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VOLUME 308

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1939

FROM OCTOBER 2, 1939, TO AND INCLUDING
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ERRATUM.—307 U. S. 434, seventh line from bottom, "reversed" should read "affirmed."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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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*Mr. Justice Butler, on account of illness, did not attend any of the sessions of the Court at the October Term, 1939, and took no part in the consideration or decision of any of the cases reported in this volume. He died in Washington on November 16, 1939; see announcement by the Chief Justice, *post*, p. v. A report of other proceedings in his memory will appear in a later volume.

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.)

MR. JUSTICE BUTLER

SUPREME COURT OF THE UNITED STATES

THURSDAY, NOVEMBER 16, 1939

Present: The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS.

The CHIEF JUSTICE said:

"It is my sad duty to announce the passing, early this morning, of our brother, Mr. Justice Pierce Butler. After a long and distinguished career at the Minnesota Bar, he was appointed Associate Justice of this Court and took his seat in January 1923. Trained in the exacting school of a most active professional practice, Pierce Butler brought to this Court not only his learning in the law, but a rich store of practical experience. His fidelity, his courage and forthrightness, which were his outstanding characteristics, made him a doughty warrior for his convictions, and he served the Court with great ability and indefatigable industry and an unwavering loyalty to its traditions and to his lofty conception of its function in preserving our constitutional heritage.

"The funeral services in Washington will be held tomorrow morning at 11 o'clock at Saint Matthew's Cathedral, and the Court will attend. A committee of the Court composed of Mr. Justice McReynolds, Mr. Justice Stone, and Mr. Justice Roberts will attend the services to be held in St. Paul.

"As a further token of respect for the memory of our brother, the Court, immediately upon the conclusion of the hearing in the case now on argument, in which counsel from the Pacific coast are engaged, will adjourn until Wednesday, November 22 next, at noon."

TABLE OF CASES REPORTED

TABLE OF CASES

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TABLE OF STATUTES

Cited in Opinions

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1939.

MASSACHUSETTS *v.* MISSOURI ET AL.

No. —, Original. Argued October 9, 1939.—Decided November 6, 1939.

1. To constitute a controversy between two States, within the original jurisdiction of this Court, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. P. 15.
2. A bill by one State against another State and citizens of the other, which alleges that the plaintiff has assessed a tax on the transfer by death of the estate of one of its own citizens, the satisfaction of which depends upon resort to intangible assets of the decedent consisting of securities held by the individual defendants, as trustees, in the defendant State, and which alleges that the defendant State claims and will exercise a right to levy a like tax upon the transfer of this intangible property, and which prays to have the respective rights of the two States adjudicated, and for general relief, but which shows that the property is sufficient to answer the claims of both States and that the claims are not mutually exclusive but independent so that each State may constitutionally press its claim without conflict in point of law or fact with the decision of the other,—does not present a justiciable controversy between the two States. *Texas* v. *Florida,* 306 U. S. 398, distinguished. *Id.*
3. State statutes purporting to exempt from local transfer tax intangible assets of decedents who, at death, were citizens of other States which grant reciprocal exemptions, create no enforceable obligation between the States enacting them. P. 16.

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4. A State may not invoke the original jurisdiction of this Court to enforce the individual rights of its citizens. P. 17.
5. Federal jurisdiction to render a declaratory judgment depends on the existence of a controversy in the constitutional sense. *Id.*
6. A State can not be brought into court by making its citizens parties to a suit not otherwise maintainable against the State. *Id.*
7. An action by a State to recover money from citizens of another State will not be entertained by the Court in the absence of facts showing that resort to the original jurisdiction is necessary for the protection of the plaintiff State. P. 18.

   In the present instance, it does not appear that Massachusetts is without a proper and adequate remedy in the Missouri courts or the federal District Court in Missouri. P. 19.
8. Clause 2 of § 2 of Article III of the Constitution merely distributes the jurisdiction conferred by clause 1. *Id.*
9. The orginal jurisdiction of this Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in Art. III, § 2, cl. 1, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts. *Cohens* v. *Virginia,* 6 Wheat. 264. *Id.*
10. The objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes, goes not to the jurisdiction but to the merits, and raises a question which the district courts are competent to decide. P. 20.

Motion for leave, denied.

On Motion for leave to file an original bill in this Court and the return to an order to show cause.

Mr. Edward O. Proctor, Assistant Attorney General of Massachusetts, with whom *Mr. Paul A. Dever,* Attorney General, was on the brief, for complainant.

Under *Graves* v. *Elliott,* 307 U. S. 383, decedent's right to revoke had the attribute of property, and control of her person and estate at the place of her domicil afforded constitutional basis for imposition of the tax.

Under that case and *Curry* v. *McCanless,* 307 U. S. 357, Missouri also can tax the transfer, though whether its

statutes exercise that power with respect to the present trusts, in view of the reciprocity provision of the statute, is another question. As the Massachusetts tax is imposed upon the trustees, who are residents of Missouri, Massachusetts can enforce the tax only by recourse to the Missouri or federal courts. The trustees deny their liability to pay, on the ground that Massachusetts has no jurisdiction to impose it. There exists, therefore, a controversy between that State and citizens of Missouri.

The purpose of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another "was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens." *Massachusetts* v. *Mellon,* 262 U. S. 447, 480, 481; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 289; *Chisholm* v. *Georgia,* 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. And if the facts present such a case, the Court may not deny jurisdiction because numerous similar cases might "be brought within its cognizance." *Minnesota* v. *Hitchcock,* 185 U. S. 373.

A suit against an individual to collect a tax clearly presents a justiciable controversy determinable "according to accepted doctrines of the common law or equity systems of jurisprudence." *United States* v. *Chamberlin,* 219 U. S. 250; *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 271; *Meredith* v. *United States,* 13 Pet. 486; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Philadelphia & Reading R. Co.,* 123 U. S. 113.

A judgment for a tax is one which is entitled to full faith and credit under the Constitution. *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268.

The Massachusetts inheritance tax is a statutory liability quasi contractual in nature, subject to enforcement by suit. The rule, adopted in some jurisdictions but denied in others, that the courts of one State will not enforce the revenue laws of another State, has been severely criticized (29 Col. L. R. 782; 48 Harv. L. R. 828) and its validity is an open question in this Court. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 275; *Moore* v. *Mitchell*, 281 U. S. 18, 24.

The rule of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, should not be extended to a suit for enforcement of revenue laws. *Milwaukee County* v. *M. E. White Co.*, *supra.*

There is presented a controversy between Massachusetts and Missouri. In view of recent decisions (*Curry* v. *McCanless, supra; Graves* v. *Elliott, supra; Worcester County Co.* v. *Riley*, 302 U. S. 292, 299; *New Jersey* v. *Pennsylvania*, 287 U. S. 580) the States, having surrendered their rights to make treaties *inter sese*, must find their only remedy against double taxation in reciprocal legislation. *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 334; *Kidd* v. *Alabama*, 188 U. S. 730, 732. Both Massachusetts and Missouri have resorted to this expedient. Massachusetts and its residents, therefore, are entitled to the immunity offered by the Missouri statute.

If the evils of multiple taxation are to be solved by reciprocal legislation of the States, as this Court has itself suggested, it is essential that there be a forum where recalcitrant States may be compelled to observe the reciprocity their legislatures have provided. The Supreme Court is the only available forum.

If the Court has jurisdiction upon either ground but not the other, the jurisdiction is not lost because of the joinder of parties not necessary to such jurisdiction.

Mr. Harry W. Kroeger, with whom *Mr. Daniel N. Kirby* was on the brief, for St. Louis Union Trust Co., Trustee, et al., respondents.

The controversies in this case are justiciable because they are of a civil nature and arise between States of the Union and between a State and citizens of another State. They exist notwithstanding the absence of constitutional restraints on double taxation. Distinguishing *Curry* v. *McCanless,* 307 U. S. 357; *Graves* v. *Elliott,* 307 U. S. 383. Because of the facts in this case, and the reciprocal exemption contained in the law of Missouri, there can here be only one tax, if in truth there can be any tax at all. In such a situation a controversy arises appropriately to be decided by a court upon an analogy to interpleader under the principle recently decided by this Court in *Texas* v. *Florida,* 306 U. S. 398.

Controversies between the States of Massachusetts and Missouri arise because each denies the right of the other to tax. A controversy arises from the assertion by Massachusetts of the validity of its tax laws in Missouri. Throughout the Eighteenth and Nineteenth Centuries English courts have announced the doctrine in *dicta* that no nation will take notice of the revenue laws of another. In America the doctrine has been followed and applied in *Ludlow* v. *Van Rensselaer,* 1 Johnson 94; *Maryland* v. *Turner,* 132 N. Y. S. 173; *Colorado* v. *Harbeck,* 232 N. Y. 71; *New York Trust Co.* v. *Island Oil & Transport Corp.,* 11 F. 2d 698; *Moore* v. *Mitchell,* 30 F. 2d 600; 281 U. S. 18.

This Court has found it unnecessary to decide whether a State might have extraterritorial enforcement of its revenue laws in an original action outside the taxing State, as distinguished from a suit on a judgment obtained in the taxing State on personal service. *Moore* v. *Mitchell, supra; Milwaukee County* v. *M. E. White*

Co., 296 U. S. 268. The issues, as suggested by *Colorado* v. *Harbeck*, 232 N. Y. 71, and *Moore* v. *Mitchell*, *supra*, go deeper than objections to extraterritorial collection. They involve questions of the vitality of the taxing law itself when sought to be applied to raise obligations and impose liens within the confines of another State. The attempt of Massachusetts here is to impose a contractual liability upon trustees who neither made themselves amenable to, nor sought the protection in any way of, the Commonwealth, and to reach over into Missouri in the attempted impressment of a lien on assets held in Missouri. Massachusetts is attempting to base her right upon revenue laws claimed to have extraterritorial effect.

A controversy arises from the denial by Missouri of the effect of her reciprocity statute. The extent of reciprocal legislation was commented upon in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, where it was said that thirty-five States had already in some form granted relief against double taxation.

In view of the holding in *Curry* v. *McCanless*, *supra*, and *Graves* v. *Elliott*, *supra*, the need for reciprocal legislation to avoid the evils of double taxation becomes of paramount importance. See, Orr, "Reciprocal Exemptions from Inheritance Taxation," 18 Boston University Law Rev. 39.

Has not Massachusetts an interest in the question whether Missouri legally withholds the exemption granted by her statute?

Enactment of mutual reciprocity laws is assumption of mutual obligations between the States. There was something of the nature of a continuing, although revocable, offer to other States, for the duration of a reciprocity law, to grant exemptions in respect of property of citizens of other States, if the States of their domiciles granted similar exemptions in respect of property of

citizens of the legislating State. This was not mere comity, since it contemplated a *quid pro quo.* The Missouri reciprocity statute was more than a mere exemption law. The nature of Missouri's obligation to Massachusetts is much like the contractual obligation expressed in §§ 85 and 90 of the American Law Institute's Restatement of the Law of Contracts.

The interest of a State such as Massachusetts granting an exemption and claiming reciprocity transcends an interest in the individual benefits to accrue to its own citizens. *Florida* v. *Mellon,* 273 U. S. 12, 16. It is a public interest which Massachusetts has in the reciprocal exemptions upon which its own exemptions are postulated. Missouri should not be permitted, unless she can show just cause, to violate her statute when her citizens are entitled to exemptions in Massachusetts. There would be a constitutional inhibition against the subsequent withdrawal of the benefit conferred at the date of Mrs. Blake's death. *City Bank Farmers' Trust Co.* v. *New York Central R. Co.,* 253 N. Y. 49. Reciprocity, it is believed, furnishes an expedient of accord without violation of the compact clause; for the obligation arising out of reciprocal legislation is not such as requires the consent of Congress. This is true because (1) the obligation, although contractual in nature, is not rested upon manifestation of assent so as to fall within the meaning of "compact" or "agreement" in the constitutional sense, and (2) no interest of the United States is involved. *Virginia* v. *Tennessee,* 148 U. S. 503, 518–519; *Stearns* v. *Minnesota,* 179 U. S. 223, 244–245; *Union Branch R. Co.* v. *East Tennessee & Georgia R. Co.,* 14 Ga. 327, 339; *State* v. *Joslin,* 116 Kans. 615, 618–619.

A controversy arises on the part of each State against the other by reason of the effect of the other's tax upon its public charities.

Controversies between the States and between each of the States and the respondent trustees arise out of the attempts of each State to collect a tax upon the trust property in Missouri. The subject matter is single. With the existence of reciprocity, there can be not more than one tax payable. There being not more than a single liability, damage to the respondent trustees arises from the multiple assertion of claims. The assumption of jurisdiction by this Court would avoid a multiplicity of suits. The existence of controversies capable of being initiated in other courts presupposes the original jurisdiction of this Court.

Mr. Edward H. Miller, with whom *Mr. Roy McKittrick,* Attorney General of Missouri, was on the brief, for the State of Missouri, respondent.

A request for an opinion does not present a case or controversy. *United States* v. *West Virginia,* 295 U. S. 463; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158; *New Jersey* v. *Sargent,* 269 U. S. 328; *Massachusetts* v. *Mellon,* 262 U. S. 447.

Massachusetts is only asking for a declaration of whether it, or Missouri, has the right to levy an inheritance tax, and "this Court may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama* v. *Arizona,* 291 U. S. 286, 291; *Ashwander* v. *T. V. A.,* 297 U. S. 288, 324; *Arizona* v. *California,* 283 U. S. 423; *Pennsylvania* v. *West Virginia,* 262 U. S. 553.

The supposed dispute is political and therefore not justiciable. *Fowler* v. *Lindsey,* 3 Dall. 410; *Virginia* v. *West Virginia,* 11 Wall. 39; *Georgia* v. *Stanton,* 6 Wall. 50; *Massachusetts* v. *Mellon, supra; Kansas* v. *Colorado,* 185 U. S. 125; *Rhode Island* v. *Massachusetts,* 12 Pet. 657.

There is no direct conflict of interests between the two States. The trust assets are far more than adequate for the payment of the total taxes claimed by them both. Distinguishing *Texas* v. *Florida,* 306 U. S. 398. The claims of the two are completely independent, are not mutually exclusive in any way, and Missouri has neither done nor threatened any act tending to interfere with the collection by Massachusetts of its asserted tax. *Muskrat* v. *United States,* 219 U. S. 346.

Missouri is not threatening any private or property right of Massachusetts. The Court has declared that only certain types of state rights will be protected from threatened invasion. *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 277; *Georgia* v. *Stanton,* 6 Wall. 50, 77; *United States* v. *West Virginia,* 295 U. S. 463.

The right to tax is an attribute of general sovereignty, as distinguished from a property right. *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *Providence Bank* v. *Billings,* 4 Pet. 514, 564; *Case of the State Freight Tax,* 15 Wall. 232, 278; Cooley on Taxation, 3rd ed., p. 7. An invasion by Missouri of the Massachusetts jurisdiction to tax, would not affect a private or property right, and therefore could not present a justiciable controversy. While the property right requirement has been relaxed in water rights cases so as to permit a State to sue as *parens patriae, Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 185 U. S. 125, such cases present no analogy to the case at bar.

Massachusetts is not the real party in interest. *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 277; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 287; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 259; *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.,* 220 U. S. 290; *New Hampshire* v. *Louisiana,* 108 U. S. 76; *Kansas* v. *United States,* 204 U. S. 331; *Florida* v. *Anderson,* 91 U. S. 667;

Louisiana v. *Texas,* 176 U. S. 1; *North Dakota* v. *Minnesota,* 263 U. S. 365.

If there is a separate controversy between a State and citizens of another State, necessary parties are absent, whose joinder would oust the jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 228; *Arizona* v. *California,* 298 U. S. 558. See also dissents in *South Dakota* v. *North Carolina,* 192 U. S. 286, 322, and *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 605. The beneficiaries under the trust are the only persons really interested in the issue framed by Massachusetts. Cf. *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 163; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 246.

The allegations afford no adequate basis for relief according to accepted doctrines of equity jurisprudence. *Texas* v. *Florida,* 306 U. S. 398. Massachusetts was faced with no possible risk of loss from anything that Missouri might do.

Even if the Court has jurisdiction it may decline to exercise it. Courts need not in every case exercise a jurisdiction which they admittedly possess. The statement in *Cohens* v. *Virginia,* 6 Wheat. 264, repeated in *Employers' Liability Cases,* 223 U. S. 1, 58; *Hyde* v. *Stone,* 20 How. 170; *Chicot County* v. *Sherwood,* 148 U. S. 529; and *McClellan* v. *Carland,* 217 U. S. 268, that a court can not decline to exercise its jurisdiction, is subject to exceptions. *Canada Malting Co.* v. *Paterson Steamships,* 285 U. S. 413; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123; *Pennsylvania* v. *Williams,* 294 U. S. 176. Cf., *Douglas* v. *New York, N. H., & H. R. Co.,* 279 U. S. 377.

The constitutional provision conferring jurisdiction in controversies between States, and between States and citizens of other States, is not mandatory. If the language of the first Judiciary Act can properly be used as a contemporaneous interpretation of the constitutional

provisions, *Ames* v. *Kansas,* 111 U. S. 449, it would seem that "all" controversies where a State is a party, the language of the statute, would have required the reading of the word "all" into the constitutional provision of clause 1 dealing with controversies between States, especially since clause 2 apparently distributes to the Supreme Court jurisdiction in "all" cases in which a State is a party. However, the Court has declined to accept that interpretation, has said that the omission in clause 1 of the word "all" was apparently deliberate, and intended to be a contrast between the classes of cases in clause 1 which are preceded by the word "all," and thus that the judicial power does not extend to all controversies to which the United States is a party, or to all controversies between a State and citizens of another State, but rather only to certain types of those controversies. *Williams* v. *United States,* 289 U. S. 553; *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.,* 220 U. S. 290. And it has read into the constitutional language certain cases not even mentioned. The Court has approved Mr. Justice Iredell's dissent in *Chisholm* v. *Georgia,* and has declared that the doctrine of the implied immunity of a sovereign from suit must be read into the constitutional language, and that its literal construction is inadmissible. *Williams* v. *United States, supra; Hans* v. *Louisiana,* 134 U. S. 1. The Court has also read into the constitutional provision a prohibition against suits by a foreign State against a State. *Principality of Monaco* v. *Mississippi,* 292 U. S. 313, 322; *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.,* 200 U. S. 290. In fact, in *Williams* v. *United States, supra,* the Court said that the phrase "Controversies to which the United States shall be a Party" in Article III, § 2, clause 1, which it placed upon precisely the same footing as the clause "Controversies between two or more States," must be construed in accordance with the practical construction put upon it by the first Judiciary Act, as though it

read, "controversies to which the United States shall be a party plaintiff or petitioner." 289 U. S. 577. The same principle has been given an even broader application. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; *Missouri* v. *Illinois*, 180 U. S. 208.

It is interesting to note that the Court has grafted a further exception upon the exception that suits which were not justiciable prior to the Constitution were not made justiciable by the Constitution. *Hans* v. *Louisiana, supra.* It is also interesting to observe that the interpretation of the Constitution and the Judiciary Act as differentiating, although the language itself suggests no such differentiation, between suits by a State or the United States, and suits against a State or the United States, was arrived at even although in the very language of the Judiciary Act, an express distinction is made between suits by ambassadors and other foreign representatives, and suits against them.

If the language of the Constitution and the Judiciary Act were taken literally in connection with controversies between, for example, a State and citizens of other States, it would appear to authorize the Supreme Court to take jurisdiction in every case where a State and citizens of other States are adversary parties. The Court has, however, interpreted this language so that the grant of power is only considered as extending to justiciable cases or controversies, of a civil nature, in which a State as plaintiff or petitioner sues only citizens of other States. Thus if the Court can read into the language of the Constitution certain exceptions which are perhaps not directly suggested by its terms, but which are derived from postulates beyond the confines of the Constitution, it would appear to be at liberty to decline to exercise jurisdiction in this case, on grounds equally compelling, and on postulates equally beyond the confines of the constitutional and statutory language. Cf., the dissenting opinion of

Mr. Chief Justice Fuller in *United States* v. *Texas,* 143 U. S. 621, 648.

The Court should decline to exercise jurisdiction in this case. This proceeding is not of the kind for which the original jurisdiction of this Court was designed. There are other entirely adequate remedies available to the interested parties. There are other remedies in other courts which are entirely adequate to dispose of any possible differences between the parties interested in this case. Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a federal district court in Missouri, and such a suit would be of a civil nature and would present a justiciable case or controversy. There is no question about the remedies available for a testing of the validity of the Missouri tax. The trustees could sue to enjoin the collection of the Missouri tax on the ground that it is unconstitutional as applied to them, *Ex parte Young,* 209 U. S. 123; or could bring an action under the Missouri Declaratory Judgment Act, Laws of Missouri 1935, pp. 218–220. And the Missouri inheritance tax laws, § 598, R. S. Mo., 1929, permit persons interested in their liability for an inheritance tax to bring suit against the State to quiet title, to which suit the State expressly consents.

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

The Commonwealth of Massachusetts asks leave to file a bill of complaint against the State of Missouri and certain citizens of that State. On return to the order to show cause why leave should not be granted, the respondents, while contesting the claims of Massachusetts, stated that they had no cause to show. The Court set the motion for hearing upon the question whether the Court has jurisdiction to entertain the suit. The com-

plainant and the individual respondents contend that the Court has jurisdiction and the State of Missouri now presents the contrary view.

The argument for jurisdiction rests upon two grounds, (1) that there is a controversy between two States, and (2) that there is a controversy between a State and citizens of another State. Constitution, Article III, § 2, paragraphs 1 and 2.

The proposed bill of complaint alleges in substance that Madge Barney Blake, domiciled in Massachusetts, died in 1935 leaving an estate in that State of $12,646.02, which has there been administered, and that this estate will be exhausted by costs of administration and federal taxes; that the decedent, while domiciled in Massachusetts, created three trusts of securities of the value (at the time of death) of $1,850,789.77, the trustees being residents of Missouri where the securities are held; that in two of these trusts, embracing the greater part of the securities, the settlor had reserved the right of revocation; that both Massachusetts and Missouri have inheritance tax statutes subjecting to taxation property passing by deed, grant or gift made or intended to take effect in possession or enjoyment after the death of the donor; that the Massachusetts statute imposes the tax upon intangibles only when owned by inhabitants of that State; that the Missouri statute exempts from the tax intangibles owned by non-residents who reside in States extending reciprocal provisions to residents of Missouri; that in this instance both States are claiming the exclusive right to impose inheritance taxes upon the trust estates; that Missouri intends to exercise its jurisdiction over the trustees and the property to the exclusion of Massachusetts; that Massachusetts has taken the action required by its statutes to determine the amount of the tax, and to certify it to the persons by whom it is payable, and that there is now due to Massachusetts from the respondent

trustees $137,000, if all the trust estates are taxable, and $127,000 if only the property under the two revocable trusts is taxable; and that the tax cannot be collected from any persons or property in Massachusetts.

Alleging the absence of adequate remedy save in this Court sitting as a court in equity, the complainant prays that the Court may adjudge whether Massachusetts or Missouri has "the jurisdiction and lawful right to impose transfer, succession or inheritance taxes" in respect of the several transfers described and to determine that question in favor of Massachusetts. There is also a general prayer for other relief by injunction or otherwise as the Court may deem expedient.

First.—The proposed bill of complaint does not present a justiciable controversy between the States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Florida* v. *Mellon,* 273 U. S. 12, 16, 17; *Texas* v. *Florida,* 306 U. S. 398, 405. Missouri, in claiming a right to recover taxes from the respondent trustees, or in taking proceedings for collection, is not injuring Massachusetts. By the allegations, the property held in Missouri is amply sufficient to answer the claims of both States and recovery by either does not impair the exercise of any right the other may have. It is not shown that there is danger of the depletion of a fund or estate at the expense of the complainant's interest. It is not shown that the tax claims of the two States are mutually exclusive. On the contrary, the validity of each claim is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each State without conflict in point of

fact or law with the decision of the other. *Curry* v. *McCanless,* 307 U. S. 357; *Graves* v. *Elliott,* 307 U. S. 383. The question is thus a different one from that presented in *Texas* v. *Florida, supra,* where the controlling consideration was that by the law of the several States concerned only a single tax could be laid by a single State, that of the domicile. This was sufficient basis for invoking the equity jurisdiction of the Court, where it also appeared that there was danger that through successful prosecution of the claims of the several States in independent suits enough of the estate would be absorbed to deprive some State of its lawful tax. *Texas* v. *Florida, supra,* 405, 406, 408, 410.

