand, rights not "secured" because not originating in or created by other provisions of the Constitution, but nonetheless guaranteed by the Fourteenth Amendment. The purported distinction rests, as we have seen, only on early cases declaring that rights other than those of national citizenship were in no sense protected by the Fourteenth Amendment and these cases are no longer good law. As the Fourteenth Amendment now protects and guarantees both kinds of rights (assuming that any distinction whatever can be sensibly made), it "secures" them; and by the same token they are covered by the Civil Rights Act. Distinguishing *Holt* v. *Indiana Co.,* 176 U. S. 68; *Marcus Brown Holding Co.* v. *Pollak,* 272 F. 137; *Gobitis* v. *Minersville School District,* 21 F. Supp. 581.

The civil rights here in issue are secured by the Fourteenth Amendment (and therefore by the Civil Rights Act) in the simple sense that, whereas in the absence of the Amendment a State could impair those rights with impunity so far as the federal Constitution was concerned, they are by the Amendment forbidden to do so. See *Smith* v. *United States,* 157 F. 721, cert. den., 208 U. S. 618.

The rights are "created" by the Fourteenth Amendment in the sense that the Amendment created a new set of sanctions to protect against their invasion.

The rights are created by the First Amendment (possibly also the Fourth). Certainly the rights created by the Bill of Rights were new rights freshly granted or created, since the national Government whose power they effectively limited, was a new entity. The fact that the Fourteenth Amendment, as judicially construed, affords additional protection to the same basic rights, does not militate against the fact that the First Amendment created them.

Jurisdiction existed under § 24 (12) of the Judicial Code (conspiracy respecting civil rights).

All of petitioners' actions constituted state action.

The status of the respondent American Civil Liberties Union (a corporation) and the unincorporated labor unions was correctly adjudged below. The American Civil Liberties Union, is not a business corporation but a membership corporation which reflects the interests of its individual members. Cf. *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 279. A ruling that corporations are not entitled to the benefit of the liberty clause of the Fourteenth Amendment so far as freedom of speech and press are concerned would be unthinkable. See *Grosjean* v. *American Press Co.,* 297 U. S. 233, and *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379.

Corporations are as much entitled to equal protection as are natural persons. *Liggett Co.* v. *Lee,* 288 U. S. 517, 536; *Southern Railroad Co.* v. *Greene,* 216 U. S. 400; *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.,* 262 U. S. 544; *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490; *Liggett Co.* v. *Baldridge,* 278 U. S. 105; and *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239.

As for the standing of unincorporated labor associations: *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344; *Hansel* v. *Purnell,* 1 F. 2d 266, 269, cert. den., 266 U. S. 617.

The decree is definite, practicable and enforcible.

From the brief of the Committee on the Bill of Rights,* of the American Bar Association:

The course of conduct of the city officials, as revealed by the findings in this record, constitutes a serious abridgment of the constitutional right "peaceably to assemble" of so deliberate and important a character as to be of national consequence.

The refusal of the permits for the meetings in this case was clearly on the ground that the persons desiring to speak were unpopular in Jersey City and that the sentiments they might utter would be unpopular. If the law should ever countenance the suppression of free speech on the basis of the inacceptability to the prevailing majority opinion of the speakers or their sentiments, the very basis of the doctrines on which our institutions are built would be destroyed.

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* The gentlemen who composed the Committee were: *Messrs. Douglas Arant,* of Alabama; *Zechariah Chafee, Jr.,* of Rhode Island; *Grenville Clark,* of New York; *Osmer C. Fitts,* of Vermont; *Lloyd K. Garrison,* of Wisconsin; *George I. Haight,* of Illinois; *Monte M. Lemann,* of Louisiana; *Ross L. Malone, Jr.,* of New Mexico; *Burton W. Musser,* of Utah; *John Francis Neylan,* of California; *Joseph A. Padway,* of Wisconsin; and *Charles P. Taft,* of Ohio.

Freedom of assembly is an essential element of the American democratic system. The decree below is in accord with the modern doctrine of this Court in its interpretation of the constitutional guaranties.

Although none of the recent cases (*Fiske* v. *Kansas,* 274 U. S. 380; *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *Griffin,* 303 U. S. 444) deals specifically with the subject of interference with freedom of assembly through the denial of permits for outdoor meetings, nevertheless the denial by this method of the right of assembly is closely analogous to the suppression of unpopular meetings by criminal prosecutions, which was held invalid in *DeJonge* v. *Oregon,* 299 U. S. 353.

The ordinance has been unconstitutionally administered. Permits were denied because of threatened disorder without reference to the possibility of controlling such disorder. Some danger of disorder must be faced for the sake of the constitutional right of free assembly. It is natural that threats of trouble should often accompany meetings on controversial questions. But meetings may not be suppressed on that account. The practice under ordinary conditions in our large cities is for the authorities to arrange with the applicants to have the meeting held in a suitable place, and to have enough policemen on hand to quell apprehended disturbances.