Massachusetts urges that a controversy has arisen over the enforcement of the reciprocal provisions of the tax statutes of the two States. It is said that Missouri has enacted reciprocal legislation under which there is exempted from taxation the transfer of intangibles where the transferor at the time of death was a resident of a State which at that time did not impose a transfer or death tax in respect of the intangible property of residents of other States or if the laws of the State of residence contained a reciprocal exemption provision (Missouri Rev. Stat. 1929, c. 1, art. 21, § 576); and that Massachusetts since 1927 (St. 1927, c. 156) has granted complete exemption from the inheritance tax to intangible property not belonging to its inhabitants. Mass. General Laws (Ter. Ed.) c. 65, § 1. The argument is that Massachusetts and its residents are entitled to the immunity offered by the Missouri statute.

But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. 1, § 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation ac-

cording to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legislation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essential character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice.

The suggestion that residents of Massachusetts are entitled to the immunity offered by the Missouri statute is unavailing, as Massachusetts may not invoke our jurisdiction for the benefit of such individuals. *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.,* 220 U. S. 277, 286; *Oklahoma* v. *Cook,* 304 U. S. 387, 394.

Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense (*Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240, 241) and as between the two States there is no such controversy here.

Second.—Complainant urges that jurisdiction may be sustained in the view that the proposed bill of complaint presents a controversy between Massachusetts and citizens of Missouri. The bill is not aptly framed so as to present such a controversy independently of a controversy between the States. The bill expressly states the issues presented as being (a) whether Massachusetts or Missouri has exclusive jurisdiction over the transfers in trust so as to have the taxing power, and (b) secondarily, whether the State having such jurisdiction can constitutionally reach one of the trusts in which the settlor reserved no right of revocation. And the specific relief sought is that the Court may determine which State has the jurisdiction to tax and may award that

jurisdiction to Massachusetts as against Missouri. If the gravamen of the proposed bill is deemed to be an assertion of a controversy between the States, jurisdiction to entertain the bill cannot be supported in the absence of the showing of such a controversy. Missouri cannot be brought into court by the expedient of making its citizens parties to a suit otherwise not maintainable against the State.

With respect to the second ground of invoking jurisdiction, as an independent ground, we are virtually asked to disregard the stated objective of the proposed bill, to treat it as amended so as to expunge claims against Missouri and to confine it to claims against the trustees; to consider the bill as no longer asking a declaratory judgment as to which State has power to tax, as not seeking relief in this Court "sitting as a court of equity," but, in the light of the general prayer for other relief, as presenting a simple action against the trustees to recover the amount of the tax claimed to be due Massachusetts irrespective of any claim of Missouri.

If it be possible to consider the proposed bill as thus stripped of its abortive allegations against Missouri and as presenting a cause of action so distinct from that primarily relied upon, still the invocation of our jurisdiction must fail. In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection. In *Oklahoma* v. *Cook, supra,* we called attention to the enormous burden which would be imposed upon this Court if by taking title to assets of insolvent state institutions, including claims against citizens of other States, a State could demand access to the origi-

nal jurisdiction of this Court to enforce such claims. To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. We have observed that the broad statement that a court having jurisdiction must exercise it (see *Cohens* v. *Virginia,* 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130, 131. Grounds for justifying such a qualification have been found in "considerations of convenience, efficiency and justice" applicable to particular classes of cases. *Rogers* v. *Guaranty Trust Co., supra.* Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States.

In this instance it does not appear that Massachusetts is without a proper and adequate remedy. Clause 2 of § 2 of Article III merely distributes the jurisdiction conferred by clause one. *Louisiana* v. *Texas,* 176 U. S. 1, 16; *Monaco* v. *Mississippi,* 292 U. S. 313, 321. The original jurisdiction of this Court, in cases where a State is a party, "refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of

the federal Courts; not to those cases in which an original suit might not be instituted in a federal Court." *Cohens* v. *Virginia, supra,* pp. 398, 399. With respect to the character of the claim now urged, we are not advised that Missouri would close its courts to a civil action brought by Massachusetts to recover the tax alleged to be due from the trustees. The Attorney General of Missouri at this bar asserts the contrary. He says that "it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes in either a Missouri state court or in a federal district court in Missouri" and that "such a suit would be of a civil nature and would present a justiciable case or controversy." We have said that the objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes, is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes "not to the jurisdiction but to the merits," and raises a question which district courts are competent to decide. *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 272.

The motion for leave to file the proposed bill of complaint is denied.

Motion denied.

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

PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE, *v.* HOME OWNERS' LOAN CORP.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 10. Argued October 12, 13, 1939.—Decided November 6, 1939.

1. The Maryland tax on mortgages, graded according to the amount of the loan secured and imposed in addition to the ordinary registration fee as a condition to the recordation of the instrument, can not be applied to a mortgage tendered for record by the Home Owners' Loan Corporation and securing one of its loans, in view of the provisions of the Home Owners' Loan Act which declare the Corporation to be an instrumentality of the United States and that its loans shall be exempt from all state and municipal taxes. *Federal Land Bank* v. *Crosland*, 261 U. S. 374. P. 29.
2. Assuming that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the power of Congress, the activities of the Corporation through which the Government lawfully acts must be regarded as governmental functions and entitled to whatever immunity attaches to those functions when performed by the Government itself through its departments. P. 32.

   The power of Congress to create a corporation to facilitate the performance of governmental functions implies a power to protect the operations thus validly authorized, which comes within the range of the express power conferred by Const. Art. I, § 8, cl. 18, to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the Government. In the exercise of this power to protect, Congress has the dominant authority which necessarily inheres in its action within the national field.

175 Md. 512; 2 A. 2d 689, affirmed.

CERTIORARI, 306 U. S. 628, to review a judgment affirming the issuance of a mandamus by Baltimore City Court requiring the Clerk of the Superior Court of Baltimore to record a mortgage.

Messrs. H. Vernon Eney, Assistant Attorney General of Maryland, and *William C. Walsh*, Attorney General,

with whom *Mr. William L. Henderson,* Deputy Attorney General, was on the brief, for petitioner.

The tax is uniform and does not discriminate against the Corporation or the United States.

The tax is not a burden on the Corporation since it could be, and customarily is, paid by the mortgagor.

If the tax is paid by the mortgagor, the effect on the Corporation of collecting the tax from the mortgagor, and the slight increase in the cost of its operations which this might entail, are so speculative, remote and uncertain as to constitute no burden at all in the constitutional sense. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Union Pacific Railroad* v. *Peniston,* 18 Wall. 5, 30; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523-524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391–392; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325, 327–328; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 127; *United States* v. *California,* 297 U. S. 175. In all of these cases the Court has avoided an extension of immunity from tax for fear of crippling the taxing power of either the States or the Federal Government.

The immunity exists only to the extent necessary to prevent undue interference with the operations of the Federal Government. The tax must have a direct and immediate effect upon the operations of the governmental instrumentality; it must restrict, retard, impede or obstruct its activities.

We rely upon *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Silas Mason Co.* v. *State Tax Commission,* 302 U. S. 186; *Atkinson* v. *State Tax Commission,* 303 U. S. 20; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376; *Helvering* v. *Gerhardt,* 304 U. S. 405; *Allen* v. *Regents of University System of Georgia,* 304 U. S. 439; and *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

From a reading of these cases it is clear that the present tendency is to scrutinize any claim to immunity and allow it only when it is abundantly clear that, otherwise, an unreasonable burden would be imposed on a governmental agency. This is particularly true where immunity would result in a benefit to a private person, but where the burden, if any, on the governmental agency is remote and speculative.

The activities of this Corporation are such that this non-discriminatory tax, laid upon it as well as upon private agencies operating in the money lending field, would not retard, impede or obstruct the operations of the Corporation. *South Carolina* v. *United States,* 199 U. S. 437; *Allen* v. *Regents of University System of Georgia,* 304 U. S. 439.

The distinction drawn, in the case of state agencies, between those exercising proprietary functions and those exercising governmental functions seems to come to no more than this: In the one case it is not necessary to inquire whether a particular federal tax is or is not a burden, for there is no implied constitutional immunity. On the other hand, if a state agency is exercising a governmental function, there is immunity from a tax which is found upon inquiry to impose a direct and palpable burden. The only difference to be noted in dealing with federal agencies is that the Court does not consider that any of them may not be governmental and hence it is necessary in each case to inquire whether or not the state tax in fact does impose a direct and palpable burden upon the federal agency.

Even though the Home Owners' Loan Corporation is a governmental agency, it is still necessary to determine whether or not the challenged tax imposes a direct and palpable burden upon the federal agency, so as to retard, obstruct or impede it in the performance of the functions delegated to it by Congress. The nature of those func-

tions must be examined, and the benefit to be derived from immunity weighed against the detriment to the State, which is coöperating with the Federal Government in the attainment of common governmental ends.

We can not close our eyes to the fact that the Federal Government is daily broadening the sphere of its activities. It is constantly setting up agencies which compete with private agencies engaging in similar activities. Carried far enough, an immunity from tax would deprive the States of their sources of revenues. This is not necessary for the protection of the Federal Government in the performance of the functions delegated to it by the Constitution.

The Home Owners' Loan Act of 1933 does not purport to confer upon the Corporation an immunity from the Maryland tax.

If construed to confer that immunity it is, to that extent, unconstitutional and void. Congress has no power to confer upon agencies of the Federal Government an immunity from state taxation which is broader and more extensive than the implied constitutional immunity. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

Assuming that Congress has the power to authorize the creation of the Home Owners' Loan Corporation to assist needy home owners by refinancing mortgages on their homes, it is, we submit, clear that an immunity from the Maryland recordation tax is not necessary or needful to protect the agency in the performance of that function. If an immunity from taxation is necessary to protect a federal agency in the performance of a governmental function devolved upon it by Act of Congress, then any tax which interferes with the performance of the function constitutes a burden upon the federal agency. If so, there is an implied constitutional immunity from the tax. On the other hand, if the tax does not so interfere, then

it constitutes no burden on the agency and there is no implied constitutional immunity from the tax. But in this event there would be no necessity for an immunity to protect the federal agency in the performance of its governmental functions, and it would therefore not be necessary for Congress to grant such an immunity in order to enable the federal agency to carry on its activities. If there is no such necessity, then clearly the power to grant immunity from tax could not be derived from the implied power of Congress "to do whatever is needful or appropriate to carry out the powers delegated to it by the Federal Constitution."

The idea that the Congress has some power, the limits of which are not defined, to grant an immunity from a tax broader than the implied constitutional immunity, is without foundation. In other words, if we concede the power of Congress to grant to a governmental agency whatever tax immunity is necessary to protect and safeguard that agency in the performance of the governmental functions delegated to it by Congress, we merely concede the implied constitutional immunity from substantial interference. If we go beyond this, then we must say that the Congress has the power to grant not merely an immunity necessary to protect the agency in the performance of its governmental functions, but an unlimited immunity. Such a rule would have disastrous consequences.

A statutory declaration of immunity may therefore be treated as an expression of congressional opinion as to the necessity for immunity, or as negativing any implication of a waiver of the immunity by Congress, or both. But beyond this point we submit that the question of whether immunity exists in any particular case depends upon whether it can be implied from the Constitution, and in every case this is a judicial and not a legislative question.

Solicitor General Jackson, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key, Warner W. Gardner, Berryman Green,* and *Harold Lee* were on the brief, for respondent.

Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended. It follows that the Corporation shares the full immunity from state taxation which attaches to the operations of the United States. Its functions are necessarily "governmental," since they are in exercise of the delegated powers of the Federal Government. Since it is wholly owned and controlled by the Government, its corporate organization does not affect the governmental nature of its activities. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 477.

Congress has full power to determine whether the recordation of these mortgages should be exempt from or subject to state taxation; and the question of tax immunity or liability is simply one of Congressional intent. *Helvering* v. *Gerhardt,* 304 U. S. 405, 411–412. Such was the decision in *Federal Land Bank* v. *Crosland,* 261 U. S. 374.

The laws of the United States are declared by the Constitution to be "the supreme law of the land." If Congress had expressly declared that the recordation of these mortgages should be exempt from state taxation the Maryland tax would fall, since the provision could not be declared to have no reasonable relationship to the ends promoted by the Corporation.

The doctrine of immunity of federal instrumentalities from state taxation was developed simply as an attribute of the supremacy clause of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316, 426, 427, 433. Not until *Collector* v. *Day,* 11 Wall. 113, did the Court ascribe immunity to the more nebulous implications of a federated constitution. But even after that decision, and notably

of late, the Court has continued to recognize the historic and specific basis for federal tax immunity. Thus, Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach. In other cases, the Court has recognized the power of Congress to create an immunity for private persons who dealt with the Government and have held the taxpayer liable because Congress had provided no such immunity; correlatively, the Court has extended immunity to such private persons because Congress had declared that they should not be subject to state taxation. With these broad powers as to the tax immunity even of private persons, simply because they deal with the United States, it follows *a fortiori* that Congress has full power to provide either tax immunity or liability for the property and operations of the Government itself.

The ultimate incidence of a tax can not ordinarily be determined with categorical exactness. In the case of the Maryland tax here involved, it is wholly impossible to determine on *a priori* grounds whether the economic burden will ultimately rest upon the Corporation or upon its borrowers. Even if the tax could be precisely allocated, it is impossible to measure the extent to which it is an interference with the governmental functions of the Corporation in providing credit relief for distressed home owners. The decision of these questions, impossible of exact answer, is committed to Congress alone.

The Constitution, in giving to Congress this power, has not placed the States in jeopardy. From the beginning it has been recognized that Congress, by its very nature, represented the interests of the States as well as those of the National Government. *McCulloch* v. *Maryland,* 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416. And in practice, Congress has many times waived an immunity which otherwise would attach to federal instrumentalities; indeed, in the last three

Congresses some thirty-two statutes contain such a waiver.

The question, therefore, is simply one of Congressional intention. No private person should be exempt from non-discriminatory taxation simply because he deals with the Government; but the Government itself should not in the absence of a clear consent be forced to account to the tax collector of a State. It would be anomalous for the operations of the United States, buttressed by the supremacy clause, to be subject to a compulsory exaction by an independent sovereign. The delay and accounting burdens, the necessity of opening the Government's books to numerous tax officials, and the burden of numerous and protracted suits, would combine to impose a staggering obstacle to the efficient conduct of the nation's business, which reaches into every taxing jurisdiction in the United States.

It is, we believe, because of these considerations that so marked a contrast appears in the decisions of this Court which deal, on the one hand, with the tax immunity of private persons and, on the other hand, with that of the Government itself. Because of the strong reasons for such an immunity and because of the unbroken consistency of the decisions of this Court, Congress can be taken to have intended a different rule only when the waiver of immunity is clear. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, dealt with the immunity of a private person from taxation simply because he chanced to deal with the Government.

Section 4 (c) of the Home Owners' Loan Act of 1933 contains nothing to destroy this normal implication of immunity; on the contrary its language points with compelling force to a Congressional desire for immunity. The fragmentary legislative history points to a similar conclusion. Cf., *Baltimore National Bank* v. *Tax Commission,* 297 U. S. 209.

The omission of a specific exemption for mortgages, found in the Federal Farm Loan Act and relied upon in *Federal Land Bank* v. *Crosland,* 261 U. S. 374, indicates no desire to waive their immunity.

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

The Home Owners' Loan Corporation brought this proceeding in the Baltimore City Court for a writ of mandamus requiring the Clerk of the Superior Court of Baltimore to record a mortgage executed to the Corporation upon the payment of the ordinary recording charge and without affixing stamps for the state recording tax. Demurrer to the petition was overruled, the Clerk did not avail himself of the opportunity to answer, and mandamus was granted. The order was affirmed by the Court of Appeals. 175 Md. 512; 2 A. 2d 689. We granted certiorari. 306 U. S. 628.

The Maryland statute imposes a tax upon every mortgage, recorded or offered for record, at the rate of ten cents for each $100, or fraction thereof, of the principal amount of the debt secured by the mortgage.[1] As the Home Owners' Loan Corporation is expressly declared to be an instrumentality of the United States (Home

[1] The Act provides for a "Tax on the Recordation of Instruments in Writing" as follows:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of

Owners' Loan Act of 1933, c. 64, 48 Stat. 128) and the mortgage was acquired in that capacity, the Court of Appeals held the tax as thus applied to be invalid.

The court relied upon our decision in *Federal Land Bank* v. *Crosland,* 261 U. S. 374. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of 1916 provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. 360, 380. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the State.

Petitioner suggests that the *Crosland* case may be distinguished; that the Alabama tax was imposed on the lender, whereas the Maryland tax is on the privilege of recording the instrument and the statute is silent as to

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mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction."

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt."

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record." Acts of 1937, Chap. 11, Code of Maryland, Art. 81, § 213.

The same Act, in § 214, provides for the affixing of stamps to cover the tax and makes it unlawful for any person to record any written instrument without providing for the payment of the tax, as stated.

the one who shall pay the tax; also that the Federal Farm Loan Act expressly declared the mortgages of Federal Land Banks to be instrumentalities of the Federal Government. The Court of Appeals thought these differences to be immaterial. As to the first, the court rightly observed that in the *Crosland* case the provision for the payment of tax by the lender was regarded as having no determining significance. We said that "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States." 261 U. S., pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is graded according to the amount of the loan,[2] and the condition attached to the registration is a practical method of collection. The recording sought was for the protection of the interest of the Home Owners' Loan Corporation. In fact, the mortgage in the instant case was offered for record by the Corporation and the tax was demanded from the Corporation.

The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides[3] that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is "*loans.*" We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation "shall be secured by

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[2] See Note 1.

[3] Section 4 (c) of the Home Owners' Loan Act provides: "The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or

a duly recorded home mortgage." [4] Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland* case.

Alive to this consideration, petitioner advances a broader contention, asking us to review and overrule the *Crosland* decision as being out of harmony with correct principle. Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot "grant an immunity of greater extent than the constitutional immunity."

We assume here, as we assumed in *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, 422; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 208, 209; *Graves v. New York ex rel. O'Keefe, supra.* Congress has not only the power to create a corporation to facilitate the performance of gov-

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by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed." 48 Stat. 128, 130; 12 U. S. C. 1463.

[4] § 4 (e) (f); 48 Stat. 131; 12 U. S. C. 1463 (e) (f).

ernmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve." *McCulloch* v. *Maryland, supra,* p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. *The Shreveport Case,* 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., *Bank* v. *Supervisors,* 7 Wall. 26, 31; *Choate* v. *Trapp,* 224 U. S. 665, 668, 669; *Smith* v. *Kansas City Title Co., supra,* p. 207; *Trotter* v. *Tennessee,* 290 U. S. 354, 356; *Lawrence* v. *Shaw,* 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

The judgment of the state court is

Affirmed.

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

STANDARD BRANDS, INC., *v.* NATIONAL GRAIN YEAST CORP.

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

No. 9. Argued October 12, 1939.—Decided November 6, 1939.

1. Patent No. 1,449,103, to Hayduck, for a process of propagating yeast in a nutrient solution, with aeration, and neutralization of excess of the acidity liberated from the components of the solution, is invalid for want of invention over the prior art. P. 36.
2. Patent No. 1,449,105, to Hayduck, for a process of propagating yeast with a relatively low yield of alcohol by initiating the propagation in a highly diluted portion of the wort, aerating that portion, and adding during the period of propagation the wort of higher concentration at a rate such that the concentration of the diluted wort remains substantially constant, whereby substantially all of the alcohol which may be formed is assimilated,—is invalid for want of sufficient disclosure. P. 37.
3. Patent No. 1,449,106, to Hayduck for a combination of the processes of the above-mentioned two patents is likewise invalid—the combination requires nothing beyond the skill of the art. P. 38.

101 F. 2d 814, affirmed.

CERTIORARI, 306 U. S. 627, to review a judgment holding three patents invalid on an appeal from a decree of the District Court by which one of them was adjudged valid and the others not, 21 F. Supp. 46.

Mr. Leonard A. Watson, with whom *Mr. Clair V. Johnson* was on the brief, for petitioner.

Mr. Stephen H. Philbin for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The order which granted this Writ limits our consideration to the validity of Hayduck patents Nos. 1,449,103, 1,449,105, 1,449,106. They relate to processes for manu-

facturing baker's yeast and are owned by the petitioner. It will be convenient to designate them by the last three figures of their office numbers—103, 105, 106.

All three patents were declared invalid by the Circuit Court of Appeals below, 101 F. 2d 814. In the District Court for New Jersey, 103 had been adjudged valid; 105 and 106 invalid, 21 F. Supp. 46.

The District Court for Maryland in two causes, (Soper, J.), held the patents valid, *Fleischman Yeast Co.* v. *Federal Yeast Corp.*, 8 F. 2d 186, *Standard Brands, Inc.* v. *Federal Yeast Corp.*, 38 F. 2d 329. The Circuit Court of Appeals, Fourth Circuit, affirmed the judgment sustaining 103, *Federal Yeast Corp.* v. *Fleischmann Co.*, 13 F. 2d 570. The parties arrived at a settlement and no appeal was taken from the second judgment.

Much has been written relative to these patents in the carefully prepared opinions referred to above. They adequately reveal the facts and points of law incident to the prolonged disputation. Irreconcilable views have been approved and we must now decide which is to be preferred.

"Yeast is a small cellular micro-organism. In its ordinary significance, it is a conglomerate mass of infinitesimally small cells. It multiplies by self propagation, limited by the means of subsistence, and the quality and yield are greatly affected by the conditions under which propagation is carried on. Yeast has been manufactured for at least 50 years by inoculating a wort; that is, by preparing a clear liquid solution and stocking it with a small amount of seed yeast. Such worts include substances to nourish the yeast cells, and are called yeast nutrient solutions. . . . The field for investigation and improvement has been the composition of the nutrient solution, and the character of the process employed during the period of growth."

Nutrient solutions often contain inorganic salts which are broken down through the growth of the seed yeast. Commonly, this brings about marked acidity. Growth progresses best in a slightly acid wort; over-acidity retards or destroys it; aeration of the wort accelerates growth.

The amount of alcohol consequent upon the growth of yeast cells has direct relation to the concentration of the wort. When intensified the yield of alcohol increases; when lowered there is less.

Generally: Patent 103 proposes to neutralize any deleterious acidity in a wort which contains inorganic salt by adding an antacid material; patent 105 requires the addition of nutrients during the growth of the yeast "at a rate such that the yeast may propagate and substantially all of the alcohol which may be formed is assimilated by the yeast"; patent 106 combines the neutralization idea of 103 with the rate of feed proposed by 105.

Claim No. 1 of patent 103, typical of all, follows—

"The process of manufacturing yeast which comprises preparing a yeast nutrient solution and propagating yeast therein with aeration, said yeast nutrient solution containing essentially sugar material and yeast nourishing inorganic salts from which components are liberated which tend increasingly to acidify the nutrient solution during propagation, and during the period of propagation neutralizing the deleterious excess of such acidity."

In respect of this petitioner's counsel maintain—

"It covers, rather, the integral coordination of propagating yeast with aeration in a prepared solution containing essentially sugar material and yeast nourishing inorganic salts from which results an increasing acidification tending to become deleterious, and neutralizing the *deleterious excess* of such acidity in the solution while the yeast propagation is being conducted."

The Circuit Court of Appeals below declared—

"We think that it cannot be denied that the use of antacid or basic materials as neutralizers for acidity in respect to yeast is old in the art. . . . We think that Hayduck has simply set forth a technique which is useful in the manufacture of yeast under modern methods. Hayduck's disclosures do not attain to the dignity of invention. His process is the result of the exercise of the skill of the calling, the application of an old principle to a similar or analogous subject with no change in the manner of application and without any substantially different result."

And it accordingly held patent 103 invalid for want of invention over the prior art.

Considering all the circumstances and notwithstanding the very forceful arguments to the contrary, we think this must be accepted as the better view.

Claim No. 10, typical of patent 105, follows—

"A process of propagating yeast with a relatively low yield of alcohol which comprises, preparing a wort containing all essential yeast nutrients in solution, initiating propagation of yeast in a highly diluted portion of said wort, aerating the diluted portion, and substantially continuously adding during the period of propagation, the wort of higher concentration at a rate such that the concentration of the dilute wort remains substantially constant, whereby substantially all of the alcohol which may be formed is assimilated."

Of this patent counsel for petitioner say—

It "is directed particularly to this procedural or manipulative, rather than chemical, aspect of the operation; i. e., a division of the wort into two parts with propagation begun in a diluted fraction and the gradual feeding in of the concentrated reserve as stated. By adopting this perfected process, the yield of yeast was still further

increased and there were also other accompanying advantages in shortened time from commencement of the yeast propagation to the harvesting of the yeast crop and in enhanced quantity of output from a given sized apparatus."

The Circuit Court of Appeals below declared—

"It was well known to the prior art that if the creation of alcohol was not desired the nutrient solution should contain a low concentration of sugar. . . . In our opinion the process described by Hayduck may constitute a mechanical improvement over the prior art but it is no more than this. But even if the process disclosed by Hayduck be held to constitute invention, the patent is invalid for indefiniteness as was held by the learned District Judge. Both the times and manner in which the concentrated nutrient solution is to be added may be ascertained as we have stated solely by experimentation. The disclosure of the patent is therefore too vague and indefinite to constitute invention."

With this conclusion we agree.

As to patent 106 counsel have stipulated—

"The process of this patent is one combining the process of patent '103, including neutralization, and the process of patent '105, including regulated nutrient feed."

Since patent No. 103 is invalid for lack of invention and No. 105 invalid because the disclosure is too vague and indefinite, a claim for patent based upon the mere union of the two processes described therein cannot be sustained where, as here, the proposed combination requires nothing beyond the skill of the art.

The challenged decree must be

Affirmed.

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

ESTATE OF SANFORD *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 34. Argued October 18, 19, 1939.—Decided November 6, 1939.

1. A gift in trust with reservation of power in the donor to alter the disposition of the property in any way not beneficial to himself, is incomplete and does not become subject to gift tax under the Revenue Act of 1924, § 319, so long as the donor retains that power. P. 41.
2. The federal gift tax is supplementary to the estate tax; the two are *in pari materia* and must be construed together. P. 42.

   An important purpose of the gift tax was to prevent, or compensate for, avoidance of death taxes. P. 44.
3. The gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete. P. 45.
4. Transfers in trust, not taxable as gifts because the donor has reserved power to change the beneficiaries, become subject to death taxes when he dies. P. 46.
5. Art. I of Treas. Reg. 67, under the Revenue Act of 1924, was not directed at relinquishments of reserved power to select new beneficiaries other than the donor and did not purport to govern cases of reserved power different from or in addition to the power to revest the title in the donor. P. 48.

   At most the regulation is ambiguous and not persuasive in determining the true construction of the statute.
6. Art. III, Reg. 79, amendment of 1936 under the Revenue Act of 1932, which declares that a gift is complete and subject to tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself," is by its terms applicable only to gifts made after June 6, 1932, and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act. P. 49.
7. A stipulation purporting to reveal the administrative practice in applying the gift tax law, *held* too vague and indefinite to afford basis for a judicial construction of the statute. P. 49.

8. A stipulation as to questions of law can not bind the Court. P. 51.
9. Administrative practice may be persuasive in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with decisions of the courts as to produce inconsistency and confusion in the administration of the law. P. 52.

But the Court does not give effect to an unpublished administrative construction on which taxpayers have not relied, which conflicts with its own decisions and with a later administrative practice conforming to lower court rulings.

10. The reënactment of the gift tax statute of 1924 by the Revenue Act of 1932 was not a legislative approval of an administrative practice which had not been disclosed by Treasury Regulation, ruling or decision, and which does not appear to have been established before the adoption of the later Act. P. 53.

103 F. 2d 81, affirmed.

CERTIORARI, 307 U. S. 618, to review a judgment which sustained a decision of the Board of Tax Appeals affirming a deficiency assessment based on the gift tax provision of the Revenue Act of 1924.

Mr. Montgomery B. Angell, with whom *Messrs. John W. Davis, Otis T. Bradley, William A. Carr,* and *Marvin Lyons* were on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Richard H. Demuth* were on the brief, for respondent.

By leave of Court, *Messrs. Beverley R. Robinson, E. N. Perkins,* and *Weston Vernon, Jr.* filed a brief, as *amici curiae,* urging reversal.

MR. JUSTICE STONE delivered the opinion of the Court.

This and its companion case, *Rasquin* v. *Humphreys, post,* p. 54, present the single question of statutory construction whether in the case of an *inter vivos* transfer of property in trust, by a donor reserving to himself the

power to designate new beneficiaries other than himself, the gift becomes complete and subject to the gift tax imposed by the federal revenue laws at the time of the relinquishment of the power. Corelative questions, important only if a negative answer is given to the first one, are whether the gift becomes complete and taxable when the trust is created or, in the case where the donor has reserved a power of revocation for his own benefit and has relinquished it before relinquishing the power to change beneficiaries, whether the gift first becomes complete and taxable at the time of relinquishing the power of revocation.

In 1913, before the enactment of the first gift tax statute of 1924, decedent created a trust of personal property for the benefit of named beneficiaries, reserving to himself the power to terminate the trust in whole or in part, or to modify it. In 1919 he surrendered the power to revoke the trust by an appropriate writing in which he reserved "the right to modify any or all of the trusts" but provided that this right "shall in no way be deemed or construed to include any right or privilege" in the donor "to withdraw principal or income from any trust." In August, 1924, after the effective date of the gift tax statute, decedent renounced his remaining power to modify the trust. After his death in 1928, the Commissioner following the decision in *Hesslein* v. *Hoey,* 91 F. 2d 954, in 1937, ruled that the gift became complete and taxable only upon decedent's final renunciation of his power to modify the trusts and gave notice of a tax deficiency accordingly.

The order of the Board of Tax Appeals sustaining the tax was affirmed by the Court of Appeals for the Third Circuit, 103 F. 2d 81, which followed the decision of the Court of Appeals for the Second Circuit in *Hesslein* v. *Hoey, supra,* in which we had denied certiorari, 302 U. S. 756. In the *Hesslein* case, as in the *Humphreys* case now

before us, a gift in trust with the reservation of a power in the donor to alter the disposition of the property in any way not beneficial to himself, was held to be incomplete and not subject to the gift tax under the 1932 Act so long as the donor retained that power.

We granted certiorari in this case, 307 U. S. 618, and in the *Humphreys* case, *id.* 619, upon the representation of the Government that it has taken inconsistent positions with respect to the question involved in the two cases and that because of this fact and of the doubt of the correctness of the decision in the *Hesslein* case decision of the question by this Court is desirable in order to remove the resultant confusion in the administration of the revenue laws.

It has continued to take these inconsistent positions here, stating that it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected. It argues in this case that the gift did not become complete and taxable until surrender by the donor of his reserved power to designate new beneficiaries of the trusts. In the *Humphreys* case it argues that the gift upon trust with power reserved to the donor, not afterward relinquished, to change the beneficiaries was complete and taxable when the trust was created. It concedes by its brief that "a decision favorable to the government in either case will necessarily preclude a favorable decision in the other."

In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 *et seq.* of the Revenue Act of 1924, 43 Stat. 253, reënacted as § 501 *et seq.* of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax

was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. See *Burnet* v. *Guggenheim,* 288 U. S. 280, 287. Following the enactment of the gift tax statute this Court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (1929) held that the relinquishment at death of a power of revocation of a trust for the benefit of its donor was a taxable transfer, cf. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; and similarly in *Porter* v. *Commissioner,* 288 U. S. 436 (1933), that the relinquishment by a donor at death of a reserved power to modify the trust except in his own favor is likewise a transfer of the property which could constitutionally be taxed under the provisions of § 302 (d) of the 1926 Revenue Act (reënacting in substance 302 (d) of the 1924 Act) although enacted after the creation of the trust. Cf. *Bullen* v. *Wisconsin,* 240 U. S. 625; *Curry* v. *McCanless,* 307 U. S. 357; *Graves* v. *Elliott,* 307 U. S. 383. Since it was the relinquishment of the power which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. Cf. *Nichols* v. *Coolidge,* 274 U. S. 531; *Helvering* v. *Helmholz,* 296 U. S. 93, 98.

The rationale of decision in both cases is that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed" (see *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Saltonstall* v. *Saltonstall, supra,* 261; *Burnet* v. *Guggenheim, supra,* 287) and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms

so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim, supra,* 286. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.[1]

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[1] The gift tax provisions of the Revenue Act of 1924 were added by amendments to the revenue bill introduced on the floor of the House and the Senate. Cong. Rec., Vol. 65, Part 3, pp. 3118–3119; Part 4, pp. 3170, 3171; Part 8, p. 8094. The sponsor of the amendment in both houses urged the adoption of the bill as a "corollary" or as "supplemental" to the estate tax. Cong. Rec., Vol. 65, Part 3, pp. 3119–3120, 3122; Part. 4, p. 3172; Cong. Rec., Vol. 65, Part 8, pp. 8095, 8096.

The gift tax of 1924 was repealed when Congress, concurrently with the enactment of § 302 (c) of the Revenue Act of 1926, 44 Stat. 70, 125, 126, establishing a conclusive presumption that gifts within two years of death were made in contemplation of death and therefore subject to the estate tax. A gift tax was reënacted by § 501 of the Revenue Act of 1932, 47 Stat. 169, shortly after it was decided in *Heiner* v. *Donnan,* 285 U. S. 312, that the legislative enactment of such a presumption violated the Fifth Amendment.

Section 322 of the 1924 Act provides that when a tax has been imposed by § 319 upon a gift, the value of which is required by any provision of the statute taxing the estate to be included in the gross estate, the gift tax is to be credited on the estate tax. The two taxes are thus not always mutually exclusive as in the case of gifts made in contemplation of death which are complete and taxable when made, and are also required to be included in the gross estate for purposes of the death tax. But § 322 is without application unless there is a gift *inter vivos* which is taxable independently of any requirement that it shall be included in the gross estate. Property transferred in trust subject to a power of control over its disposition reserved to the donor is likewise required by § 302(d) to be included in the gross estate. But it does not follow that the transfer in trust is also taxable as a gift. The point was decided in the *Guggenheim* case where it was held that a gift upon trust, with power in the donor to revoke it is not taxable as a gift because the transfer is incomplete, and that the transfer whether *inter vivos* or at death becomes complete and taxable only when the power of control is relinquished. We think, as was pointed out in the *Guggenheim* case, *supra,* 285, that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete.

Section 501 (c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because *Burnet* v. *Guggenheim,* 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess., p. 50.

It is plain that the contention of the taxpayer in this case that the gift becomes complete and taxable upon the relinquishment of the donor's power to revoke the trust cannot be sustained unless we are to hold, contrary to the policy of the statute and the reasoning in the *Guggenheim* case, that a second tax will be incurred upon the donor's relinquishment at death of his power to select new beneficiaries, or unless as an alternative we are to abandon our ruling in the *Porter* case. The Government does not suggest, even in its argument in the *Humphreys* case, that we should depart from our earlier rulings, and we think it clear that we should not do so both because we are satisfied with the reasoning upon which they rest and because departure from either would produce inconsistencies in the law as serious and confusing as the inconsistencies in administrative practice from which the Government now seeks relief.

There are other persuasive reasons why the taxpayer's contention cannot be sustained. By §§ 315(b), 324, and more specifically by § 510 of the 1932 Act, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321(b)(1) exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete, for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust

for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself.

The argument of petitioner that the construction which the Government supports here, but assails in the *Humphreys* case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax.

Nor do we think that the provisions of § 219 (g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees.[2] Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with that contingency in § 219 (g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to "revest in himself title" to the trust property producing the income. Whether this section is to be read as relieving the donor of the income tax where the power reserved is to modify the trust, except for his own benefit, we do not now decide. If Congress, in enacting it, undertook to

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[2] See references to Congressional Record, Footnote 1.

define the extent to which a reserved power of control over the disposition of the income is equivalent to ownership of it so as to mark the line between those cases on the one hand where the income is to be taxed to the donor and those on the other where, by related sections, the income is to be taxed to the trust or its beneficiaries, we do not perceive that the section presents any question so comparable to that now before us as to affect our decision. We are concerned here with a question to which Congress has given no answer in the words of the statute, and it must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death. If Congress, for the purpose of taxing income, has defined precisely the amount of control over the income which it deems equivalent to ownership of it, that definition is controlling on the courts even though without it they might reach a different conclusion, and even though retention of a lesser degree of control be deemed to render a transfer incomplete for the purpose of laying gift and death taxes.

The question remains whether the construction of the statute which we conclude is to be derived from its language and history, should be modified because of the force of treasury regulations or administrative practice. Article I of Regulations 67, under the 1924 Act (adopted without any change of present significance in Article III, Regulations 79, under the 1932 Act) provides that the creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust does not constitute a gift subject to the tax and declares that "where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated." Petitioner urges that

the regulation is in terms applicable to the trust presently involved because it was subject to a power of revocation in favor of the donor before the enactment of the gift tax which was later relinquished. But we think, as the court below thought, that the regulation was not directed to the case of the relinquishment of a reserved power to select new beneficiaries other than the donor and did not purport to lay down any rule for cases where there was a reserved power different from or in addition to the power to revest the title in the donor. At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16, 20. The amended regulation of 1936 under the 1932 Act, Art. III, Reg. 79, removed the ambiguity by declaring that the gift is complete and subject to the tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself." But this regulation is by its terms applicable only to gifts made after June 6, 1932, and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act.

Petitioner also insists that the construction of the statute for which he contends is sustained by the administrative practice. That practice is not disclosed by any published Treasury rulings or decisions and our only source of information on the subject is a stipulation appearing in the record. It states that in the administration of the gift tax under the 1924 and 1932 Acts and until the decision in the *Hesslein* case it was "the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of

the transfer"; and that three hundred cases "of such character" have been closed or adjusted in conformity to this practice.

This definition of the practice appears as a part of a stipulation of facts setting forth in some 126 printed pages the original trust deed of December 24, 1913, and thirteen modifications of it between that date and the final relinquishment of the power of modification on August 20, 1924. They reveal a varied and extensive power of control by the donor over the disposition of the trust property which survived the relinquishment, in 1919, of the power of revocation for his own benefit, and with which he finally parted after enactment of the gift tax. The description of the practice as that resorted to in adjusting "cases of the character of that here involved," presupposes some knowledge on our part of what the signers of the stipulation regarded as the salient features of the present case which, although not specified by the stipulation, were necessarily embraced in the practice. Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision. If relinquishment of the power of revocation mentioned by the stipulation was of controlling significance in defining the practice, that circumstance was not present in the *Hesslein* case or in the *Humphreys* case. Whether in any of the three hundred cases mentioned in the stipulation the relinquishment of the power of revocation was followed by the relinquishment *inter vivos* of a power of changing the beneficiaries like that in this case, does not appear.

Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal

questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 289.

Without attempting to say what the administrative practice has actually been we may, for present purposes, make the assumption most favorable to the taxpayer in this case that the practice was as stated by the Government in its brief in the *Humphreys* case, viz., that until the decision in the *Hesslein* case "the Bureau consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to revest title in himself."

But the record here shows that no such practice was recognized as controlling in 1935 when the present case first received the attention of the Bureau. On February 21, 1935, the Assistant General Counsel gave an opinion reviewing at length the facts of the present case and the applicable principles of law, and concluded on the reasoning and authority of the *Guggenheim* and *Porter* cases that the gift was not complete and taxable until the relinquishment in August, 1924 of the power to modify the trust by the selection of new beneficiaries. In April, 1935, the matter was reconsidered and a new opinion was given which was finally adopted by the Assistant Secretary who had intervened in the case. This opinion reversed the earlier one on the authority of the *Guggenheim* case. It was at pains to point out that in that case the Court had held that the relinquishment of the power of revocation was a taxable gift but it made no mention of the fact that there, unlike the present case, there was no power of modification which survived the relinquishment of the

power of revocation, which was crucial in the *Porter* case. Neither opinion rested upon or made any mention of any practice affecting cases where such a power of modification is reserved. After the decision in the *Hesslein* case the ruling of the Bureau in this case was again reversed and notice of deficiency sent to the taxpayer.

From this record it is apparent that there was no established administrative practice before the opinion of April, 1935,[3] and if the practice was adopted then it was because of a mistaken departmental ruling of law based on an obvious misinterpretation of the decisions in the *Porter* and *Guggenheim* cases.

Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.

But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. See *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468. Here the practice has not been revealed by any published rulings or action of the Department on which taxpayers could have relied. The taxpayers in the present cases are contend-

[3] In the petition for certiorari filed in November, 1937, in *Hesslein* v. *Hoey* (No. 556), the Government asserted that the 300 cases referred to in the stipulation in this case had been decided so recently that the time for filing claims for refunds had not expired.

ing for different rulings. In Harriet Rosenau, 37 B. T. A. 468 (1938), as in the *Humphreys* case, the taxpayer contended that the date when the power to change the beneficiary is renounced is controlling. The petitioner here, who contends that the date of relinquishment of the power of revocation is controlling, rather than the date of surrender of power of modification, set up his trust and relinquished the power of revocation before the gift tax was enacted. The reënactment of the gift tax statute by the 1932 Act can not be said to be a legislative approval of the practice which had not been disclosed by Treasury regulation, ruling or decision, and which does not appear to have been established before the adoption of the 1932 Act. Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468.

The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience, see *Brewster* v. *Gage*, 280 U. S. 327, 336, there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served. If, as we have held, we may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons, see *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16, we should be equally free to reject the practice when it conflicts with our own decisions. A change of practice to conform to judicial decision, such as has occurred since the decision in the *Hesslein* case, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions. *Morrissey* v. *Com-*

missioner, 296 U. S. 344, 354. Here we have an added, and we think conclusive reason for rejecting the earlier practice and accepting the later. The earlier, because in sharp conflict with our own decisions, as we have already indicated, cannot be continued without the perpetuation of inconsistency and confusion comparable to that of which the Government asks to be relieved by our decision.

Affirmed.

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

RASQUIN, COLLECTOR OF INTERNAL REVENUE, *v.* HUMPHREYS.

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

No. 37. Argued October 19, 1939.—Decided November 6, 1939.

1. A gift in trust reserving power in the donor to change the beneficiaries other than himself is incomplete and not subject to be taxed as a gift under the Revenue Act of 1932. *Sanford* v. *Commissioner, ante,* p. 39, followed. P. 55.
2. Article III of Treasury Regulation 79 (1933 ed.), under the Revenue Act of 1932, affords no basis for modification of the above construction of the statute; and the amendment of the regulation in 1936 is so plainly in conflict with the statute as to preclude its application retroactively. *Id.*

101 F. 2d 1012, affirmed.

CERTIORARI, 307 U. S. 619, to review the affirmance of a judgment recovered from the Collector in an action to recover money collected as a gift tax.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Richard H. Demuth* were on the brief, for petitioner.

Mr. Sidney W. Davidson, with whom *Mr. Allin H. Pierce* was on the brief, for respondent.

By leave of Court, *Messrs. Beverley R. Robinson, E. N. Perkins,* and *Weston Vernon, Jr.,* filed a brief, as *amici curiae,* urging reversal.

Mr. Justice Stone delivered the opinion of the Court.

Decision in this case turns on the question, differing only in form from that this day decided in *Sanford* v. *Helvering, ante,* p. 39, whether, in case of an *inter vivos* transfer of property in trust, reserving to the donor power to designate new beneficiaries other than himself, the gift becomes complete at the time of the creation of the trust and subject to the gift tax imposed by the Revenue Act of 1932.

In December, 1934, respondent created a trust of personal property for his own benefit for life, with remainders over to specified classes of beneficiaries. By the trust indenture he reserved to himself a power to change the beneficiaries of the trust and to prescribe the conditions under which the new beneficiaries should take an interest in the trust, but without any power to increase his own beneficial interest in the trust property.

Respondent paid the gift tax assessed against him with respect to the transfer of the remainder interests upon creation of the trust, and brought the present suit in the district court to recover the tax as illegally collected. Judgment in his favor was affirmed by the Circuit Court of Appeals for the Second Circuit, 101 F. 2d 1012, on the authority of *Hesslein* v. *Hoey,* 91 F. 2d 954. We granted certiorari, 307 U. S. 619, so that this case might be considered with the *Sanford* case.

The gift tax, § 319 *et seq.* of the 1924 Act, so far as now material, reappeared in § 501 *et seq.* of the 1932 Act, 47 Stat. 169. Other pertinent provisions of the earlier act

were reënacted without change of present moment in §§ 501, 510, 801. The applicable estate tax provisions are § 302 (c) (d) of the 1926 Act, 44 Stat. 40, 71. Section 501 (c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because *Burnet* v. *Guggenheim,* 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess., p. 50.

For the reasons stated in our opinion in the *Sanford* case we conclude that the reserved power in the donor at the time of the creation of the trust rendered the gift incomplete and not subject to the gift tax. As pointed out in our opinion in the *Sanford* case the Treasury regulation under the 1932 Act, Art. III, Regulation 79 (1933 edition), in force when the trust was created, affords no basis for modification of our construction of the statute. Whatever validity the amended regulation of 1936 may have in its prospective operation, we think it is so plainly in conflict with the statute as to preclude its application retroactively so as to subject to tax such transfer as was made by the creation of the trust in 1934. Cf. *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110.

Affirmed.

Mr. Justice Butler took no part in the consideration or decision of this case.

Counsel for Parties.

BOTELER, TRUSTEE, *v.* INGELS, DIRECTOR OF MOTOR VEHICLES OF CALIFORNIA, ET AL.

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

Nos. 15 and 16. Argued October 16, 1939.—Decided November 6, 1939.

1. Section 57 (j) of the Bankruptcy Act, barring allowance of debts owing to federal, state, or local governments, as penalties, except for the amount of the pecuniary loss sustained etc., prohibits allowance of tax penalties only if incurred by the bankrupt prior to bankruptcy. P. 59.
2. Penalties attaching upon nonpayment of state automobile license taxes, which taxes and penalties accrued while the business of a bankrupt estate was being operated by a trustee in bankruptcy for the purpose of liquidation, are allowable against the bankrupt estate by virtue of the Act of June 18, 1934, which subjects trustees and other appointees of United States courts, who are authorized to conduct a business, "to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. . . ." P. 60.

100 F. 2d 915, affirmed.

CERTIORARI, 307 U. S. 617, to review the reversal of two orders of the District Court, which in effect held a bankrupt estate not liable for penalties accruing upon nonpayment of state automobile license taxes. Appeals from the orders were consolidated for briefing, hearing, and decision in the Circuit Court of Appeals; and the cases are treated similarly here.

Mr. Raphael Dechter, with whom *Messrs. Thomas S. Tobin* and *Joseph J. Rifkind* were on the brief, for petitioner.

Mr. H. H. Linney, Deputy Attorney General of California, with whom *Messrs. Earl Warren,* Attorney General, and *Frank W. Richards,* Deputy Attorney General, were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Under California law vehicle license and registration fees are due the State on January first of each year; they become delinquent when a vehicle is operated without registration and license; if the fees are not paid within thirty days after delinquency a penalty equal to the fees accrues; fees and penalties are protected by statutory lien on the vehicle from the due date.[1]

The single question presented is sufficiently stated by the petition for certiorari:

"Is a bankrupt's estate liable to penalties imposed by state statutes for non-payment of automobile license fees where license fees and penalties claims accrued during operations for purposes of liquidation of the business of bankrupt's estate by the Trustee in Bankruptcy?"

As trustees of a business in bankruptcy, petitioner and his predecessor continuously operated unregistered and unlicensed vehicles on California highways, from January first to February twenty-seventh. Tender of fees without accrued penalties was rejected by California. Upon petition of the trustee, the referee in bankruptcy ordered the vehicles sold free and clear of any claims or liens of the State but permitted California to file claims for fees, without penalties, within thirty days or be forever barred. The referee's order was confirmed by the District Court which also directed California officials (respondents here) to issue licenses to the trustee. The Circuit Court of Appeals reversed, ordering alternatively that accrued fees and penalties be paid, or that the vehicles be disposed of subject to the lien of the State for the unpaid taxes and penalties.[2] Because of asserted conflict with the

[1] c. 362, Calif. Stat. of 1935, p. 1313, as amended. c. 27, Calif. Stat. of 1935, Calif. Vehicle Code, pp. 147, 150, 151.

[2] 100 F. 2d 915. The court below stated that the two cases here reviewed (Nos. 15, 16) "involved the identical facts, were consolidated

Court of Appeals for the Seventh Circuit,[3] we granted certiorari.

The trustee insists that the State is barred from collecting the penalties because of subdivision 57 (j) of the Bankruptcy Act[4] which provides:

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Recognizing that 57 (j) prohibits allowance of tax penalties accruing prior to bankruptcy,[5] the State nevertheless insists that this subdivision does not exempt the trustee from state laws applicable to the business he operates after bankruptcy. California considers the trustee subject to the requirements and penalties of its license and registration laws under an Act of Congress of June 18, 1934, 48 Stat. 993, reading in part as follows:

"Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation; . . . "

First. Subdivision 57 (j) prohibits allowance of a tax penalty against the bankrupt estate only if incurred by the bankrupt before bankruptcy by reason of his own delinquency. After bankruptcy, it does not purport to ex-

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for briefing and hearing and are disposed of in this opinion." We have followed the same course.