The real question at issue is whether any threat of disorder, even though only by opponents of the speakers, excuses denial of permits. If so, the right of free assembly will have become a mockery. The right would thus be subject to destruction by an arbitrary official decision, notwithstanding that the Bill of Rights was intended to protect citizens from arbitrary action of that very character.

To "secure" the rights of free speech and assembly against "abridgment," it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small minority of persons hostile to the speaker or to the views he would be likely to express.

The essential ground upon which the Circuit Court of Appeals held this ordinance void on its face appears to have been that the ordinance by its very terms contains an unconstitutional standard for the guidance of the licensing officer. The court did not deny that any ordinance merely requiring an application to be made to a city official for a permit, or giving the official a reasonable discretion as to the time or place of the meeting in order to allow for traffic or recreational conditions, would have been valid. It evidently considered that an ordinance which by its terms contemplates the refusal of a permit merely because, in the opinion of the licensing official, disorder is probable, without regard to a city's ability to prevent or suppress the disorder, is void *per se*.

As a practical matter a city has a virtual monopoly of every open space at which a considerable outdoor meeting can be held, and if its streets and parks may be entirely closed to such meetings, the practical result would be to abolish them.

A statesmanlike and workable approach would be to regard the availability of streets and parks as but two parts of a single problem which should be handled as a unit. This problem is that of reconciling the city's function of providing for the exigencies of traffic in its streets and for the recreation of the public in its parks, with its other basic obligation to provide adequate places for public discussion in order to safeguard the guaranteed right of public assembly.

It would seem that if a city adopted the policy of providing an adequate number of places similar to Hyde Park in London, to be used exclusively for outdoor meetings, it might constitutionally close both its streets and ordinary parks to such meetings if, in the judgment of the city authorities, the requirements of traffic and recreation made this advisable. It is true that under usual conditions in an average large city it is perfectly feasible to find some suitable places for meetings even in streets; yet it is conceivable that under extraordinary conditions, the necessities of traffic would make all the streets unsuitable, at least temporarily. In another city it might be that the parks are unsuitable under certain conditions and at particular times, while proper places for meetings could readily be provided in squares or wide streets. It may well develop that the most feasible solution of this problem in many cities will be the establishment of "Hyde Parks" of sufficient number and so located as to provide effectively for free outdoor public discussion.

The sound constitutional doctrine which should control this problem is that a city must in some adequate manner provide places on its property for public meetings—as distinguished from a more rigid doctrine that would compel both its streets and its ordinary parks to be made available. Under such a doctrine, the basic constitutional requirement of protecting freedom of assembly would be fulfilled, but without imposing rigid specific requirements as to either streets or parks that might in practice prove difficult or unworkable.

Thus, while we stress the vital importance of upholding the principle that a city must safeguard the right of assembly in open-air meetings, we also suggest that in respect of ways and means to that end, the rule should be reasonably flexible.

Davis v. *Massachusetts,* 167 U. S. 43, relied upon by defendants, is distinguishable in respect of its facts and

the issue involved. Moreover, its rationale is incompatible with more recent decisions of this Court. A city does not control its parks like a private owner of property, but holds them for public purposes including public meetings. The right of a city in respect of its parks resembles other governmental rights in that it must be administered for the benefit of the public and not in an arbitrary manner. There are many different kinds of public benefits to be derived from parks, and one of the most important is the constitutional right of assembly therein. The parks are held by the city subject to this right. It can be regulated in a reasonable manner; it must not be denied.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1936, 1937, AND 1938

	ORIGINAL			APPELLATE			TOTALS		
Terms	1936	1937	1938	1936	1937	1938	1936	1937	1938
Total cases on dockets	13	22	13	1,039	1,069	1,007	1,052	1,091	1,020
Cases disposed of during terms	1	9	1	941	1,004	922	942	1,013	923
Cases remaining on dockets	12	13	12	98	65	85	110	78	97

	TERMS		
	1936	1937	1938
Distribution of cases disposed of during terms:			
Original cases	1	9	1
Appellate cases on merits	270	286	246
Petitions for certiorari	671	718	676
Cases remaining on dockets:			
Original cases	12	13	12
Appellate cases on merits	53	34	48
Petitions for certiorari	45	31	37

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I. In General.

1. *Subject Matter.* Jurisdiction of suit to enjoin municipal officers from enforcing ordinances forbidding distribution of printed matter and holding public meetings without permit. *Hague* v. *C. I. O.,* 496.

2. *Id.* Citizen deprived of civil rights may seek redress in federal court without exhausting judicial (distinguished from administrative) remedy in state court. *Lane* v. *Wilson,* 268.

3. *Federal Questions.* Suit by members of state legislature to compel proper record of legislative action on Child Labor Amendment involved federal questions under Art. V of Constitution. *Coleman* v. *Miller,* 433.

4. *Political Questions.* Federal court may not restrain state officers from certifying ratification of proposed constitutional amendment because of previous rejection. *Coleman* v. *Miller,* 433.

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