[3] *In re Messenger's Merchants Lunch Room,* 85 F. 2d 1002.

[4] c. 6, 11 U. S. C., § 93 (j).

[5] Cf. *New York* v. *Jersawit,* 263 U. S. 493, 496.

empt the trustee from the operation of state laws, or to relieve the estate from liability for the trustee's delinquencies.[6] For 57 (j) is a subdivision of § 57 of the Bankruptcy Act governing "Proof and Allowance of Claims." And 57 (a) makes clear that § 57 as a whole relates only to claims "justly owing from the bankrupt to the creditor." The fees and penalties in issue were incurred by the trustee in operating the bankrupt business, and thus were not owed by the bankrupt to the State as a "creditor." Therefore, regardless of other rights the State might have, it could not file proof of claim for these fees and penalties as a creditor under § 57. And neither the tax liability nor the penalties incurred by the trustee after bankruptcy are governed by this section or its subdivisions. We must look elsewhere than to 57 (j) to determine whether the court below correctly held that California may enforce its statutory penalties against this estate.

Second. The Act of June 18, 1934 declares that a trustee in bankruptcy conducting a business, as this trustee was, "shall . . . be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. . . ." As originally offered, this Act applied only to receivers.[7] Reported by the House Committee on the Judiciary without amendment,[8] the bill was amended on the House floor to apply not only to receivers but to a "liquidator, referee, trustee or other officer or agent."[9]

We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in

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[6] Whether the trustee might be personally surcharged because his refusal to pay the fees subjected the estate to the increased liability of the penalties, is not presented.

[7] Cong. Record, 73rd Cong., 2nd Sess., p. 4037.

[8] *Id.*, p. 6067.

[9] *Id.*, p. 6656.

bankruptcy is operated by a bankruptcy trustee makes the business immune from state laws and valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to state taxes "the same as if such business [es] were conducted by an individual or corporation." If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. However, petitioner's contention would exempt a trustee operating a business in bankruptcy from this double tax liability which other delinquents must bear. A State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment.

Taxation on and regulation of highway traffic are matters of constantly increasing importance and concern to the States. The Act of 1934 indicates a Congressional purpose to facilitate—not to obstruct—enforcement of state laws; the court below correctly recognized and applied this Congressional purpose and its judgment is

Affirmed.

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

UNITED STATES *v.* GLENN L. MARTIN CO.

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

No. 30. Argued October 19, 20, 1939.—Decided November 6, 1939.

1. A contract for sale to the United States of aircraft and aircraft material, contained a provision that the stipulated prices included "any federal tax heretofore imposed by the Congress which is applicable to the material called for" by the contract, and a provision requiring additional compensation to the seller in the event of imposition by Congress subsequent to the date of the contract of any taxes which should be "made applicable directly upon production, manufacture, or sale of the supplies called for herein and are paid by the contractor on the articles or supplies herein contracted for . . ." *Held,* that federal Social Security taxes (subsequently imposed by Congress) were not taxes of such character as required additional compensation to the seller under the terms of the contract. P. 64.
2. It is unnecessary in this case to consider whether a tax paid under a state unemployment compensation statute is a tax "imposed by Congress." P. 66.

100 F. 2d 793, reversed.

CERTIORARI, 307 U. S. 618, to review the reversal of a judgment in favor of the United States in an action against it on a contract, 23 F. Supp. 262.

Assistant Attorney General Clark, with whom *Solicitor General Jackson* and *Messrs. Sewall Key* and *Joseph M. Jones* were on the brief, for the United States.

Mr. John T. Koehler for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

We must determine whether a contract to purchase certain aircraft and aircraft material from respondent required the United States to increase the stipulated

price by the amount of Social Security taxes paid by respondent.

June 28, 1934, the War Department and respondent, a Maryland manufacturer, made the contract, providing—

"It is expressly understood and agreed to by and between the parties hereto that the prices herein stipulated include any Federal Tax heretofore imposed by the Congress which is applicable to the material called for under the terms of this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacture, or sale of the supplies called for herein and are paid by the Contractor on the articles or supplies herein contracted for then the price herein stipulated will be increased or decreased accordingly and any amount due the Contractor as result of such change will be charged to the Government and entered on vouchers as separate items."

With respect to payrolls of employees alleged to have been engaged in fulfilling this contract during 1936 and 1937, respondent paid $794.03 in Federal Social Security taxes and $6,943.29 under the State of Maryland's Unemployment Compensation Law. Both the federal tax and Maryland's tax were levied "subsequent to the date of this contract." Respondent claims that both the Maryland Unemployment Compensation taxes[1] and the federal Social Security taxes[2] were "imposed . . . by . . . Congress" and were of the type for which the contract provided extra compensation.

Rejecting respondent's construction of the contract, the District Court held that no part of the taxes paid by respondent served to increase the liability of the Govern-

[1] Laws of Maryland, extraordinary session, Dec. 1936, c. 1.

[2] 49 Stat. 620, 637.

ment on its contract.[3] The Circuit Court of Appeals reversed [4] and we granted certiorari.[5]

Obviously, the seller fixed its stipulated prices so as to provide a margin of profit over federal taxes for which it might at the time of the contract be responsible on the particular "material" sold. This clearly appears from the governing provision's opening declaration that "the prices herein stipulated include any Federal tax heretofore imposed by Congress which is applicable to the material called for under the terms of this contract." But, without more, future increases in federal taxes "applicable to the material" might have substantially affected the margin of profit which the contract was calculated to insure. Against the contingency of increase in federal taxes applicable to the "material" purchased, the Government undertook to compensate the seller for payment of future federal taxes "on the articles or supplies contracted for" should Congress levy any sales tax, processing tax or other tax "applicable directly upon production, manufacture or sale of the articles . . . contracted for . . ."

But the Social Security Act [6] imposes upon every employer "an excise tax with respect to having individuals

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[3] 23 F. Supp. 262.

[4] 100 F. 2d 793.

[5] 307 U. S. 618. The government's petition for certiorari set out that "Almost all government contracts since 1933 have contained provisions either identical with that here involved, or so similar as to present substantially the same question. . . . The War Department alone . . . states that approximately 4,000 potential claims may arise under contracts with language identical with that in . . . the contract in this case." The Comptroller General of the United States has interpreted a contract substantially identical with the one under consideration as denying reimbursement for Social Security taxes. 16 Comp. Gen. 790 (1937). Certiorari was granted in order to obtain a final determination of the question.

[6] Social Security Act, c. 531, 49 Stat. 620, §§ 804, 210 (b).

in his employ." And employment in that Act "means any service, of whatever nature, performed within the United States by an employee for an employer . . . " with exceptions not material here. This excise has been represented as one levied "upon the relation of employment" [7] and upon "the right to employ" [8] and as a payroll tax.[9] It is not—as taxes upon the privilege of selling, manufacturing or processing characteristically are—measured by the value of the privilege taxed, or by either quantity or price of what is manufactured, processed or sold. A tax on the processing or sale of an article, while an excise, commonly would be denoted a tax "on" the article processed or sold. The contract itself speaks of such taxes which may, in the future, be "paid by the contractor *on* the articles or supplies contracted for." (Ital. supp.) Thus, this contract was concerned with federal taxes "on" the goods to be provided under it, whatever the occasion for the taxes. And a tax "on" the relationship of employer-employee—characterized as a tax on payrolls—is not of the type treated by the contract as a tax "on" the goods or articles sold.

The contract refers only to federal taxes, existing or future, on "material," "articles" or "supplies." And additional compensation is provided to offset only federal taxes of the type of sales taxes and processing taxes, "applicable directly upon production, manufacture, or sale" and actually paid on supplies delivered to the Government. Since a tax on payrolls, or on the relationship of employment, is not—but in fact is distinct from—the type of tax "on" articles represented by sales taxes and processing taxes, respondent is not entitled to the additional compensation which it seeks.

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[7] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578.

[8] See, *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508.

[9] *Id.*, 506, 511.

In view of our determination that the federal Social Security tax was not contemplated by the contract, we need not discuss respondent's contention that the tax paid under the Maryland Unemployment Compensation Act was a tax "imposed . . . by . . . Congress."

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

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

TREINIES *v.* SUNSHINE MINING CO. ET AL.

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

No. 4. Argued October 10, 1939.—Decided November 6, 1939.

1. This Court inquires *sua sponte* into the question of the federal court's jurisdiction of this case under the Interpleader Act of January 20, 1936, since its own jurisdiction is affected thereby. P. 70.
2. A bill interpleading one group of claimants, all of whom are citizens of the same State, and another group claiming adversely, all of whom are citizens of another State, of which latter State the complainant himself is a citizen, satisfies the requirements of the Interpleader Act as to diversity of citizenship, since the Act requires diversity only as between the claimants. P. 70.
3. Art. III, § 2 of the Federal Constitution, extending the judicial power of the United States to controversies "between citizens of different States," is broad enough to authorize the granting of jurisdiction to the federal court in such a case of interpleader. P. 71.
4. The Eleventh Amendment is not infringed by joinder of a state court judge and a state court receiver as defendants in an interpleader proceeding in the federal court, in which proceeding the State has no interest and neither the judge nor the receiver is enjoined by the final decree. P. 74.

5. The authority of the federal court under the Interpleader Act to enjoin parties to the proceeding from further prosecuting any suit in any state or federal court in respect of the property involved, is essential to the interpleader jurisdiction and is a valid exercise of the judicial power. Section 265 of the Judicial Code—an earlier statute—forbidding the federal courts from staying proceedings in any state court, is inapplicable. P. 74.
6. A final decree of an Idaho state court of general jurisdiction in a suit to determine the ownership of personal property, awarding the property to the plaintiff and holding that a probate court of Washington which had awarded the property to another, under whom the defendant claimed, was without jurisdiction of the subject matter, *held*, as to the issue of the jurisdiction of the state courts, *res judicata* in a proceeding in the federal court interpleading the same plaintiff and defendant in respect of the same property. Pp. 75, 78.

99 F. 2d 651, affirmed.

CERTIORARI, 306 U. S. 624, to review the affirmance of a decree, 19 F. Supp. 587, adverse to the petitioner here, in a proceeding under the Interpleader Act. In an earlier phase of the controversy, certiorari to review a decree of the Supreme Court of Idaho, 57 Idaho 10; 59 P. 2d 1087, was denied by this Court, 299 U. S. 615.

Mr. Thomas D. Aitken for petitioner.

Mr. C. W. Halverson, with whom *Mr. Nat U. Brown* was on the brief, for the Sunshine Mining Co., respondent.

Mr. Richard S. Munter, with whom *Mr. Lester S. Harrison* was on the brief, for Katherine Mason et al., respondents.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari was granted to review the action of the Court of Appeals for the Ninth Circuit in affirming [1] a decree of the District Court of Idaho [2] upon a bill

[1] 99 F. 2d 651.

[2] 19 F. Supp. 587.

of interpleader filed by the Sunshine Mining Company, a Washington corporation, against Evelyn H. Treinies and other citizens of the State of Washington, claimants to certain stock of the Sunshine Mining Company and the dividends therefrom, and Katherine Mason and T. R. Mason, her husband, and other citizens of the State of Idaho, adverse claimants to the same stock and dividends.

The occasion for the interpleader was the existence of inconsistent judgments as to the ownership of the Sunshine stock. The Superior Court of Spokane County, Washington, in administering the estate of Amelia Pelkes, adjudged that it was the property of John Pelkes, assignor of petitioner, Evelyn H. Treinies; and the District Court of Shoshone County, Idaho, adjudged that the same property belonged to respondent, Katherine Mason. They are the sole disputants. Other parties may be disregarded. On account of conflict between the judgments of the respective courts of sister states and the assertion of the failure to give full faith and credit to both in the interpleader action, we granted certiorari.

The alleged rights of the respective claimants arose as follows: Amelia Pelkes, the wife of John Pelkes, died testate in Spokane, Washington, in 1922, leaving her husband and one child, Katherine Mason, the offspring of a former marriage, as the beneficiaries of her will. As a part of her community estate, there were 30,598 shares of Sunshine Mining stock. It was considered valueless and was not inventoried or appraised. The order of distribution assigned a three-fourths undivided interest in these shares to Pelkes and a one-fourth to Mrs. Mason, an omnibus clause covering unknown property. The estate of Mrs. Pelkes was not distributed according to the order of distribution. Instead Pelkes and his stepdaughter, Mrs. Mason, divided the inventoried

property between themselves in accordance with their wishes.

It is the contention of Pelkes and his assignee that this partition of the property was in consideration of the release by Mrs. Mason to Pelkes of all of her interest in the shares of the stock of the Sunshine Mining Company. On the other hand, Mrs. Mason asserts that Pelkes was to hold one-half of the amount owned, 15,299 shares, in trust for her.

In August, 1934, Mrs. Mason instituted a suit in the District Court of Idaho for Shoshone County against Pelkes, Evelyn H. Treinies, the Sunshine Mining Company, and others not important here, alleging that she was the owner of 15,299 shares of the stock, that these had been acquired by Miss Treinies from Pelkes with knowledge of Mrs. Mason's rights, and praying that the trust be established and the stock and dividends be awarded to her, Mrs. Mason. It was finally decreed by the District Court on August 18, 1936, after an appeal to the Supreme Court of Idaho,[3] that the stock and dividends belonged to Mrs. Mason. Certiorari to the Supreme Court of Idaho was refused by this Court.[4]

Before the entry of the first decree of the District Court of Idaho, Katherine Mason filed a petition in the Superior Court of Spokane County, Washington, in the probate proceedings involving Amelia Pelkes' will, to remove the executor, John Pelkes, for failure to file his report of distribution and for dissipation of the Sunshine stock. Pelkes by cross-petition and petition claimed the stock. Thereupon Mrs. Mason applied to the Supreme Court of Washington for a writ of prohibition against further proceedings in the Superior Court on the ground

[3] 57 Idaho 10; 59 P. 2d 1087.

[4] *Pelkes* v. *Mason*, 299 U. S. 615.

of lack of jurisdiction in that court to determine the controversy over the stock. The writ was refused. On May 31, 1935, a judgment was entered in the Superior Court upholding in full the ownership of Pelkes.

After the Supreme Court of Idaho had decided the Idaho suit against Pelkes and Miss Treinies, they filed in August, 1936, a suit in the Superior Court of Washington against Katherine Mason and others alleging that they were the owners of the stock, further alleging that the Idaho decree was invalid for lack of jurisdiction, and asking that their title to the stock be quieted and the Sunshine Mining Company, a party to this and the Idaho suit, be compelled to recognize their ownership. It was at this point in the litigation that the Sunshine Company filed the bill of interpleader now under consideration. Further proceedings in the suit to quiet title were enjoined by the District Court in this action.

Jurisdiction.—Before considering the questions raised by the petition for certiorari, the jurisdiction of the federal court under the Act of January 20, 1936,[5] must be determined. As this issue affects the jurisdiction of this Court, it is raised on its own motion.[6] By the Act of January 20, 1936, the district courts have jurisdiction of suits in equity, interpleading two or more adverse claimants, instituted by complainants who have property of the requisite value claimed by citizens of different states. The suit may be maintained "although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another." Process may run at least throughout all the states.

As required by the Act this case was begun by the complainant, a corporation of the State of Washington, im-

[5] 49 Stat. 1096, 28 U. S. C. § 41 (26).

[6] *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 384.

pleading one group of claimants who are citizens of that same state and another, the adverse group, who are citizens of Idaho. Under the Interpleader Act, this identity of citizenship is permissible since diversity only between claimants is required. The Interpleader Act is based upon the clause of § 2, Article III, of the Constitution which extends the judical power of the United States to controversies "between citizens of different States." Is this grant of jurisdiction broad enough to cover the present situation?

The Judicial Code, § 24, provides for original jurisdiction of suits of a civil nature between citizens of different states in precisely the language of the Constitution. The present wording is practically the same as that of the Act of March 3, 1875,[7] "the circuit courts . . . shall have original cognizance . . . of all suits . . . in which there shall be a controversy between citizens of different States," and that of the original Judiciary Act of September 24, 1789,[8] "the suit is between a citizen of the State where the suit is brought and a citizen of another State." Without ruling as to possible limitations of the constitutional grant, it is held by this Court that the statutory language of the respective judiciary acts forbids suits in the federal courts unless all the parties on one side are of citizenship diverse to those on the other side.[9] For the determination of the validity of the Interpleader Act we need not decide whether the words of the Constitution, "Controversies . . . between Citizens of different States," have a different meaning from that given by judicial construction to similar words in the Judiciary Act. Even though the constitutional language limits the

[7] 18 Stat. 470.

[8] 1 Stat. 78.

[9] *Strawbridge* v. *Curtiss*, 3 Cranch 267; *Camp* v. *Gress*, 250 U. S. 308, 312.

judicial power to controversies wholly between citizens of different states, that requirement is satisfied here.[10]

This is for the reason that there is a real controversy between the adverse claimants. They are brought into the court by the complainant stakeholder who simultaneously deposits the money or property, due and involved in the dispute, into the registry of the court. This was done in this case. The Act provides that the "court shall hear and determine the cause and shall discharge the complainant from further liability." Such deposit and discharge effectually demonstrates the applicant's disinterestedness as between the claimants and as to the property in dispute,[11] an essential in interpleaders.[12] The complainant is a proper party for the determination of the controversy between the adverse claimants, citizens of different states. Their controversy could have been settled by litigation between them in the federal courts. Under similar circumstances as to parties, this Court ruled that a removal of separable controversies to the federal court was permissible even though a proper defendant was a citizen of the same state as the plaintiff.[13] We so held as to a stakeholder in *Salem Co.* v. *Manufacturers' Co.*[14] There a suit was brought in a state court against the Manufacturers' Company, a Delaware cor-

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[10] Cf. Chafee, Interpleader in the United States Courts, 41 Yale L. J. 1134, 1141, 1165; and Chafee, The Federal Interpleader Act of 1936, 45 Yale L. J. 963, 973.

[11] Diversity requirements for federal equity jurisdiction to avoid a multiplicity of suits from diverse claimants with claims contested by the debtor is not involved. Cf. *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 70.

[12] *Sanders* v. *Fertilizer Works*, 292 U. S. 190, 200; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 571.

[13] *Barney* v. *Latham*, 103 U. S. 205, 213; cf. *Pullman Co.* v. *Jenkins*, 305 U. S. 534, 538.

[14] 264 U. S. 182, 189.

poration, and against a co-citizen of plaintiff, a Massachusetts corporation, the International Trust Company. The Manufacturers' Company removed and plaintiff sought a remand alleging its co-citizen was a necessary party. The suit was to determine rights to a fund in the co-citizen's hands "and to have the same paid to" the plaintiff. The right of removal was upheld on the ground that the only obligation of the stakeholder was to pay over the money deposited with it. In *Cramer* v. *Phoenix Mut. Life Ins. Co.*[15] the Circuit Court of Appeals for the Eighth Circuit, considering that the claimants were the real contestants, construed the Interpleader Act of May 8th, 1926,[16] to give jurisdiction to the federal court although the interpleader and certain claimants were citizens of the same state. The language as to citizenship is the same as that of the act here involved.[17]

Application of Interpleader Act.—The inclusion as defendants of the judge of the Superior Court of Washington, the administrator of John Pelkes, and a court receiver of the property in dispute is said to violate the

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[15] 91 F. 2d 141, 146. See also *Mutual Life Ins. Co.* v. *Lott*, 275 F. 365, 372 (S. D. Cal.); *New York Life Ins. Co.* v. *Cross*, 7 F. Supp. 130 (S. D. N. Y.); cf. *Eagle, Star and British Dominions* v. *Tadlock*, 14 F. Supp. 933 (S. D. Cal.), reversed, 91 F. 2d 481 (C. C. A. 9); *Ackerman* v. *Tobin*, 22 F. 2d 541 (C. C. A. 8).

[16] 44 Stat. 416.

[17] We do not determine whether the ruling here is inconsistent with the conclusion in those cases where jurisdiction was rested on diversity of citizenship between the applicant and co-citizens who are claimants. (*Mallers* v. *Equitable Life Assur. Soc.*, 87 F. 2d 233 (C. C. A. 7), cert. denied, 301 U. S. 685 (New York corporation impleads Illinois claimants); *Security Trust & Savings Bank* v. *Walsh*, 91 F. 2d 481 (C. C. A. 9) (English corporation impleads California claimants); *Penn Mut. Life Ins. Co.* v. *Meguire*, 13 F. Supp. 967, 971 (W. D. Ky.) (Pennsylvania corporation impleads Kentucky claimants); *Turman Oil Co.* v. *Lathrop*, 8 F. Supp. 870, 872 (N. D. Okla.) (Delaware corporation impleads Oklahoma claimants).

rule against a citizen suing a state embodied in the Eleventh Amendment.[18]

Without analyzing all the pleadings, a short answer against the petitioner's contention is the fact that neither the receiver nor the judge is enjoined by the final decree. Pelkes' administrator and Miss Treinies are enjoined from further prosecution of the Washington action to quiet title. They are the parties whose individual rights to the stock are settled in this action. The State of Washington has no interest and no infringement of the Eleventh Amendment occurs.

Neither are the provisions of § 265 of the Judicial Code applicable. That section forbids a United States court from staying proceedings in any state court. The Interpleader Act, passed subsequently, however, authorizes the enjoining of parties to the interpleader from further prosecuting any suit in any state or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power. Section 265 is a mere limitation upon the general equity powers of the United States courts and may be varied by Congress to meet the requirements of federal litigation.[19]

Res Judicata of the Idaho Decree.—On the merits, petitioner's objection to the decree below is that it fails to consider and give effect to the Washington judgment of May 31, 1935, awarding the property in question to Pelkes, petitioner's assignor. It is petitioner's claim that the Washington judgment must be considered as effective in this litigation because the question of the jurisdiction of the Washington court was actually litigated before

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[18] *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 296, is relied upon.

[19] *Smith* v. *Apple,* 264 U. S. 274, 278; *Dugas* v. *American Surety Co.,* 300 U. S. 414, 428.

the Supreme Court of Washington and determined favorably to petitioner by the refusal to grant a writ of prohibition against the exercise of jurisdiction by the Washington Superior Court in probate. This failure to give effect to the judgment is said to infringe the full faith and credit clause of the Constitution. The decree of the Court of Appeals is based upon the doctrine of *res judicata*. The applicability of that doctrine arises from a determination of pertinent matters by the Supreme Court of Idaho. Accordingly we turn to a discussion of whether or not the issues tendered below by petitioner were foreclosed by the decision of the Supreme Court of Idaho of July 23, 1936.

The issues tendered by petitioner in the trial court in this interpleader proceeding were (1) the invalidity of the Idaho decree, and (2) the conclusiveness of the Washington decree of May 31, 1935, awarding the property to Pelkes. Both of these issues rest on petitioner's contention that complete jurisdiction of the probate of Mrs. Pelkes' estate was in the Superior Court of Washington, that the stock was at all times a part of that estate, and that therefore that court's jurisdiction over the disposition of the stock was exclusive of all other courts.

The Idaho decree was pleaded in this proceeding as *res judicata* of the controversy between petitioner and respondent. The proceedings in Idaho showed a cause of action based on an alleged oral agreement of Pelkes, made in Idaho at the time of distribution of Mrs. Pelkes' estate, to hold the Sunshine Mining Company stock in trust for the joint benefit of himself and Mrs. Mason. All parties, including this petitioner, were before the court and a decree was entered sustaining the trust and awarding the stock and dividends, as claimed, to respondent, Mrs. Mason, with directions to the Mining Company to recognize the assignment of the certificates and adjudging a re-

covery for prior dividends against Pelkes and petitioner. The Idaho court was a court of general jurisdiction.[20]

The Court of Appeals held that the Idaho suit settled that the stock was distributed in 1923 and that therefore the Idaho court had jurisdiction to determine rights under the alleged oral trust. It was further of the view that the Idaho court's invalidation of the Washington judgment and its decree upholding Mrs. Mason's claim to the disputed property were *res judicata* in this action. Petitioner's only ground for objection to the conclusion that the Idaho decree is *res judicata* rests on the argument that by such ruling below the "judgment of the courts of the State of Washington affecting the same subject matter and parties" is ignored.

In the Idaho proceeding the Washington judgment awarding the stock and dividends to Pelkes was pleaded in bar to Mrs. Mason's suit to recover the stock. The effectiveness of the Washington judgment as a bar depended upon whether the court which rendered it had jurisdiction, after an order of distribution, to deal with settlements of distributees with respect to the assets of an estate. On consideration it was determined in the Idaho proceeding that the Washington court did not have this jurisdiction and that the stock of the Mining Company became the property of Mrs. Mason. In declining to give effect to the Washington decree for lack of jurisdiction over the subject matter, the Idaho court determined also the basic question raised by petitioner in the interpleader action. The contention of petitioner in the interpleader proceedings that the Idaho court did not have jurisdiction of the stock controversy because that controversy was in the exclusive jurisdiction of the Washington probate court must fall, because of the Idaho decision that the Washington probate court did not have

[20] Constitution of Idaho, Art. 5, § 20; Idaho Code, 1932, § 1-705.

exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceedings. If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings. While petitioner sought review from the decree of the Supreme Court of Idaho by petition for certiorari to this Court, which was denied, no review was sought from the final decree of the Idaho District Court of August 18, 1936, on new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho.[21]

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[21] It is unnecessary to consider whether the Idaho determination as to the jurisdiction of the Washington court was properly made. As the procedure by which a state court examines into the question of the jurisdiction of the court of a sister state is a matter within the control of the respective states (*Adam* v. *Saenger,* 303 U. S. 59, 63), it need only be added that such procedure is subject to question only on direct appeal.

It was stipulated by all parties to the Idaho cause that the Idaho courts might take judicial notice of the statutes and decisions of Washington. Some constitutional and statutory provisions relating to the jurisdiction of the Superior Court were pleaded and admitted. It has long been the rule in Idaho that its courts do not take judicial notice of the laws of another state and that without allegation and evidence it will be assumed the laws are the same as those of Idaho. (*Maloney* v. *Winston Bros. Co.,* 18 Idaho 740, 757, 762; 111 P. 1080, 1086; *Douglas* v. *Douglas,* 22 Idaho 336, 343; 125 P. 796; *Mechanics & Metals Nat. Bank* v. *Pingree,* 40 Idaho 118, 129; 232 P. 5; *State* v. *Martinez,* 43 Idaho 180, 192; 59 P. 2d 1087; *Kleinschmidt* v. *Scribner,* 54 Idaho 185, 189; 30 P. 2d 362). While none of these cases involved a stipulation, the decision of the Supreme Court of Idaho (57 Idaho 10; 59 P. 2d 1087) declares the law of that jurisdiction. It follows from the Idaho court's refusal to look into the statutes of Washington that the jurisdiction of the Washington court was presumed to be governed by Idaho law. Under proper proof, the Idaho court would have been compelled to examine the jurisdiction of the Washington court under Washington law.

The Court of Appeals correctly determined that the issue of jurisdiction *vel non* of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.

The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question.[22] Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.[23]

One trial of an issue is enough.[24] "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues," [25] as well to jurisdiction of the subject matter as of the parties.[26]

Decree affirmed.

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

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[22] *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 15; *Thompson* v. *Whitman*, 18 Wall. 457, 468; *Adam* v. *Saenger*, 303 U. S. 59, 62.

[23] *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 30; *Stoll* v. *Gottlieb*, 305 U. S. 165, 172; *Roche* v. *McDonald*, 275 U. S. 449, 454.

[24] *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525.

[25] *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166.

[26] *Stoll* v. *Gottlieb*, *supra*, note 23, 172.

No decision or statute relative to the reëxamination of the decree or judgment of an Idaho court on a contested issue of jurisdiction has been found or called to our attention. It is concluded that the rule here expressed states too the law of Idaho.

PALMER ET AL., TRUSTEES, *v.* MASSACHUSETTS.

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

No. 7. Argued October 11, 1939.—Decided November 6, 1939.

1. Creditors of a railroad, debtor in a reorganization proceeding under § 77 of the Bankruptcy Act, petitioned the District Court for an order directing the reorganization trustees to discontinue certain local transportation service. The trustees had previously applied to the state commission for authority to discontinue the same service, which application accorded with requirements of the state law and was then pending and being given orderly hearing and consideration. *Held,* the District Court was without power to order discontinuance of the service. P. 88.
2. In the light of the history of the legislation, such power in the District Court may not be implied from § 77 (a), granting to the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located," or § 77 (c) (2), permitting the trustees, subject to the control of the court, "to operate the business of the debtor." P. 85.

101 F. 2d 48, affirmed.

CERTIORARI, 306 U. S. 627, to review the reversal of an order of the District Court authorizing the trustees of a railroad in reorganization proceedings to discontinue certain local transportation service.

Mr. Edward R. Brumley, with whom *Messrs. Fred N. Oliver, Willard P. Scott, Oscar M. Shaw,* and *R. Ammi Cutter* were on the brief, for petitioners.

The bankruptcy court may direct its trustees to discontinue intrastate passenger service, irrespective of authorization by the state regulatory body normally having jurisdiction, in order to preserve and rehabilitate the property of an interstate railroad, and to make and effect a plan of reorganization. *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 676. Bankruptcy Act, § 77 (a) (c) (1), § 2, § 77 (o) (f).

When Congress occupies the field it precludes all inconsistent state regulation, unless specific reservations of state powers are made. *Colorado* v. *United States,* 271 U. S. 153, 162–166; *Transit Commission* v. *United States,* 284 U. S. 360; and see *New York* v. *United States,* 257 U. S. 360; *American Brake Shoe & Foundry Co.* v. *I. R. T.,* 10 F. Supp. 512; affirmed, 76 F. 2d 1002, cert. denied, *New York City* v. *Murray,* 295 U. S. 760.

The power of an equity court to protect property in its custody, *In re Tyler,* 149 U. S. 164; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 94, was recognized in cases under the Bankruptcy Act prior to the enactment of § 77. *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Isaacs* v. *Hobbs Tie & T. Co.,* 282 U. S. 734. Compare *Ex parte Baldwin,* 291 U. S. 610; *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648; *Board of Directors St. Francis Levee Dist.* v. *Kurn,* 91 F. 2d 118; 98 F. 2d 394; *Crawford* v. *Duluth Street Ry. Co.,* 60 F. 212; *Iowa* v. *Old Colony Trust Co.,* 215 F. 307.

The legislative history of § 77 shows its broad purpose to facilitate and expedite interstate railroad reorganizations. Congress conferred jurisdiction upon the court, free from state laws and state regulations that interfere with reorganization.

Section 75 of the Judicial Code is inapplicable. *In re Denver & R. G. W. R. Co.,* 23 F. Supp. 298.

Mr. Edward O. Proctor, Assistant Attorney General of Massachusetts, with whom *Mr. Paul A. Dever,* Attorney General, was on the brief, for respondent.

A railroad can not abandon the public service which was the condition upon which its franchises were granted and still retain them.

Power to permit or deny abandonment of service on intrastate lines is reserved to the several States in the absence of federal legislation displacing that power. This

power is customarily exercised by state regulatory commissions.

Earlier than § 77, no federal legislation displaced the states' power to permit or deny partial abandonment of service on lines retained by the railroads, although the Interstate Commerce Commission was empowered to authorize complete abandonment.

Section 77 manifests intent that the Interstate Commerce Commission rather than the bankruptcy court be the arbiter of conflicting interests of the railroad and the public, and that partial abandonment shall be authorized only as a part of the reorganization plan, with the Commission's approval.

Section 77 does not empower the court to oust state regulatory bodies from their jurisdiction to determine what services the railroad may abandon, pending confirmation of the reorganization plan.

By leave of Court, *Mr. Vernon W. Marr* filed a brief on behalf of the Town of Scituate, as *amicus curiae,* urging affirmance.

Mr. Justice Frankfurter delivered the opinion of the Court.

October 23, 1935, opened another chapter in the long history of the vicissitudes of the New York, New Haven and Hartford Railroad Company.[1] By filing a petition for reorganization under § 77 of the Bankruptcy Act (47 Stat. 1474, as amended by 49 Stat. 911 and 49 Stat. 1969,

[1] Brandeis, "Financial Condition of the New York, New Haven and Hartford Railroad Co." (1907); The New England Investigation, 27 I. C. C. 560 (1913); In re Financial Transactions of the New York, New Haven and Hartford Railroad Co., 31 I. C. C. 32 (1914); Report of the Joint New England Railroad Committee to the Governors of the New England States. (Storrow Report.) (1923.)

11 U. S. C. § 205), the New Haven invoked the shelter of the United States District Court for the District of Connecticut. There it has since remained. An episode in this new chapter, already four years old, is presented by this case. We brought it here, 306 U. S. 627, because it raises important questions under the railroad bankruptcy law, particularly where it intersects the regulatory systems of the states. The District Court assumed power to supplant the relevant authority of the state—an authority which, apart from proceedings under § 77, has not been conferred by Congress either upon the federal courts or the Interstate Commerce Commission. The Circuit Court of Appeals, one judge dissenting, reversed the District Court, *Converse* v. *Massachusetts*, 101 F. 2d 48.

A summary of the facts will lay bare the legal issues. On December 28, 1937, the bankruptcy Trustees of the New Haven, acting under the requirements of Massachusetts law,[2] applied to that Commonwealth's Department of Public Utilities for leave to abandon eighty-eight passenger stations.[3] Twenty-one hearings were held by

[2] Mass. Gen. Laws (Ter. Ed.) c. 160, § 128, provides: "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station . . . nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department [of Public Utilities] after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

See also Mass. Gen. Laws (Ter. Ed.) c. 159, § 16, vesting general control over intrastate railway services in the Department of Public Utilities.

[3] The application also sought permission to effect certain other curtailments of passenger service. Some of the stations were situated on the lines of the New Haven, most of them on the lines of the Old

the Department on the questions raised by this application. During the pendency of these hearings and before the Department had taken any action, the present litigation was initiated in the New Haven bankruptcy proceedings by creditors of the debtor for an order directing the Trustees to abandon these local services. The Trustees joined in the prayer, while the Commonwealth denied the jurisdiction of the District Court and asked that the proceedings before the Department be allowed to reach fruition. The District Judge ruled that § 77 gave him the responsibility of disposing of the petition on its merits and, having taken evidence, gave the very relief for which the Trustees had applied to the Department and which was still in process of orderly consideration.

Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of con-

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Colony Railroad, and some on the lines of the Boston and Providence Railroad.

The New Haven in 1893 leased for 99 years all the properties of the Old Colony, including the Boston and Providence lines which the Old Colony had leased for 99 years in 1888. On June 1, 1936, the New Haven Trustees disaffirmed, as they were empowered to do under § 77, the Old Colony lease. After the disaffirmance the New Haven operated the lines on account of the Old Colony. On June 3, 1936, the Old Colony itself commenced proceedings under § 77. The Trustees of the New Haven were then appointed trustees for the Old Colony.

struction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere.[4] But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.[5] Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases,* 230 U. S. 352; *cf. Kelly* v. *Washington ex rel. Foss Co.,* 302 U. S. 1.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states.[6]

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[4] E. g., *The Shreveport Cases,* 234 U. S. 342; *Railroad Comm'n of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563. See I Sharfman, "The Interstate Commerce Commission," pp. 82–86, 219–225. For the careful observance of state interests in applying the Shreveport doctrine, see *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493 and *Florida* v. *United States,* 282 U. S. 194.

[5] See Clark, "The Rise of a New Federalism," *passim.*

[6] The controlling Massachusetts statute has been in force since 1911. But Massachusetts has exercised control over its railroads through administrative machinery ever since the famous Adams Commission in 1869. See First Annual Report, Board of Railroad Commissioners of Massachusetts, Public Document No. 40, pp. 3–12 (1870); Hadley, "Railroad Transportation" (1885 ed.) pp. 136–139.

Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado* v. *United States,* 271 U. S. 153,[7] this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. Public Convenience Application of Kansas City Southern Ry., 94 I. C. C. 691; see Proposed Abandonment, Morris & Essex Co., 175 I. C. C. 49. If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change.

We are asked to find it in § 77 (a) granting to the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located," [8] and in § 77 (c) (2) permitting the trustees, subject to the court's control, "to operate the business of the debtor." [9] In order to expedite the reorganization of insolvent railroads, such broad and general provisions doubtless suffice to confer

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[7] For illustration of the scrupulous regard for local authority and local interests shown by the Commission in the exercise of its control over abandonments, see II Sharfman, "The Interstate Commerce Commission," pp. 264–269.

[8] Section 77 (a), 47 Stat. 1474, as amended in 1935 by 49 Stat. 911, 11 U. S. C. § 205 (a) provides so far as here relevant: "If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

[9] "The trustee or trustees so appointed . . . shall have . . . subject to the control of the judge and the jurisdiction of the Commission as provided . . . the power to operate the business of the debtor." § 77 (c) (2), 47 Stat. 1475, as amended by 49 Stat. 914–15, 11 U. S. C. § 205 (c) (2).

upon the district courts power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings. Cf. *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648. But the District Court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion," as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties." [10]

Not only is there no specific grant of the power which the District Court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act.[11] But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate.[12] Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of

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[10] See *Converse* v. *Massachusetts,* 101 F. 2d 48, at 51.

[11] See H. Rep. No. 1897, 72d Congress, 2d Session, p. 5.

[12] See Chapter XXII "Railroad Receiverships" in I Gresham, "The Life of Walter Quintin Gresham," pp. 366–378; Jacobs "The Interstate Commerce Commission and Interstate Railroad Reorganizations," 45 Harv. L. Rev. 855; Lowenthal "The Investor Pays." See also remarks by Senator Wheeler, as Chairman of the Committee on Interstate Commerce, introducing the amendment of 1935, 79 Cong. Rec., Pt. 13, p. 13764.

the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission.[13] Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission.[14] Thus, in § 77 (c) and

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[13] See 76 Cong. Rec., Pt. 5, p. 5358 (remarks of Representative La-Guardia): "I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission." The suggestion for administrative receiverships originated with the late Chief Justice Taft, when Circuit Judge, in an address before the American Bar Association. Taft, "Recent Criticism of the Federal Judiciary," Reports of the American Bar Association (1895) 237, 264.

[14] Section 77 (c) (1) requires the appointment of trustees to be ratified by the Commission; § 77 (c) (2) gives the Commission supervision over the compensation paid to trustees and their counsel; § 77 (c) (3) permits the issuance of trustees' certificates only with the Commission's approval; § 77 (c) (9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; § 77 (c) (10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; § 77 (c) (11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; § 77 (c) (12) gives the Commission supervision over allowances for the expenses of

§ 77 (o) the power of the district courts to permit abandonments is specifically conditioned on authorization of such abandonments by the Commission. In view of the judicial history of railroad receiverships and the extent to which § 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road.[15] About a fourth of the railroad mileage of

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various parties in interest in connection with the reorganization proceedings; §§ 77 (d) and 77 (e) give to the Commission control over any proposed plan of reorganization; § 77 (p) gives to the Commission control over the solicitation of proxies or deposit agreements.

See also H. Rep. No. 1897, 72d Congress, 2d Session, pp. 5–6; H. Rep. No. 1283, 74th Congress, 1st Session, pp. 3–5; S. Rep. No. 1336, 74th Cong., 1st Session, pp. 4–6; Report, Federal Coordinator of Transportation, 1934, H. Doc. No. 89, 74th Cong., 1st Session, pp. 100–101; 76 Cong. Rec., Pt. 5, pp. 5108–5110; 79 Cong. Rec., Pt. 12, p. 13301, Pt. 13, pp. 13764, 13767.

[15] "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto . . . the laws of any State or the decision or order of any State authority to the contrary notwithstanding." § 77 (f).

The records of the Interstate Commerce Commission disclose that eight plans of reorganization have thus far been filed with the District Court in the New Haven proceedings and transmitted to the Interstate Commerce Commission. Proceedings before the Commission had progressed to the point where an examiner's report was filed; but the report was withdrawn for further hearings. The present record fails to show what, if any, disposition of the Old Colony lines any of these plans proposed to make.

the country is now in bankruptcy.[16] The petitioners ask us to say that district judges in twenty-nine states have effective power, in view of the weight which often attaches to findings at *nisi prius,* to set aside the regulatory systems of these twenty-nine states with all the consequences implied for those communities. Congress gave no such power.

Arguments of convenience against denial of the existence of this power have been strongly pressed upon us. Continuance of state control over these local passenger services will, it is urged, impair the bankruptcy court's power to formulate a reorganization plan for the approval of the Interstate Commerce Commission. Such embarrassments, due either to the time required for exhaustion of the orderly state procedure or to the financial losses that may be involved in the continuance of local services until duly terminated by the state, may easily be exaggerated. It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, do supplant state authority. But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesman-like imagination that transcends the wisdom of local attachments.

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[16] On October 23, 1939, there were 61,292.69 miles of railroad in bankruptcy proceedings under § 77. This mileage includes lines in 29 states.

Other arguments, drawn from the legislative history of § 77 and from the general equity powers conferred by § 77(a) and § (77)(c)(2),[17] were urged but we deem it unnecessary to say more.

The decree below is

Affirmed.

MR. JUSTICE BUTLER took no part in the consideration and decision of this cause.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILSHIRE OIL CO., INC.*

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

No. 1. Argued October 9, 1939.—Decided November 6, 1939.

1. An oil company which pursuant to a Treasury Regulation elected irrevocably to deduct development expenses from gross income in computing its taxable net income rather than charge them to capital account, and which made this election at a time when Treasury practice under the Revenue Acts of 1921, § 234 (a) (9), and 1924, § 204 (c), required that "operative expenses" but not expenses of development be deducted from gross income in computing "the net income from the property" which limits the depletion allowance, has no ground to attack as retroactive a later regulation made under the Revenue Act of 1928, § 114 (b) (3), and looking to the future, which requires that development, as well as operative, expenses be deducted in the computation. P. 97.

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[17] *In re Tyler,* 149 U. S. 164, and other decisions of this Court cited by petitioners deal with attempts at "physical invasion" of the properties held in the custody of a federal court. See 149 U. S. at 182. Section 65 of the Judicial Code (36 Stat. 1104, 28 U. S. C. § 124) decisively indicates that Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.

* See No. 2, *Helvering* v. *Bandini Petroleum Co.* and No. 3, *Helvering* v. *Wilshire Annex Oil Co., post,* p. 512.

Tax statutes and regulations are subject to change. The taxpayer in making its election took the risk that the method of treating depletion might be altered by statute or authorized regulation.

2. The claim that it was inequitable in the present case to alter the regulations in the manner above described after the taxpayer had made its irrevocable election in its return for the year 1925, can not be allowed in view of the fact that in 1927, after the basis of depletion had been changed by the Act of 1926 from a "discovery value" to a percentage basis, an opportunity to make a new election as to the treatment of development expenses for taxable periods ending on or after January 1, 1925, was offered by Treasury decision, of which the taxpayer failed to take advantage. P. 97.

An opinion of the General Counsel of the Treasury is considered in this case, in connection with a Treasury decision, as affording notice that a change might be made in the practice touching the treatment of development expenses in determining depletion allowances for oil wells.

3. The term "net income from the property," used in the Revenue Acts of 1921, 1924, 1926 and 1928 as a limitation upon allowance for depletion of mines, including oil wells, was construed by the Treasury, under the two earlier statutes, as meaning gross income from the property less "operating expenses," not including development expenses. Under the Act of 1926, however, (which adopted an arbitrary percentage of gross receipts, instead of "discovery value," as the basis of depletion allowances for oil and gas wells) the Treasury changed its policy in respect of such deductions and altered its regulation; and under the Act of 1928, it promulgated a regulation which required that development expenses as well as operating expenses be deducted in computing the net income limitation on depletion where the taxpayer had elected to deduct development expenses in computation of taxable net income. *Held:*

(1) That the legislative approval of the earlier administrative construction of the term "net income from the property," implied from the reënactment in 1924 of the statutory provision of 1921, can not be attributed also to the reënactment of 1928, in view of the intervening change of Treasury construction of the same statutory language in the Act of 1926. P. 99.

(2) The statement that administrative construction receives legislative approval by reënactment of a statutory provision without material change, applies where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice

prior to reënactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one Act becomes frozen into another Act merely by reënactment of that provision, so that that administrative interpretation can not be changed prospectively through exercise of appropriate rule-making powers. P. 100.

4. The power conferred by § 23 (1) of the Revenue Act of 1928 to make rules and regulations for the computation of depletion allowances, extends to the percentage depletion allowance under § 114 (b) (3), and includes administrative construction of the ambiguous phrase "net income from the property." P. 101.

Restrictions on that power should not be lightly imposed where the incidence of such rules as are promulgated is prospective only.

95 F. 2d 971, reversed.

CERTIORARI, 306 U. S. 628, to review an affirmance by the court below of a decision of the Board of Tax Appeals (35 B. T. A. 450) reducing a deficiency assessment.

Mr. Arnold Raum, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for petitioner.

Mr. Joseph D. Brady for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents the question whether respondent, Wilshire Oil Company, Inc., in computing its net income for the years 1929 and 1930 for the purpose of applying the 50 per cent limitation on depletion allowance under § 114 (b) (3) of the Revenue Act of 1928 (45 Stat. 791), may refuse to take as deductions certain development expenditures,[1] where it has deducted those development

[1] These expenditures consisted of such items as labor, fuel and power, materials and supplies, tool rental, truck and auto hire, repairs to drilling equipment and depreciation upon equipment used in drilling.

expenditures in computing its taxable net income for those years. The Board of Tax Appeals held for the respondent (35 B. T. A. 450) and that decision was affirmed by the Circuit Court of Appeals, one judge dissenting (95 F. 2d 971). Because of the importance of the problem of the scope of the Commissioner's rule-making power and because of an asserted conflict of the decision below with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *F. H. E. Oil Co.*, 102 F. 2d 596, we granted certiorari.

Respondent is engaged in the business of producing oil and gas from its various properties. In computing taxable net income in its returns for 1929 and 1930 respondent, pursuant to the regulations, deducted development expenditures in the respective amounts of $606,051.66 and $279,927.04. But it refused to make those deductions in determining its "net income . . . from the property" for the same years, when computing allowable depletion under § 114 (b) (3) of the Revenue Act of 1928.[2]

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[2] For the year 1929 the Commissioner's computations were as follows:

Gross Income from the properties		$1,001,375.17
Deductions: Production expense	$171,399.03	
Development expense	606,051.66	
Total expenses		777,450.69
Net income from property (computed without allowance for depletion)		$223,924.48
50 per cent of that income		$111,962.24

The Commissioner limited the depletion allowance to the last mentioned figure since 50 per cent of the net income from the property as thus computed was less than 27½ per cent of the gross income.

Under the taxpayers computation, the net income for depletion purposes would be $1,001,375.17 less $171,399.03 or $829,976.14 and 50

That section provides:

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

By virtue of § 23 of the Revenue Act of 1928 companies like respondent were allowed as deductions in computing net income a "reasonable allowance for depletion . . . according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." Pursuant to that rule-making power the phrase "net income of the taxpayer (computed without allowance for depletion)" as used in § 114(b)(3) was defined by Treasury Regulations 74, Art. 221(i) promulgated under the 1928 Act as meaning "gross income from the sale of oil and gas" less certain deductions including "development expenses (if the tax-

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per cent thereof would not be less than 27½ per cent of the gross income.

For the year 1930 the Commissioner's computation showed a loss of $194,869.22. He therefore ruled that since the percentage depletion allowance was limited to 50 per cent of the net income from the properties and since the taxpayer had no such net income, no deduction on account of percentage depletion could be allowed. The taxpayer refused, however, to deduct development expenses in the application of the 50 per cent limitation and claimed a depletion deduction of $42,528.91, arrived at as follows:

Gross income from the properties	$370,448.72
Deductions: Production expense	285,390.90
Net Income	$85,057.82
Depletion deduction (50 per cent of net income)	$42,528.91

payer has elected to deduct development expenses) . . . but excluding any allowance for depletion." For 1925 respondent, having the option to treat these expenses as deductions for development expenses or as charges to the capital account returnable through depletion,[3] chose the former.

On these facts it would seem that Treasury Regulations 74, Art. 221(i) would require respondent to deduct development expenses in computing "net income" as used in § 114(b)(3), since respondent fell clearly within the class described therein.

But respondent contends that these regulations as applied to it for the taxable years in question are invalid. Its argument runs as follows: (1) The phrase "net income . . . from the property" present in § 114 (b) (3) originated in § 234 (a) (9) of the Revenue Act of 1921 (42 Stat. 227) and was reënacted without change in § 204 (c) of the 1924 Act (43 Stat. 253). It was also carried over into § 204 (c) (2) of the 1926 Act (44 Stat. 9), when Congress adopted the present so-called percentage depletion formula. Shortly after the enactment of the Revenue Act of 1921, Treasury Regulations were issued defining net "income . . . from the property" as meaning gross income from the property less "operating expenses." [4] A similar definition was given in the Treasury Regulations issued under the Revenue Act of 1924.[5] The admitted Treasury practice under those two Acts

[3] Treasury Regulations 69, Art. 223, promulgated under the Revenue Act of 1926 provides that "such incidental expenses as are paid for . . . development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. . . . An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years."

[4] Treasury Regulations 62, Art. 201 (h).

[5] Treasury Regulations 65, Art. 201 (h).

was to permit net income from the property to be computed without regard to development expenditures. Hence, respondent argues, the meaning of the phrase "net income . . . from the property" had acquired a plain and definite meaning, known to the Congress; thus when that phrase was reënacted in the 1924 Act, the Congress intended it to have the meaning which administrative practice had given it. And, the argument continues, that meaning having been adopted by the Congress in the 1924 Act, it clung to the same phrase in the 1926 Act [6] and in the 1928 Act, especially since the Commissioner prior to February 15, 1929 [7] never did undertake by regulation or decision to give that phrase a meaning different from that which had been consistently applied under the earlier Acts.

(2) Secondly, respondent contends that the fact that it deducted development expenses in computing taxable net income does not mean that it is required to make the same deductions for the "net income" computation under § 114 (b) (3) for the reason that it had no free choice in the first of these computations. In that connection it points out that it was required to make these deductions from gross income by reason of its election in its 1925 return to treat these expenses as deductions for development expenses rather than as charges to capital account returnable through depletion, an election binding for all subsequent years. In that posture of the

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[6] Respondent points to the Report of Committee on Ways and Means on Revenue Bill of 1926 (H. Rep. No. 1, 69th Cong., 1st Sess., p. 6): "The discovery depletion deduction limitation of an amount not in excess of 50 per cent of the net income of the taxpayer from the property upon which discovery was made, provided in existing law, is retained in this provision."

[7] The date when Treasury Regulations 74, Art. 221 (i), here in question, were promulgated.

case it argues that the attempted change in the regulations here involved has a retroactive effect, as applied to it, and withdraws one of the important inducements offered by the Commissioner in connection with the election which respondent made in its 1925 return.

We do not think that respondent's position is tenable.

As to respondent's claim of retroactivity, it is true that the election made in connection with its 1925 return was known to be binding for all subsequent years. It is likewise true that it was made at a time when Treasury practice did not require deduction of development expenses in making the computation under § 114(b)(3). But that is no basis for a claim of retroactivity. Treasury Regulations 74, Art. 221(i) which required the deduction of development expenses for the purpose of the computation under § 114(b)(3) were issued February 15, 1929 under the 1928 Act. These regulations applied prospectively only and did not purport to reach back to earlier years when the taxpayer relied on a different rule or practice. Tax statutes and tax regulations never have been static. Experience, changing needs, changing philosophies inevitably produce constant change in each. One making an election in the 1925 return took the risk that the method of treatment of depletion might be changed by the Congress, or, where power existed, by the Commissioner. Any other conclusion would make the application of changes pursuant to regulations, though prospective, dependent on fortuitous circumstances under which each taxpayer made such an election. Rigidity, as well as confusion, in administration of tax laws would be the result.

But in this case there is another answer to respondent's claim that an inequity results by changing the regulations after it had made its election in the 1925 return. On June 18, 1927, the Commissioner, with the

approval of the Secretary, issued a Treasury Decision [8] stating that "In view of the change in the basis for depletion provided by the Revenue Act of 1926, in the case of oil and gas wells, taxpayers may make a new election as to the treatment" of development expenditures "for taxable periods ending on or after January 1, 1925, but not later than six months after the date of this decision." Taxpayers desiring to make a new election were required to file amended returns for the taxable periods involved within six months from the date of that decision. Thus respondent, after Congress adopted the new percentage depletion provision, was afforded ample opportunity to make a new election. This it did not do. To be sure, that Treasury Decision contained no notice of any projected change in the meaning of "net income . . . from property" as used in § 114 (b)(3). But in September 1927 there issued a General Counsel's Memorandum [9] in which it was stated that thereafter "if a taxpayer elects to treat development expenditures as ordinary and necessary business expenses . . . in computing taxable net income, such expenditures must be deducted in determining the net income from the property, which amount is used as a limitation in the computation of the depletion allowance based on income." To be sure, this was merely an opinion of the General Counsel of the Bureau and did not have the force or effect of a Treasury Decision. Yet in view of such ruling, there is now no reasonable basis for concluding that when respondent made its second election in 1927 it had no basis for assuming that the policy as respects "net income . . . from the property" under the 1926 Act was or would be no different than it had been under the 1921 and 1924 Acts. Therefore, in terms of equitable considerations respond-

[8] Treasury Decision 4025, Cum. Bul. VI–1, p. 75.

[9] G. C. M. 2315, Cum. Bul. VI–2, p. 21.

ent has no just ground of complaint. On these facts substantial justice requires that respondent take such burdens as may flow from its election along with the benefits.

Irrespective of these considerations, we think the regulations in question were valid. It is true, as stated by respondent, that the regulations under the 1921 Act provided that the "net income . . . from the property" should be computed for purpose of the depletion allowance without regard to development expenditures. And it may be assumed that that administrative construction received legislative approval by the reënactment of the statutory provision in the 1924 Act, without material change. Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466. But that does not mean that that meaning survived both the 1926 and the 1928 Acts. In the first place, there were no comparable regulations under the 1926 Act.[10] In fact, the Commissioner under-

[10] As respects discovery depletion in the case of mines under the 1926 Act, provisions similar to those under the 1921 and 1924 Acts were retained. Treasury Regulations 69, Art. 201 (h). But this was not true as respects oil and gas wells. Section 204 (c) (2) of the Revenue Act of 1926 applied the percentage depletion allowance exclusively to "oil and gas wells." Treasury Regulations 69, Art. 221, provided:

"Under section 204 (c) (2), in the case of oil and gas wells, a taxpayer may deduct for depletion an amount equal to 27½ per cent of the gross income from the property during the taxable year, but such deduction shall not exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. In no case shall the deduction computed under this paragraph be less than it would be if computed upon the basis of the cost of the property or its value at the basic date, as the case may be. In general, 'the property,' as the term is used in section 204 (c) (2) and this article, refers to the separate tracts or leases of the taxpayer."

Thus, it is apparent that the delimitation implied in the permission to deduct "operating expenses" present under the earlier regulations disappeared from the 1926 regulations in case of oil and gas wells.

took under that Act to follow the practice later set forth in the regulations here in question. See *Ambassador Petroleum Co.* v. *Commissioner,* 81 F. 2d 474. Those facts are of some significance here for they refute the suggestion that the Congress in enacting the 1928 Act was giving approval to an administrative construction which had been given to comparable provisions of earlier Acts but which was abandoned before the passage of the 1928 Act. The more reasonable inference seems to be that reënactment of the provision in question by the 1928 Act at a time when Treasury policy as respects its construction had changed did nothing more than to restore to the phrase "net income . . . from the property" its original ambiguity. Accordingly that phrase became peculiarly susceptible to new administrative interpretation. *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110; *Morrissey* v. *Commissioner,* 296 U. S. 344.

But in any event, the validity of the regulations in question seems clear. The oft-repeated statement that administrative construction receives legislative approval by reënactment of a statutory provision, without material change (*United States* v. *Dakota-Montana Oil Co., supra*) covers the situation where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice prior to reënactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers. Cf. *Morrissey* v. *Commissioner, supra,* at p. 355. The contrary conclusion

would not only drastically curtail the scope and materially impair the flexibility of administrative action; it would produce a most awkward situation. Outstanding regulations which had survived one Act could be changed only after a pre-view by the Congress. In preparation for a new revenue Act the Commissioner would have to prepare in advance new regulations covering old provisions. Their effectiveness would have to await Congressional approval of the new Act. The effect of such procedure, so far as time is concerned, would be precisely the same as if these new regulations were submitted to the Congress for approval. Such dilution of administrative powers would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations. It would make the administrative process under these circumstances cumbersome and slow. Known inequities in existing regulations would have to await the advent of a new revenue act. Paralysis in effort to keep abreast of changes in business practices and new conditions would redound at times to the detriment of the revenue; at times to the disadvantage of the taxpayer. Likewise the result would be to read into the grant of express administrative powers an implied condition that they were not to be exercised unless, in effect, the Congress had consented. We do not believe that such impairment of the administrative process is consistent with the statutory scheme which the Congress has designed.

The only remaining question is whether Treasury Regulations 74, Art. 221(i) were within the power of the Commissioner to promulgate. That they were seems clear beyond question. We are not dealing here, as was this Court in *Helvering* v. *R. J. Reynolds Tobacco Co., supra,* with regulations applied retroactively. These are

applied prospectively only. The rule-making power here in question may be found in § 23(l) of the Revenue Act of 1928. That section, after providing that companies like respondent were entitled, as a deduction in computing net income, to a "reasonable allowance for depletion . . . according to the peculiar conditions in each case," laid especial emphasis on the power of the Commissioner to make rules for the computation of the depletion allowance, by providing that "such reasonable allowance in all cases is to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary."

Respondent does not strongly urge that the regulatory power conferred by § 23(l) does not extend to the percentage depletion allowance under § 114(b)(3). Rather the contention seems to be that to allow the Commissioner by regulation to change the measure of "net income . . . from the property" from time to time, especially in the manner here attempted, would be to approve a result equally as contrary to the intention of Congress as if he had attempted by regulation to change the percentage factors themselves. But the scope or importance of the change effected by the regulations is immaterial if the power to promulgate such regulations exists. Here the Congress has not prescribed a precise formula free from all ambiguity. The ambiguous phrase "net income . . . from the property" was susceptible of various meanings and hence administrative interpretation of it was peculiarly appropriate, as we have said. And there were special reasons growing out of the complex nature of the depletion problem as it is treated for purposes of the income tax, for requiring the Commissioner to make precise the vague elements of that formula. In its general aspects under revenue acts depletion is a problem on which taxpayers, government and accountants

have expressed a contrariety of opinions.[11] Obfuscation in attempted application of its principles under income tax laws has frequently been the result. The Congress itself, as revealed in the history of the revenue acts, has expressed varying philosophies. In practical administration of any one statute there are admittedly borderline cases between deductible business expenses and non-deductible capital outlays. On specific fact situations the clear line between depletion, depreciation, and obsolescence often becomes blurred.[12] What those lines are or should be is for the Congress and the Commissioner. Experience and new insight can be expected to produce rather constant change. In sum, the highly technical and involved factors entering into a practical solution of the problem of depletion in administration of the tax laws points to the necessity of interpreting § 23(l) so as to strengthen rather than to weaken the administrative powers to deal with it equitably and reasonably. These considerations are persuasive here not only in reaffirming the conclusion that the rule-making power existed, but also in concluding that restrictions on that power should not be lightly imposed where the incidence of such rules as are promulgated is prospective only.

Reversed.

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

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[11] 2 Paul & Mertens, The Law of Federal Income Taxation (1934), ch. 21; 47 Yale L. Journ. 806 (1938).

[12] See for example the issues posed in *United States* v. *Dakota-Montana Oil Co., supra.*

F. H. E. OIL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 26. Argued October 9, 10, 1939.—Decided November 6, 1939.

A regulation under the Revenue Act of 1932, requiring that development as well as operative expenses be deducted from gross income from oil wells, in ascertaining "net income from the property" under § 114 (b) (3), *sustained,* upon the authority of *Helvering* v. *Wilshire Oil Co., ante,* p. 90.

102 F. 2d 596, affirmed.

CERTIORARI, 307 U. S. 618, to review a judgment of the court below which reversed a decision of the Board of Tax Appeals (36 B. T. A. 1327), reducing a deficiency assessment.

Mr. Harry C. Weeks for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key and Ellis N. Slack* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents the same issue as is involved in *Helvering* v. *Wilshire Oil Co., ante,* p. 90, except that it arises under the Revenue Act of 1932 (47 Stat. 169). In computing its taxable net income under that Act, petitioner deducted certain development expenditures as it had done since its organization in 1925. But it refused to take these same deductions in computing net income for the purpose of applying the 50 per cent limitation on the depletion allowance, as provided in § 114 (b) (3) of the

1932 Act.[1] That section, so far as material here, was the same as § 114 (b) (3) of the 1928 Act (45 Stat. 791). And Treasury Regulations 77, Art. 221 (h) promulgated under the 1932 Act[2] defined "net income . . . from the property" as used in § 114 (b) (3) so as to require "development costs" of the kind here involved to be deducted from "gross income from the property."[3] The Board of Tax Appeals held that petitioner need not deduct these

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[1] That section provided:

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

[2] Section 23 (l) of the Revenue Act of 1932 provided:

"In computing net income there shall be allowed as deductions:

. . . . . .

"(*l*) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . ."

[3] Treasury Regulations 77, Art. 221 (h) provided:

"'Net income of the taxpayer (computed without allowance for depletion) from the property,' as used in section 114 (b) (2), (3), and (4) and articles 221 to 248, inclusive, means the 'gross income from the property' as defined in paragraph (g) less the allowable deductions attributable to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (*g*) in so far as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. . . ."

development expenditures in applying the 50 per cent limitation on depletion allowance (36 B. T. A. 1327) and the Circuit Court of Appeals reversed (102 F. 2d 596). Since we have this day decided in *Helvering* v. *Wilshire Oil Co., supra,* that comparable regulations under the 1928 Act were lawful, *a fortiori* those here involved are valid and binding on petitioner. The judgment of the court below was therefore right and is

Affirmed.

MR. JUSTICE BUTLER and MR. JUSTICE REED took no part in the consideration or disposition of this case.

CASE ET AL. *v.* LOS ANGELES LUMBER PRODUCTS CO., LTD.

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

Nos. 23 and 24. Argued October 18, 1939.—Decided November 6, 1939.

1. The question whether a plan of reorganization is "fair and equitable" within the meaning of § 77B of the Bankruptcy Act is a question of law. P. 114.
2. Where a plan of reorganization is not fair and equitable as a matter of law, it can not be approved by the court even though the percentage of the various classes of security holders required by § 77B (f) for confirmation of a plan has consented. *Id.*
3. The fact that a great majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. *Id.*
4. Under § 77B of the Bankruptcy Act, as in equity reorganizations, the court must use its own informed and independent judgment in every important determination in the administration of the proceedings. P. 115.
5. Where words are employed in an Act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Id.*
6. It is a fixed principle, governing under § 77B of the Bankruptcy Act as well as in equity reorganizations, that, to the extent of their

debts, creditors are entitled to absolute priority over stockholders against all the property of an insolvent corporation, relative priority not being sufficient. P. 115.

7. To accord the creditor his full or absolute priority against the corporate assets where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent to the participation accorded the stockholder. Pp. 115–122.

8. The amount owed bondholders by an insolvent corporation was more than four-fold the value of its assets. A plan of reorganization under § 77B of the Bankruptcy Act gave to the old stockholders 23 per cent. of the assets and voting power in a new company without requiring of them any fresh contribution of capital, *held* not "fair and reasonable." P. 122.

Such participation by the old stockholders can not be justified:

(1) upon the ground that some of them possess a financial standing and influence and can provide a continuity of management beneficial to the bondholders (p. 122); or

(2) upon the ground that if the bondholders were to foreclose presently they would receive substantially less than the appraised assets (p. 123); or

(3) upon the ground that the virtual abrogation by the Plan of an earlier agreement deferring foreclosure gave to the bondholders a valuable consideration justifying participation by the stockholders in the reorganization (p. 124); or

(4) upon the ground that the bondholders will be aided by maintaining the debtor as a going concern and avoiding litigation with the old stockholders. P. 129.

9. An insolvent corporation, by invoking the jurisdiction of the District Court under § 77B of the Bankruptcy Act, necessarily waives its right to remain in unmolested dominion and control over the corporate property; and consequently a purported surrender, in its plan of reorganization, of its right, under an earlier agreement, to postpone the date when the mortgage securing its bonds could be foreclosed, furnishes no consideration for participation by stockholders of the corporation in the assets and management of the new one to be formed. P. 124.

10. In determining whether a plan of reorganization presented by an insolvent corporation under § 77B of the Bankruptcy Act is "fair and equitable," to minority bondholders, the fact that it was previously agreed to by the requisite majorities of security holders does not give it the force of a contract binding on the court. P. 125.

11. In proceedings under § 77B of the Bankruptcy Act, compromise of claims is allowable in fitting circumstances; but the District Court is not to be influenced to approve or disapprove a plan of reorganization by threats of litigation on the part of stockholders. P. 129.
12. The criteria for exclusion or inclusion of old stockholders in a reorganization under § 77B are the same whether the petition be voluntary or involuntary. P. 131.
13. Failure to accept a plan proposed does not force dismissal or liquidation. Under § 77B (c) (8), the District Court may allow time for proposal of a new plan where it does not appear that one which is fair and equitable and in accordance with the Act can not be adopted, nor that all reasonable time for proposal of such alternative plan has expired. P. 131.

100 F. 2d 963, reversed.

CERTIORARI, 307 U. S. 619, to review the affirmance of decrees of the District Court confirming a corporate debtor's amended plan of reorganization under § 77B of the Bankruptcy Act. 27 F. Supp. 501.

Mr. Robert M. Clarke, with whom *Mr. Thomas K. Case, in propria persona,* was on the brief, for petitioners.

By special leave of Court, *Solicitor General Jackson,* with whom *Messrs. Warner W. Gardner, Robert K. McConnaughey, Daniel W. Knowlton, Chester T. Lane, Samuel H. Levy,* and *Homer Kripke* were on the brief, for the United States, as *amicus curiae,* urging reversal.

Messrs. J. Clifford Argue and *John C. Macfarland,* with whom *Messrs. David R. Faries, H. D. Crotty,* and *Woodward M. Taylor* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases [1] present the question of the conditions under which stockholders may participate in a plan

[1] One involves an interlocutory order and the other a final order confirming a plan of reorganization under § 77B of the Bankruptcy Act.

of reorganization under § 77B (48 Stat. 912) of the Bankruptcy Act where the debtor corporation is insolvent both in the equity and in the bankruptcy sense. Because of the contrariety of tendencies in practical administration of the Act among the circuits as illustrated by the differences between the holding below (100 F. 2d 963) and that in *In re Barclay Park Corp.*, 90 F. 2d 595, we granted certiorari.

The debtor is a holding company owning all of the outstanding shares of the capital stock (except for certain qualifying shares held by directors) of six subsidiaries. Three of these have no assets of value to the debtor. Two have assets of little value. The debtor's principal asset consists of the stock of Los Angeles Shipbuilding and Drydock Corporation which is engaged in shipbuilding and ship repair work in California. This subsidiary has fixed assets of $430,000 and current assets of approximately $400,000. This subsidiary has only current debts of a small amount, not affected by the plan. The debtor's assets other than the stock of its subsidiaries aggregate less than $10,000.

The debtor's liabilities[2] consist of principal and interest of $3,807,071.88 on first lien mortgage bonds issued in 1924 and maturing in 1944, secured by a trust indenture covering the fixed assets of Los Angeles Shipbuilding and Drydock Corporation (one of the subsidiaries) and the capital stock of all of the subsidiaries. No interest has been paid on these bonds since February 1, 1929. In 1930, as a consequence of the financial embarrassment of the debtor, a so-called voluntary reorganization was effected. To that end, a supplement to this trust indenture was executed, pursuant to a provision therein, with the consent of about 97% of the face value of all

[2] Other liabilities, not material here, are $6,075.94 of current accounts payable and $496,899.76 due the Los Angeles Shipbuilding and Drydock Corporation.

the outstanding bonds, which reduced the interest from 7½% to 6% and made the interest payable only if earned. At the same time the old stock of the debtor was wiped out by assessment and new stock issued, divided into Class A and Class B, with equal voting rights. Class A stock was issued to some of the old stockholders who contributed $400,000 new money which was turned over to the Los Angeles Shipbuilding and Drydock Corporation and used by it as working capital. In consideration of this contribution the bondholders who agreed to the modification of the indenture likewise released the stockholders' liability under California law in favor of these contributors. Some Class B stock was issued to bondholders in payment of unpaid interest coupons.[3] At present there are outstanding 57,788 shares of Class A stock and 5,112 shares of Class B stock.

In 1937 the management prepared a plan of reorganization to which over 80% of the bondholders and over 90% of the stock assented. This plan of reorganization, as we shall discuss hereafter, provided for its consummation either on the basis of contract or in a § 77B proceeding, such election to be made by the board of directors. In January 1938 the directors chose the latter course and the debtor corporation filed a petition for reorganization under § 77B of the Bankruptcy Act, with the plan attached and reciting, *inter alia,* that the required percentage of security holders had consented to it. This plan as filed was later modified by the debtor, as we point out later, in a manner not deemed by us ma-

[3] A large block of Class B stock was escrowed under a management contract with one Armes to be delivered to him when all the bonds were retired and the Class A stockholders were paid back their $400,000 plus interest in the form of dividends. But this management contract was later terminated and the escrowed Class B stock was returned to the debtor and cancelled. Class A stock was preferred to Class B in the event of liquidation to the amount of $400,000 and interest.

terial to the issues here involved. That plan as modified provides for the formation of a new corporation, which will acquire the assets of Los Angeles Shipbuilding and Drydock Corporation,[4] and which will have a capital structure of 1,000,000 shares of authorized $1 par value voting stock. This stock is divided into 811,375 shares of preferred and 188,625 shares of common. The preferred stock will be entitled to a 5% non-cumulative dividend, after which the common stock will be entitled to a similar dividend. Thereafter all shares of both classes will participate equally in dividends. The preferred stock will receive on liquidation a preference to the amount of its par value. Thereupon the common will receive a similar preference. Thereafter all shares of both classes participate equally.

170,000 shares of preferred are reserved for sale to raise money for rehabilitation of the yards.[5] 641,375 shares of the preferred are to be issued to the bondholders, 250 shares to be exchanged for each $1000 bond. The Class A stockholders will receive the 188,625 shares of common stock, without the payment of any subscription or assessment. No provision is made for the old Class B stock. The aggregate par value of the total preferred and common stock to be issued to existing security holders is $830,000—an amount which equals the going concern value of the assets of the enterprise.

The plan was assented to by approximately 92.81% of the face amount of the bonds, 99.75% of the Class A

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[4] The assets of the debtor, except the capital stock of two subsidiaries which have assets of some, though slight, value will also be transferred to the new company. The assets of these two subsidiaries will be liquidated and the proceeds distributed pro rata among bondholders. The assets of the other three subsidiaries will also apparently be acquired by the new company.

[5] No underwriting of these funds is provided and no disclosure is made as to how the additional funds are to be raised.

stock, and 90% of the Class B stock. Petitioners own $18,500 face amount of the bonds. They did not consent to the so-called voluntary reorganization in 1930 whereby the trust indenture was amended. And throughout the present § 77B proceedings they appropriately objected that the plan was not fair and equitable to bondholders.

The District Court found that the debtor was insolvent both in the equity sense and in the bankruptcy sense. The latter finding was based upon "appraisal and audit reports." In this connection the court found that the total value of all assets of Los Angeles Shipbuilding and Drydock Corporation was $830,000, those assets constituting practically all of the assets of the debtor and of its various subsidiaries of any value to the estate. Yet in spite of this finding, the court, in the orders now under review, confirmed the plan. And the court approved it despite the fact that the old stockholders, who have no equity in the assets of the enterprise, are given 23% of the assets and voting power in the new company without making any fresh contribution by way of subscription or assessment. The court, however, justified inclusion of the stockholders in the plan (1) because it apparently felt that the relative priorities of the bondholders and stockholders were maintained by virtue of the preferences accorded the stock which the bondholders were to receive and the fact that the stock going to the bondholders carried 77% of the voting power of all the stock presently to be issued under the plan; and (2) because it was able to find that they had furnished the bondholders certain "compensating advantages" or "consideration." This so-called consideration was stated by the District Court in substance as follows:

1. It will be an asset of value to the new company to retain the old stockholders in the business because of "their familiarity with the operation" of the business and their "financial standing and influence in the com-

munity"; and because they can provide a "continuity of management."

2. If the bondholders were able to foreclose now and liquidate the debtor's assets, they would receive "substantially less than the present appraised value" of the assets.

3. By reason of the so-called voluntary reorganization in 1930, the bondholders cannot foreclose until 1944, the old stockholders having the right to manage and control the debtor until that time. At least the bondholders cannot now foreclose without "long and protracted litigation" which would be "expensive and of great injury" to the debtor. Hence, the virtual abrogation of the agreement deferring foreclosure until 1944 was "the principal valuable consideration" passing to the bondholders from the old stockholders.

4. Bonding companies are unwilling to assume the risk of becoming surety for the debtor or its principal subsidiary "because of the outstanding bond issue." The government's construction program will provide "valuable opportunities" to the debtor if it is prepared to handle the business. Hence, the value to the bondholders of maintaining the debtor "as a going concern, and of avoiding litigation, is in excess of the value of the stock being issued" to the old stockholders.

The Circuit Court of Appeals in affirming the decree confirming the plan stated that it was not possible for it to do other than accept these findings because of a stipulation and the state of the record thereunder. That stipulation provided for an abbreviated record and stated that the dissenting bondholders intended "to raise questions of substantive law only." But it also specified as errors, *inter alia,* the inclusion of stockholders in a plan where they have no equity and the finding that the plan was "fair" and "equitable." Thereby the stipulation adequately reserved the question of law as to whether

on these facts the plan was fair and equitable within the meaning of § 77B. But in any event a stipulation does not foreclose legal questions. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 289.

On that question of law we think that the District Court erred in confirming the plan and that the Circuit Court of Appeals erred in affirming that decree. We think that as a matter of law the plan was not fair and equitable.

At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by § 77B (f) for confirmation of the plan has consented. It is clear from a reading of § 77B (f)[6] that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be "fair and equitable." The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. This is in line with the decision of this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, which reversed an order approving a plan of reorganization under § 77B, in spite of the fact that the requisite percentage of the various classes of

[6] It provides in part: "After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; . . ."

security holders had approved it, on the ground that preferred stock of the debtor corporation was inequitably treated under the plan. The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by the Congress on the district courts under § 77B. That function and duty are no less here than they are in equity receivership reorganizations, where this Court said, "Every important determination by the court in receivership proceedings calls for an informed, independent judgment." *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436.

Hence, in this case the fact that 92.81% in amount of the bonds, 99.75% of the Class A stock, and 90% of the Class B stock have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of a large bond issue.

The words "fair and equitable" as used in § 77B(f) are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U. S. 216, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Keck* v. *United States,* 172 U. S. 434, 446.

In equity reorganization law the term "fair and equitable" included, *inter alia,* the rules of law enunciated by this Court in the familiar cases of *Railroad Co.* v. *Howard,* 7 Wall. 392; *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.,* 174 U. S. 674; *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.,* 271 U. S. 445. These cases dealt with the precedence to be accorded

creditors over stockholders in reorganization plans.[7] In *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co., supra,* this Court reaffirmed the "familiar rule" that "the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors." And it went on to say that "any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation" (p. 684). This doctrine is the "fixed principle" according to which *Northern Pacific Ry. Co.* v. *Boyd, supra,* decided that the character of reorganization plans was to be evaluated. And in the latter case this Court added, "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." (p. 508.) On the reaffirmation of this "fixed principle" of reorganization law in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* it was said that "to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation" (p. 455).

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[7] For analyses and reviews of these cases as applied to equity reorganizations or reorganizations under § 77B and § 77 of the Bankruptcy Act see Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va. L. Rev. 541; Swaine, Reorganization of Corporations: Certain Developments of the Last Decade, 27 Col. L. Rev. 901; Spaeth and Winks, The Boyd Case and Section 77, 32 Ill. L. Rev. 769; Bonbright and Bergerman, Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization, 28 Col. L. Rev. 127; Friendly, Some Comments on the Corporate Reorganization Act, 48 Harv. L. Rev. 39; 2 Gerdes on Corporate Reorganizations, § 1084.

In application of this rule of full or absolute priority this Court recognized certain practical considerations and made it clear that such rule did not "require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock." *Northern Pacific Ry. Co.* v. *Boyd, supra,* p. 508. And this practical aspect of the problem was further amplified in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* by the statement that "when necessary, they (creditors) may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right" (pp. 454–455). And it also recognized the necessity at times of permitting the inclusion of stockholders on payment of contributions, even though the debtor company was insolvent. As stated in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* p. 455: "Generally, additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them unless stockholders are permitted to contribute and retain an interest sufficiently valuable to move them. In such or similar cases the chancellor may exercise an informed discretion concerning the practical adjustment of the several rights." But even so, payment of cash by the stockholders for new stock did not itself save the plan from the rigors of the "fixed principle" of the *Boyd* case, for in that case the decree was struck down where provision was not made for the unsecured creditor and even though the stockholders paid cash for their new stock. Sales pursuant to such plans were void, even though there was no fraud

in the decree. *Northern Pacific Ry. Co.* v. *Boyd, supra,* p. 504. As this Court there stated, p. 502, "There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

Throughout the history of equity reorganizations this familiar rule was properly applied in passing on objections made by various classes of creditors that junior interests were improperly permitted to participate in a plan or were too liberally treated therein. In such adjudications the doctrine of *Northern Pacific Ry. Co.* v. *Boyd, supra,* and related cases, was commonly included in the phrase "fair and equitable" or its equivalent. As we have said, the phrase became a term of art used to indicate that a plan of reorganization fulfilled the necessary standards of fairness. Thus throughout the cases in this earlier chapter of reorganization law, we find the words "equitable and fair," [8] "fair and equitable," [9] "fairly and equitably treated," [10] "adequate and equitable," [11] "just, fair and equitable" [12] and like phrases [13] used to include the "fixed principle" of the *Boyd* case, its antecedents and

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[8] *Jameson* v. *Guaranty Trust Co.*, 20 F. 2d 808, 815, certiorari denied 275 U. S. 569.

[9] *Flershem* v. *National Radiator Corp.*, 64 F. 2d 847, 852, rev'd 290 U. S. 504.

[10] *P. R. Walsh Tie & Timber Co.* v. *Missouri Pacific Ry. Co.*, 280 F. 38, 44.

[11] *Mountain States Power Co.* v. *A. L. Jordan Lumber Co.*, 293 F. 502, 506.

[12] *St. Louis-San Francisco Ry. Co.* v. *McElvain*, 253 F. 123, 134. See also *Guaranty Trust Co.* v. *Missouri Pacific Ry. Co.*, 238 F. 812, 816, 819.

[13] *Northern Pacific Ry. Co.* v. *Boyd, supra,* spoke of a "fair" offer to the creditor and a "just reorganization" as the prerequisite to validity of the plan (p. 508). *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* said that the offer to the creditor had to be "fair and binding" (p. 452).

its successors. Hence we conclude, as have other courts,[14] that that doctrine is firmly imbedded in § 77B.

We come then to the legal question of whether the plan here in issue is fair and equitable within the meaning of that phrase as used in § 77B.

We do not believe it is, for the following reasons. Here the court made a finding that the debtor is insolvent not only in the equity sense but also in the bankruptcy sense. Admittedly there are assets not in excess of $900,000, while the claims of the bondholders for principal and interest are approximately $3,800,000. Hence even if all of the assets were turned over to the bondholders they would realize less than 25 percent on their claims. Yet in spite of this fact they will be required under the plan to surrender to the stockholders 23 percent of the value of the enterprise.

True, the relative priorities of the bondholders and the old Class A stockholders are maintained by virtue of

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[14] See *In re Day & Meyer, Murray & Young*, 93 F. 2d 657; *Tellier* v. *Franks Laundry Co.*, 101 F. 2d 561; *In re Philadelphia & Reading Coal & Iron Co.*, 105 F. 2d 357; *In re New York Railways Corp.*, 82 F. 2d 739, 744; 2 Gerdes on Corporate Reorganizations, § 1085. Intimations to the contrary, *Downtown Investment Assn.* v. *Boston Metropolitan Buildings, Inc.*, 81 F. 2d 314, 323–324; *In re A. C. Hotel Co.*, 93 F. 2d 841, are not tenable.

The statutory scheme of § 77B (in those respects which are material here) is in sharp contrast to that which was provided for compositions under former § 12. This Court said in *Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464, 470: "Reorganizations now permitted under § 77B present certain resemblances to compositions under § 12, which have been commented upon as supporting the constitutionality of the reorganization provisions of § 77 or § 77B. . . . But § 77B contemplates a procedure and results not permissible under § 12. Reorganizations are nowhere referred to in the statute as compositions." Under § 12 (a) (as it existed at the time § 77B was enacted) only a "bankrupt" could offer "terms of composition to his creditors." Under § 77B (d) plans may be proposed not only by the debtor but also by a designated percentage of the creditors or, where

the priorities accorded the preferred stock which the bondholders are to receive. But this is not compliance with the principle expressed in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* that "to the extent of their debts creditors are entitled to priority over stockholders against all the property of an insolvent corporation," for there are not sufficient assets to pay the bondholders the amount of their claims. Nor does this plan recognize the "equitable right" of the bondholders "to be preferred to stockholders against the full value of all property belonging to the debtor corporation," within the meaning of the rule announced in that case, since the full value of that property is not first applied to claims of the bondholders before the stockholders are allowed to participate. Rather it is partially diverted for the benefit of the stockholders even though the bondholders would obtain less than 25% payment if they received it all. Under that theory all classes of

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the debtor is not found to be insolvent, by a specified percentage of stockholders. Section 12 (d) as it then existed provided that the judge "shall confirm a composition if satisfied" *inter alia* that "it is for the best interests of the creditors." See *Fleischmann & Devine, Inc.* v. *Saul Wolfson Dry Goods Co.,* 299 F. 15. The "fair and equitable" standard employed in § 77B was not then present in § 12. Consent by the debtor to the composition was implicit in former § 12 (cf. *In re Bryer,* 281 F. 812). But under § 77B approval of a plan by security holders who have no equity in the enterprise is unnecessary. *In re 620 Church Street Building Corp.,* 299 U. S. 24. The general view was well expressed in *In re Dutch Woodcraft Shops,* 14 F. Supp. 467, 469, "The preservation of business enterprises must not be at the expense of creditors, and the provisions of section 77B should not be taken advantage of to effect what, in fact, amounts to a composition under section 12."

The Chandler Act, c. 10 (52 Stat. 840) approved June 22, 1938, now supplants § 77B. Various substantial changes in the provisions of § 77B have been made therein. But the standard of "fair and equitable" as used in § 77B remains unaltered as one of the criteria necessary for confirmation of a plan of reorganization. § 221 (2).

security holders could be perpetuated in the new company even though the assets were insufficient to pay—in new bonds or stock—the amount owing senior creditors. Such a result is not tenable.

It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. This Court, as we have seen, indicated as much in *Northern Pacific Ry. Co.* v. *Boyd, supra,* and *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra.* Especially in the latter case did this Court stress the necessity, at times, of seeking new money "essential to the success of the undertaking" from the old stockholders.[15] Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made. But if these conditions are not satisfied the stockholder's participation would run afoul of the ruling of this Court in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co., supra,* that "Whenever assessments are demanded, they must be adjusted with the purpose of according to the creditor his full right of priority against the corporate assets, so far as possible in the existing

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[15] This new money was commonly necessary in equity reorganizations not only to provide new working capital but also to pay dissenting creditors. See Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization, 27 Col. L. Rev. 132.

Like considerations are relevant in reorganizations under § 77B. As stated by the court in *In re Dutch Woodcraft Shops,* 14 F. Supp. 467, 471:

"Circumstances may exist where the success of an undertaking requires that new money be furnished and where the former stockholders are the only or most feasible source of the new capital. In such instances, the court may recognize as fair and equitable a plan which includes contributions of new money by stockholders, provided it satisfactorily appears that full recognition has been given to the value of creditors' claims against the property."

circumstances" (p. 456). If, however, those conditions we have mentioned are satisfied, the creditor cannot complain that he is not accorded "his full right of priority against the corporate assets." If that were not the test, then the creditor's rights could be easily diluted by inadequate contributions by stockholders. To the extent of the inadequacy of their contributions the stockholders would be in precisely the position which this Court said in *Northern Pacific Ry. Co.* v. *Boyd, supra,* the stockholders there were in, viz., "in the position of a mortgagor buying at his own sale" (p. 504).

In view of these considerations we believe that to accord "the creditor his full right of priority against the corporate assets" where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder.

The alleged consideration furnished by the stockholders in this case falls far short of meeting those requirements.

1. The findings below that participation by the old Class A stockholders will be beneficial to the bondholders because those stockholders have "financial standing and influence in the community" and can provide a "continuity of management" constitute no legal justification for issuance of new stock to them. Such items are illustrative of a host of intangibles which, if recognized as adequate consideration for issuance of stock to valueless junior interests, would serve as easy evasions of the principle of full or absolute priority of *Northern Pacific Ry. Co. v. Boyd, supra,* and related cases. Such items, on facts present here, are not adequate consideration for issuance of the stock in question. On the facts of this case they cannot possibly be translated into money's worth reasonably equivalent to the participation accorded the old stockholders. They have no place in the asset

column of the balance sheet of the new company. They reflect merely vague hopes or possibilities.[16] As such, they cannot be the basis for issuance of stock to otherwise valueless interests. The rigorous standards of the absolute or full priority doctrine of the *Boyd* case will not permit valueless junior interests to perpetuate their position in an enterprise on such ephemeral grounds.[17]

2. The District Court's further finding that if the bondholders were to foreclose now they would receive "substantially less than the present appraised value" of the assets of the debtor corporation is no support for inclusion of the old stockholders in the plan. The fact that bondholders might fare worse as a result of a foreclosure and liquidation than they would by taking a debtor's plan under § 77B can have no relevant bearing on whether a proposed plan is "fair and equitable" under that section. Submission to coercion is not the application of "fair and equitable" standards. Such a proposition would not only drastically impair the standards of "fair and equitable" as used in § 77B; it would pervert

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[16] On comparable facts a like conclusion was reached in *In re Barclay Park Corp.*, 90 F. 2d 595, where the court said, p. 598:

"It is argued that the stockholders represent the present management of the hotel and that the management is valuable and indeed necessary to the enterprise and that the manager-stockholders will 'walk out' if the proposed plan does not go through and leave the hotel to its fate. But there is no binding agreement on their part to remain which might afford a justification for giving them a stock interest and, if their managerial skill is vital to the success of the hotel, any stock issued to insure the continuance of their relation ought to go to those stockholders who are of use to the enterprise and agree to act in its behalf, and not to all stockholders as such. Indeed, the supposed advantages of retaining the existing management seem to be a matter of inference, if not of speculation, supported by the oral statements of attorneys instead of by testimony."

[17] This conclusion is reëmphasized here by the fact that not all of the Class A stockholders who receive new stock are part of the management of the debtor.

the function of that Act. One of the purposes of § 77B was to avoid the consequences to debtors and creditors of foreclosures, liquidations, and forced sales with their drastic deflationary effects.[18] To hold that in a § 77B reorganization creditors of a hopelessly insolvent debtor may be forced to share the already insufficient assets with stockholders because apart from rehabilitation under that section they would suffer a worse fate, would disregard the standards of "fair and equitable"; and would result in impairment of the Act to the extent that it restored some of the conditions which the Congress sought to ameliorate by that remedial legislation.

3. The conclusion of the District Court that the virtual abrogation of the agreement deferring foreclosure until 1944 ("the principal valuable consideration" given to the bondholders by the stockholders) justified participation by the stockholders in the plan is likewise erroneous.

What were the rights of the bondholders under the supplemental indenture executed in 1930 we cannot determine. That indenture is not in the abbreviated record before us. The District Court found that for all practical purposes the bondholders could not foreclose until 1944. From the findings below we conclude that that followed as a consequence of making interest payable only if earned. On this record it does not appear whether or not there might be other events of default—such as non-payment of sinking funds—giving bondholders or the trustee the right to foreclose or giving bondholders or the trustee the right to accelerate the maturity of the bonds so that suits could be brought thereon. Hence, we must assume, as the District Court found, that the bondholders and the trustee could not take possession

[18] See H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 38, dealing with recent amendments to the section; and H. R. Rep. No. 194, 73rd Cong., 1st Sess., p. 2, the report accompanying the original Act.

of the property through foreclosure or otherwise until the maturity of the bonds. And as a corollary thereof we likewise assume that the stockholders, at least so far as the bondholders were involved, could keep their management group in possession and control until that time. And we assume that this right or power on the part of the stockholders to keep possession until 1944 was for them a thing of value, though there is no finding that the old stock had any value, present or prospective.

But we cannot conclude that that right survived the commencement of the proceedings under § 77B. A debtor as well as a creditor who invokes the aid of the federal courts in reorganization or rehabilitation under § 77B assumes all of the consequences which flow from that jurisdiction. Once the property is in the hands of the court private rights as respect that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by the Congress. As a result of such proceedings the hand of all executions or levies may be stayed.[19] The court acquires "exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section." [20] The court need not keep the debtor in possession but may substitute for the old management a trustee; or if the old management is retained it operates the business "subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as the judge may from time to time impose and prescribe." [21] Thus, while the property remains in the hands of the court, as it does until dismissal or final decree on confirmation, the debtor, though left in pos-

[19] § 77B (a), (c) (10). Cf. *Continental Illinois Nat. Bank Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648.

[20] § 77B (a).

[21] § 77B (c).

session by the judge, does not operate it, as it did before the filing of the petition, unfettered and without restraint. The control of the court is then pervasive.[22] Furthermore, stockholders and other junior interests may be excluded from any plan of reorganization if the court finds that the debtor is insolvent. *In re 620 Church Street Building Corp.*, 299 U. S. 24. And on facts such as exist here, these junior interests must be excluded unless they furnish adequate consideration for the interest which they obtain in the new company. And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction.[23] He in-

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[22] See, 1 Gerdes on Corporate Reorganizations, c. 9. These powers embrace not only the specifically enumerated powers contained in § 77B but also "all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature." § 77B (a). In addition, by virtue of § 77A the district court, as a court of bankruptcy, has original jurisdiction in proceedings under § 77B. Illustrative of specific powers granted by § 77B are the powers of the court to authorize issuance of certificates (§ 77B (c) (3)), to require the filing of schedules and reports (§ 77B (c) (4)), to direct rejection of executory contracts (§ 77B (c) (5)), to control salaries of officers and to approve appointments "to any office" (§ 77B (c)). The last subsection also provides, "In case a trustee is not appointed, the debtor shall continue in the possession of its property, and, if authorized by the judge, shall operate the business thereof during such period, fixed or indefinite, as the judge may from time to time prescribe, and shall have all the title to and shall exercise, consistently with the provisions of this section, all the powers of a trustee appointed pursuant to this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as the judge may from time to time impose and prescribe." In the instant case the court left the debtor in possession, allowing its officers no salaries but allowing specified salaries to be paid to designated officers of the principal subsidiary.

[23] The Act has explicit standards for dismissal (§ 77B (c) (8)) which we discuss hereafter.

vokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits. One of those disadvantages from the viewpoint of the debtor and its stockholders is the approval of a plan of reorganization which eliminates them completely.[24] Accordingly, respondent's assertion in this case that the major contribution of these stockholders justifying their inclusion in the plan was the waiver of their right to defer or put off foreclosure until 1944, i. e., to remain in possession, does not stand analysis. The right to remain in unmolested dominion and control over the property was necessarily waived or abandoned on invoking the jurisdiction of the federal courts in these proceedings. When that jurisdiction attached, the court rather than the stockholders was in control with all of the powers and duties which that entailed under § 77B. Certainly the surrender of a right thus waived is not adequate consideration for the dilution of the bondholders' priorities which this plan would effect.

And there is a further reason why this result necessarily follows, if the will of the Congress as expressed in § 77B is not to be thwarted and if the integrity of such proceedings is to be maintained. As we have said, this plan had its origin in an endeavor on the part of the debtor in 1937 to effect a voluntary reorganization. A plan was proposed by the debtor which was the same as that here involved except for the amount and nature of the stock to be received by the bondholders.[25] That plan

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[24] As recognized in *In re 620 Church Street Building Corp., supra,* § 77B (e) (1) expressly takes care of this contingency in the provision that acceptance of the plan by a majority of the stock "shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined" *inter alia* that "the debtor is insolvent."

[25] Under that plan the new company was to have an authorized capital of $1,000,000 consisting of 1,000,000 shares of a par value of

contained two methods for its consummation. The first was by means of an amendment to the trust indenture and a recapitalization of the debtor, a method to be followed if the board felt that sufficient approvals had been obtained. The second was by means of § 77B. Over 80% of the bondholders and over 90% of the stock approved the original plan. Thereupon the debtor filed its petition in § 77B. Thereafter, the debtor filed a modification of the plan to which the assents, here relied upon, were obtained.[26] Thus respondent argues that since the plan of reorganization was entered into between the bondholders and the stockholders before institution of the reorganization proceedings under § 77B, the consideration flowing from the stockholders had been furnished and the interests of the bondholders and stockholders in the assets of the debtor had been fixed prior to the filing of the petition. In fact, respondent frankly insists that the stockholders' "right of participation was secured by contract before, and as a condition precedent to, the institution of the 77B proceedings."

But the mere statement of this proposition is its own refutation. If the reorganization court were bound by such conventions of the parties, it would be effectively ousted of important duties which the Act places on it. Federal courts acting under § 77B would be required to place their imprimatur on plans of reorganization which disposed of the assets of a company not in accord with the standards of "fair and equitable" but in compliance with agreements which the required percentages of secu-

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$1.00 per share, the bondholders getting 590,065 of the shares and the old Class A stockholders getting 239,935 of the shares. Shares going to the bondholders were of the same class as those received by stockholders.

[26] These assents were apparently measured by the failure of the bondholders to withdraw their consents which had been given to the original plan, on receiving copies of the proposed modification.

rity holders had previously made. Such procedure would deprive scattered and unorganized security holders of the protection which the Congress had provided them under § 77B. The scope of the duties and powers of the Court would be delimited by the bargain which reorganizers had been able to make with security holders before they asked the intercession of the court in effectuating their plan. Minorities would have their fate decided not by the court in application of the law of the land as prescribed in § 77B, but by the forces utilized by reorganizers in prescribing the conditions precedent on which the benefits of the statute could be obtained. No conditions precedent to enjoyment of the benefits of § 77B can be provided except by the Congress. To hold otherwise would be to allow reorganizers to rewrite it so as to best serve their own ends.[27]

4. The holding of the District Court that the value to the bondholders of maintaining the debtor as a going concern and of avoiding litigation with the old stockholders justifies the inclusion of the latter in the plan is likewise erroneous. The conclusion of the District Court that avoidance of litigation with the stockholders gave validity to their claim for recognition in the plan involves a misconception of the duties and responsibilities of the court in these proceedings. Whatever might be the strategic or nuisance value of such parties outside of § 77B is irrelevant to the duties of the court in confirming or disapproving a plan under that section. In these proceedings there is no occasion for the court to yield to such pressures. If the priorities of creditors which the law

[27] Cf. *Hollister* v. *Stewart*, 111 N. Y. 644; 19 N. E. 782, where the court struck down a voluntary reorganization which attempted to bind minority bondholders. The court said "Unless railroad syndicates or committees are to be put above the Constitution, the trustees cannot set aside and change their contract with plaintiff, of their own volition, without his consent." (p. 660.)

protects are not to be diluted, it is the clear duty of the court to resist all such assertions. Of course, this is not to intimate that compromise of claims is not allowable under § 77B. There frequently will be situations involving conflicting claims to specific assets which may, in the discretion of the court, be more wisely settled by compromise rather than by litigation. Thus, ambiguities in the wording of two indentures may make plausible the claim of one class of creditors to an exclusive or prior right to certain assets as against the other class in spite of the fact that the latter's claim flows from a first mortgage.[28] Close questions of interpretations of after-acquired property clauses in mortgages, preferences in stock certificates, divisional mortgages and the like will give rise to honest doubts as to which security holders have first claim to certain assets. Settlement of such conflicting claims to the *res* in the possession of the court is a normal part of the process of reorganization. In sanctioning such settlements the court is not bowing to nuisance claims; it is administering the proceedings in an economical and practical manner. But that is not the situation here. As a result of the filing of the petition in this case, the court, not the stockholders, acquired exclusive dominion and control over the estate. Hence, any strategic position occupied by the stockholders prior to these proceedings vanished once the court invoked its jurisdiction. Threats by stockholders of the kind here in question are merely threats to the jurisdiction of the

[28] That would appear to be essentially the type of case involved in *In the Matter of Detroit International Bridge Co., Debtor*, No. 24131, U. S. D. C. E. D. Mich., cited to us by the respondent and described in an advisory report (Corporate Reorganization Release No. 9) submitted by the Securities and Exchange Commission pursuant to § 172, c. X of the Chandler Act. However, the action of the court, if any, on the plan has not yet appeared in the published reports.

court, which jurisdiction these selfsame stockholders invoked for their benefit when they caused the debtor's petition to be filed. Consequently, these claims of the stockholders are, as we have said, entitled to no more dignity than any claim based upon sheer nuisance value.

In this connection it should be observed that the finding of the court that it was important to admit the stockholders to participation in the plan so as to maintain the debtor as a going concern and thus protect the bondholders was based upon a misconception of its legal powers and duties. For the court assumed that the only alternative to acceptance of this debtor's plan was a dismissal of the proceeding or a liquidation. But this is not true. In the first place, no special perquisites (of consequence here) flow to stockholders by virtue of the fact that the proceedings are instituted by a voluntary rather than an involuntary petition. The criteria for exclusion or inclusion of stockholders in a plan are precisely the same in both situations. In practice it is not infrequent to find proceedings which start with a debtor's petition ending up with plans of reorganization which exclude stockholders. *Reading Hotel Corp.* v. *Protective Committee,* 89 F. 2d 53. In the second place failure to accept this plan does not force dismissal or liquidation. Section 77B(c)(8) gives the court explicit powers where "a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix" either to "extend such period" or to "dismiss the proceeding" or, with exceptions not relevant here, to cause liquidation, such choice to be made "as the interests of the creditors and stockholders may equitably require." Accordingly, dismissal has not infrequently been properly denied. *In re Bush Terminal Co.,* 84 F. 2d 984. And in this case there has been no showing that a plan which is not only fair and equitable but also meets the other

requirements of the Act cannot be adopted nor that all reasonable time for proposal of such alternative plans has expired.

We therefore hold that the plan is not fair and equitable and that the judgment below must be and is

Reversed.

MR. JUSTICE BUTLER took no part in the consideration or disposition of this case.

ZIFFRIN, INC. *v.* REEVES, COMMISSIONER OF REVENUE OF KENTUCKY, ET AL.

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

No. 8. Argued October 12, 1939.—Decided November 13, 1939.

1. In the exercise of its power over the manufacture, distribution and sale of intoxicating liquors, a State may confine the business of transporting them within the State to those who are licensed as common carriers, and may enforce this by penalty and confiscation. P. 138.
2. The state power to prohibit absolutely, includes the lesser power to permit manufacture, sale, transportation or possession, subject to prescribed conditions which are not unreasonable and which subserve the policy of confining the liquor traffic in order to minimize its evils and to secure payment of revenue. P. 138.
3. Provisions of the Kentucky Alcohol Beverage Control Act forbidding the carriage of intoxicating liquors by carriers other than licensed common carriers and forbidding distillers to deliver to an unauthorized carrier, are not invalid under the Commerce Clause, or under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, nor inconsistent with the Federal Motor Carrier Act of 1935, as applied to a contract carrier in an established business of transporting such liquors, produced in Kentucky, to consignees in other States. Pp. 138, 140.
4. The State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband. P. 140.

5. Although regulation by a State may impose some burden on interstate commerce, this is permissible when "an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." P. 141.

24 F. Supp. 924, affirmed.

APPEAL from a decree of a District Court of three judges denying an injunction and dismissing the bill in a suit to restrain public officials in Kentucky from enforcing against the appellant certain provisions of the state Liquor Control Law. The case was heard below on plaintiff's application for a preliminary injunction, and defendants' motions to dissolve a temporary restraining order and to dismiss the amended bill of complaint.

Mr. Norton L. Goldsmith, with whom *Mr. Howell Ellis* was on the brief, for appellant.

Mr. H. Appleton Federa, with whom *Messrs. Hubert Meredith,* Attorney General of Kentucky, *M. B. Holifield, Harry D. France,* and *William Hayes,* Assistant Attorneys General, were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Since March 1933 appellant, an Indiana corporation, has continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It has permission under the Federal Motor Carrier Act, 1935,[1] to operate as a contract carrier, and claims the right to transport whiskey as heretofore, notwithstanding inhibitions of the Kentucky Alcoholic Beverage Control Law approved March 7, 1938.[2] By this proceeding it

[1] Aug. 9, 1935, c. 498, 49 Stat. 543; U. S. C. Title 49, § 301, *et seq.*

[2] Kentucky Acts 1938, Ch. 2; Baldwin's Supp. to Carroll's Statutes 1936, Ch. 81, § 2554b–97, *et seq.*

seeks to restrain officers of the State from enforcing the contraband and penal provisions of that enactment.

The bill charges that to enforce the Control Law would impair appellant's rights under the Commerce Clause, Federal Constitution, and deprive it of the Due Process and Equal Protection guaranteed by the Fourteenth Amendment. The District Court—three judges sitting—sustained a motion to dismiss. A direct appeal brings the matter here.

The statute is a long, comprehensive measure (123 sections) designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to constant control by the State. Every phase of the traffic is declared illegal unless definitely allowed. The property becomes contraband upon failure to observe the statutory requirements and whenever found in unauthorized possession.

Section 52 provides—"It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act." [3]

Section 53 declares to be contraband: "(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the pro-

[3] Baldwin's Supplement to Carroll's Kentucky Statutes 1936, § 2554b–150.

visions of this Act."[4] Peace officers are authorized to seize such contraband and institute proceedings for forfeiture.

Licenses are authorized (§ 18(1)–(9))[5] for distillers, rectifiers, vintners, wholesalers, retailers, and (§ 18(7))[6] for the transportation of liquors to and from any point in the State. Privileges which may be exercised under these are definitely set out.

Section 21—"A distiller's, rectifier's or Vintner's license, as the case may be, shall authorize the holder thereof, at

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[4] *Id.*, § 2554b–151. "The following property is hereby declared to be contraband: (1) Any illicit still designed for the unlawful manufacture of intoxicating liquors, or any apparatus designed for the unlawful manufacture of spirituous, vinous, malt or intoxicating liquors. An illicit still or apparatus designed for the unlawful manufacture of intoxicating liquors shall include (a) An outfit or parts of an outfit commonly used, or intended to be used, in the distillation or manufacture of spirituous, vinous or malt liquors which is not duly registered in the office of a collector of Internal Revenue for the United States, and the burden of proving that same is so registered shall be on the defendant or defendants under charge; (b) any and all material, equipment, implements, devices, firearms, and other property used or intended for use, directly and immediately, in connection with the illicit traffic in alcoholic beverages. (2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act. (3) Any spirituous, vinous or malt liquors in the possession of any one and to which the revenue stamps have not been affixed as and when required by the provisions of the Alcoholic Beverage Tax Act, sections 4281c–1 to and including 4281c–25, Carroll's Kentucky Statutes, one thousand nine hundred and thirty-six (1936) edition. (4) Any distilled spirits, wine or malt beverage in a container of a size prohibited by law or prohibited the particular party in whose possession same is found. (5) Any distilled spirits or wine kept in an unauthorized place within any licensed premises under the provisions of section 77 of this Act. (6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages."

[5] *Id.*, § 2554b–114.

[6] *Id.*, § 2554b–114 (7).

the premises specifically designated in the license, to engage in the business of distiller, rectifier, or vintner, as the case may be, as those terms are defined in this Act, and to transport for himself only any alcoholic beverage which he is authorized under this license to manufacture or sell, . . ." [7]

Section 22—"Sales and deliveries of alcoholic beverages may be made at wholesale, and from the licensed premises only, . . . (3) by licensed distillers, rectifiers or vintners for export out of the Commonwealth; provided, no distiller, rectifier or vintner, shall sell or contract to sell, give away or deliver any alcoholic beverages to any person, who is not duly authorized by the law of the State of his residence and of the Federal Government if located in the United States, to receive and possess said alcoholic beverages; and in no event shall he sell or contract to sell, give away or deliver, any of his products to any retailer or consumer in Kentucky." [8]

Section 27—"A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided" etc.[9] Section 54(7)—"A Transporter's License as provided for in section 18(7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier." [10]

Section 89—"No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be

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[7] *Id.*, § 2554b–118.
[8] *Id.*, § 2554b–119.
[9] *Id.*, § 2554b–124.
[10] *Id.*, § 2554b–154(7).

transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine." [11]

A license may only issue (§ 33)[12] upon an application which incorporates (§ 36(5))[13] a promise that "the applicant will in all respects and in good faith conscientiously abide by all the provisions of this Act and of any other Act or ordinance relating to alcoholic beverages" etc. Also, (§ 37)[14] there must be a bond "conditioned that such applicant, if granted the license sought, will not suffer or permit any violation of the provisions of this Act" etc.

Having been denied a Common Carrier's Certificate, appellant sought and was refused a transporter's license because it held no such certificate.

In sum, counsel for appellant say: The complaint charges that the Control Law is unconstitutional because repugnant to the Commerce, Due Process and Equal Protection Clauses of the Federal Constitution in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise. Interstate commerce includes both importation of property within a State and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the powers of the States over intoxicants in both of these movements were limited by the

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[11] *Id.*, § 2554b–190.
[12] *Id.*, § 2554b–131.
[13] *Id.*, § 2554b–134 (5).
[14] *Id.*, § 2554b–135.

Commerce Clause. These enactments relate to importations only. Exports remain, as always, subject to that clause. "Although a state may prohibit the manufacture of liquor, if a state permits distillation, sale and transportation—as Kentucky does—the rule of law is that the state may not annex to its consent to manufacture and sell the unconstitutional ban upon carriage of interstate exports of liquors by contract carriers."

The court below rejected appellant's insistence and affirmed the asserted power of the State. Like conclusions were approved in *Commonwealth* v. *One Dodge Motor Truck,* 326 Pa. 120; 191 A. 590 (123 Pa. Superior Ct. 311; 187 A. 461); *Clark* v. *State ex rel. Bobo,* 172 Tenn. 429; 113 S. W. 2d 374; *Jefferson County Distilling Co.* v. *Clifton,* 249 Ky. 815; 61 S. W. 2d 645.

The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 320; *Crane* v. *Campbell,* 245 U. S. 304, 307; *Seaboard Air Line Ry.* v. *North Carolina,* 245 U. S. 298, 304; *Samuels* v. *McCurdy,* 267 U. S. 188, 197–198.

Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. *Seaboard Air Line Ry.* v. *North Carolina, supra.* The State may protect her people

against evil incident to intoxicants, *Mugler* v. *Kansas,* 123 U. S. 623; *Kidd* v. *Pearson,* 128 U. S. 1; and may exercise large discretion as to means employed.

Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils, and secure payment of revenue. The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the State; and property so circumstanced cannot be regarded as a proper article of commerce. *Sligh* v. *Kirkwood,* 237 U. S. 52, 59; *Clason* v. *Indiana,* 306 U. S. 439.

In effect we are asked by injunction to allow a distiller to do what the statute prohibits—deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing—receive and transport within the State.

Kidd v. *Pearson, supra:* An Act of the Iowa Legislature in general terms forbade manufacture or sale of intoxicating liquor but permitted these for mechanical or other purposes. An injunction was approved which restrained Kidd from operating his distillery although he claimed the output would be exported for sale beyond the State. This Court said: "Whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. . . . The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

The doctrine of that case has been often applied. *Geer* v. *Connecticut,* 161 U. S. 519; *Rippey* v. *Texas,* 193 U. S. 504, 509; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357: "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end"; *Sligh* v. *Kirkwood,* 237 U. S. 52; *State Board* v. *Young's Market Co.,* 299 U. S. 59, 63; *Clason* v. *Indiana,* 306 U. S. 439.

The two cases last cited recognize that the State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.

We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity.

The point suggested in respect of Due Process is not in accord with what has been decided in the cases above referred to.

The record shows no violation of Equal Protection. A licensed Common Carrier is under stricter control than an ordinary contract carrier and may be entrusted with privileges forbidden to the latter.

Here the state law creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce.

The Motor Carrier Act of 1935 is said to secure to appellant the right claimed, but we can find nothing there which undertakes to destroy state power to protect her people against the evils of intoxicants or to sanction the receipt and conveyance of articles declared contraband. The Act has no such purpose or effect.

The power of a State to regulate her internal affairs notwithstanding the consequent effect upon interstate commerce was much discussed in *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189. There it was again affirmed that although regulation by the State might impose some burden on interstate commerce this was permissible when "an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states." In the absence of controlling language to the contrary—and there is none—the Federal Motor Carrier Act should not be brought into conflict with this reiterated doctrine.

The challenged decree must be

Affirmed.

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

VALVOLINE OIL CO. *v.* UNITED STATES ET AL.

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

No. 25. Argued October 19, 1939.—Decided November 13, 1939.

1. An oil company owning and operating a pipe line through which it transports to its own refineries for its own refining purposes, partly across state lines, oil which it purchases from producers at the mouths of their wells, is an interstate "pipe-line company" and a "common carrier" within the meaning of § 1 (1) (b), and (3), of the Interstate Commerce Act, and under § 19a (a) and (e) may constitutionally be required by the Commission to furnish maps, charts and schedules of its pipe-line properties, for use in valuing such properties under that section. P. 143.
2. In § 1 (b) (3) of the Interstate Commerce Act which provides that the term "common carrier" shall include "all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission

as aforesaid as common carriers for hire," the final clause is conjunctive, not a modifier, and does not affect the generality of the first clause as to pipe-line companies. P. 145.

3. The valuation provisions, § 19a (a) and (e) are so far separable from the regulatory provisions of the Act that in a suit to set aside an order under that section the question whether the pipe-line owner if subjected to regulation of its rates, etc., as a common carrier would be deprived of property without due process does not properly arise. P. 146.
4. The validity of the provisions of § 19a (a) and (e) of the Act does not depend upon the extent of a pipe-line company's operations. *Id.*

25 F. Supp. 460, affirmed.

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

Mr. J. Campbell Brandon, with whom *Mr. Harry S. Elkins* was on the brief, for appellant.

Mr. Hugh B. Cox, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Elmer B. Collins, Frank Coleman, Richard H. Demuth,* and *Daniel W. Knowlton* were on the brief, for appellees.

MR. JUSTICE REED delivered the opinion of the Court.

The Valvoline Oil Company appeals[1] from the final decree of a three-judge district court for the Western District of Pennsylvania, under the Urgent Deficiencies Act,[2] dismissing a petition to enjoin and annul an order of the Interstate Commerce Commission. The order, requiring appellant to file with the Commission certain maps, charts and schedules of its pipe-line properties for use in valuing the properties under § 19a of the Interstate

[1] Judicial Code § 238, 28 U. S. C. § 345.

[2] 38 Stat. 220, 28 U. S. C. §§ 47, 47a.

Commerce Act, was made after a determination by the Commission that appellant was "engaged in the transportation of oil by pipe line in interstate commerce and that it is a common carrier subject to the provisions of the Interstate Commerce Act."

Through 1,426 miles of pipe line, running to 9,020 wells in Pennsylvania, West Virginia and Ohio, Valvoline gathers some 75,000 barrels of oil per month for its two refineries in Pennsylvania which manufacture the products distributed by Valvoline to the trade. All of this oil is purchased from producers at the well, 50 per cent originating in Pennsylvania, 38 per cent in West Virginia, and 12 per cent in Ohio. At the time of the final order of the Commission which it challenges here, Valvoline was selling surplus oil, not needed in its own operations, to a refinery in Pennsylvania and to another in West Virginia, but none of this came from out of the state of the refinery. Because, thus, it does not transport interstate other oil than that which it purchases at the well for its own use, Valvoline claims that it is not a common carrier of oil subject to the Interstate Commerce Act, or, should it be held to come within the terms of the statute, that the statute is unconstitutional as to it in that the provisions violate due process by taking the carrier's property for public use without compensation.

Appellant urges as reasons why it is not a common carrier within the provisions of the Interstate Commerce Act that its pipe lines are used primarily to transport oil to its own refineries, that it is not clothed with a public interest, that the oil flowing through its lines is not in commerce until after preparation for market, and that, since the purpose of § 19a(a) and (e) of the Interstate Commerce Act in requiring valuation data is to furnish a basis for the establishment of traffic and rates, the report required is the first step in general regulation to

which it is not subject. The pertinent provisions of the Act are set out in the margin.[3]

There is no controversy over whether appellant is an interstate pipe line company. Obviously it is. The contentions above are advanced to show it is not subject to the Act. Section 1(3) defines common carrier to include "all pipe-line companies." If this definition is not limited by the subsequent clause "engaged . . . as common carriers for hire," extended consideration of these characteristics of a private carrier is unnecessary as the language of the definition is decisive.

The practice of compelling producers to sell at the well before admitting their oil to the lines was widely used as a means of monopolizing the product before the Hepburn Amendment in 1906.[4] Whether the oil so owned

[3] Sec. 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

. . . . . .

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

From one State . . . to any other State. . . .

(3) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation [or transmission] as aforesaid as common carriers for hire.

. . . . . .

Sec. 19a. (a) The Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this chapter. . . .

(e) Every common carrier subject to the provisions of this chapter shall furnish to the Commission or its agents from time to time as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier. . . .

[4] 34 Stat. 584; see 40 Cong. Rec. 6365–66; *Pipe Line Cases*, 234 U. S. 548, 559.

and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. Certainly one would find a public interest in the sole means of transporting this commodity from thousands of wells for thousands of producers. This was covered by the *Pipe Line* decision. There it was stated that commerce is not dependent on title, "and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce." The applicable section of the Interstate Commerce Act at the time of the *Pipe Line Cases* read:

That the provisions of this Act shall apply to any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act.

This Court construed that section to cover those who were common carriers in substance even if not in technical form and read it that those "engaged in the transportation of oil . . . by means of pipe lines" shall be treated as common carriers under the Act. The last clause was held not "to cut down the generality" of the Act.

In the present Act there is a change of language but we perceive none in meaning. Speaking of the amendments of the Transportation Act of 1920, which recast the Hepburn Amendment into the present form, the House Committee on Interstate and Foreign Commerce reported that the section here under consideration "amends the first five paragraphs of section 1 of the Commerce Act, making minor corrections and classifying language in several respects, but making no important changes in policy." [5] As now written the section brings railroads

[5] Rep. No. 456, Nov. 10, 1919, to accompany H. R. 10453, 66th Cong., 1st Sess.

under the Act by means of the last clause of subsection (3) only.[6] This clause is a conjunctive, not a modifier. It does not affect the generality of the first clause as to pipe-line companies.

The appellant relies upon the *Pipe Line Cases* to show that the present act does not cover a pipe line transporting oil for its own refining purposes only. The discussion referred to is that concerning the Uncle Sam Oil Company. But that company's pipe line was used for the "sole purpose of conducting oil from its own wells to its own refinery." This was held not to be transportation under the Act. Here, however, it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline.

Appellant presses its argument beyond the question whether it comes under the Act. If it does, it urges, the Act is in violation of the due process clause in that by the involuntary change of status from private to common carrier its property is taken. It looks upon the various regulatory provisions of the Interstate Commerce Act as inseparable from the valuation provisions of § 19a(a) and (e). The losses feared, from present or future legislation other than the valuation provisions, may never occur. The data required by the present order may never be used to fix rates. No such information as to other pipe lines has been so used. Publicity alone may give effective remedy to abuses, if any there be.[7] This legislation was intended to free interstate commerce in oil from practices believed to be detrimental, and in that connection accessibility of valuation information to the Congress is essential. Its separate significance being apparent, we confine ourselves to § 19a(a) and (e). The

[6] Cf. *Pennsylvania R. Co.* v. *Public Utilities Comm'n*, 298 U. S. 170, 174.

[7] II Sharfman, The Interstate Commerce Commission, 96.

constitutionality of such requirements was settled by the *Pipe Line Cases* and we see nothing that excepts appellant from their effect. The smallness of the operation is immaterial.[8]

Affirmed.

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

SCHNEIDER *v.* STATE (TOWN OF IRVINGTON).*

CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 11. Argued October 13, 16, 1939.—Decided November 22, 1939.

1. The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth Amendment against abridgment by a State. P. 160.
2. It is a duty of municipal authorities, as trustees for the public, to keep the streets open and available for movement of people and property—the primary purpose to which the streets are dedicated; and to this end the conduct of those who use them may be regulated; but such regulation must not abridge the constitutional liberty of those who are rightfully upon the streets to impart information through speech or the distribution of literature. *Id.*
3. The guaranty of freedom of speech and of the press does not deprive a municipality of power to enact regulations against stand-

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[8] *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 606.

* Together with No. 13, *Kim Young* v. *California,* on appeal from the Appellate Department of the Superior Court of Los Angeles County, California; No. 18, *Snyder* v. *Milwaukee,* certiorari to the Supreme Court of Wisconsin; and No. 29, *Nichols et al.* v. *Massachusetts,* on appeal from the Superior Court of Worcester County, Massachusetts.

ing in the middle of a crowded street and obstructing traffic, or interfering with the passage of pedestrians in order to force their acceptance of tendered leaflets, or against throwing literature broadcast in the streets, since such conduct bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion. P. 160.

4. The purpose to keep the streets clean and neat is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities, in cleaning and caring for the streets, as an indirect consequence of such distribution, results from the constitutional protection of the freedom of speech and press. P. 162.

   There are obvious methods of preventing littering of the streets,—e. g., the punishment of those who actually throw papers on the streets.

5. The circumstance that, in the actual enforcement of an ordinance forbidding all distribution of literature in the streets, the distributor is arrested only if those who receive the literature throw it on the streets, does not render the ordinance valid. P. 163.

6. Ordinances forbidding distribution of printed matter are not made valid by limiting their operation to streets and alleys and leaving other public places free. P. 163.

7. A municipal ordinance prohibiting solicitation, and distribution of circulars, by canvassing from house to house, unless licensed by the police after an inquiry and decision amounting to censorship, *held* void as applied to one who delivered literature and solicited contributions from house to house in the name of religion. P. 163.

121 N. J. L. 542, 3 A. 2d 609; 33 Cal. App. 2d 747, 85 P. 2d 231; 230 Wis. 131, 283 N. W. 301; 18 N. E. 2d (Mass.) 166, reversed.

Two of these four cases came up by appeal, and two by certiorari, 306 U. S. 628, 629, to review decisions of state courts which upheld convictions under municipal ordinances forbidding or regulating distribution of literature in the streets or other public places. In three of the cases the acts charged took place in the streets. The other was a case of circulars distributed by house to house visitations.

Mr. Joseph F. Rutherford, with whom *Mr. Hayden C. Covington* was on the brief, for petitioner in No. 11.

Mr. Robert I. Morris argued the cause, and *Messrs. Meyer Q. Kessel* and *Joseph C. Braelow* were on the brief, for respondent in No. 11.

Since the ordinance is valid on its face and petitioner failed to seek a permit under it, she is not entitled to contest its validity in answer to the charge against her, nor may she complain of anticipated improper or invalid action in administration. *Lovell* v. *Griffin,* 303 U. S. 444; *Smith* v. *Cahoon,* 283 U. S. 553; *Gundling* v. *Chicago,* 177 U. S. 183; *Lehon* v. *Atlanta,* 242 U. S. 53.

The ordinance, of itself and as applied to the acts of the petitioner, is constitutional and valid, because it is a reasonable and proper exercise of the police power in furtherance of the public welfare, to which the constitutional rights of freedom of speech and of the press are properly subject. *Lovell* v. *Griffin,* 303 U. S. 444, distinguishable and inapplicable. See *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 552; *Pittsburgh* v. *Ruffner,* 134 Pa. Super. 192; 4 A. 2d 224, 228; *Barbier* v. *Connolly,* 113 U. S. 27, 31; *Mugler* v. *Kansas,* 123 U. S. 623, 664; *Bergenfield* v. *Morgan et al.,* Sup. Ct. N. J., March 21, 1934; *Davis* v. *Beason,* 133 U. S. 333, 344; *Dziatkiewicz* v. *Maplewood,* 115 N. J. L. 37, 42; *Leoles* v. *Landers,* 302 U. S. 656; *Hering* v. *State Board of Education,* 303 U. S. 624; *Thomas* v. *Atlanta,* 1 S. E. 2d 598; *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, 268.

Mr. Osmond K. Fraenkel, with whom *Carol King* and *Mr. A. L. Wirin* were on the brief, for appellant in No. 13.

Messrs. Ray L. Chesebro, Frederick Von Schrader, Leon T. David, John L. Bland, and *Bourke Jones* submitted for appellee in No. 13.

The ordinance, prohibiting the distribution of handbills to pedestrians upon the public streets of the City of Los Angeles, is a reasonable exercise of the police power of the State.

The validity of the ordinance under the due process clause is determined by its reasonableness as a measure under the police power of the State. *Gitlow* v. *New York,* 268 U. S. 652, 668; *Whitney* v. *California,* 274 U. S. 357, 371; *Fiske* v. *Kansas,* 274 U. S. 380, 387; *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 72.

The wisdom and necessity for this prohibition are primarily for the City Council to determine. *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 192; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185; *Fifth Avenue Coach Co.* v. *New York,* 221 U. S. 467, 482; *Soon Hing* v. *Crowley,* 113 U. S. 703, 708.

There is nothing in the record which tends to show that the prohibition of the distribution of handbills and dodgers upon the public streets was not a reasonable exercise of discretion on the part of the Council of the power of the City to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Cal. Const., Art. XI, § 11.)

An uncontrolled distribution of papers of any kind on the streets is bound to result, more or less, in stoppage of storm drains.

It would present an anomalous situation if municipal authorities could, in the interest of public health and safety and the general welfare, establish set-back lines for buildings or require open areas on each lot, *Gorieb* v. *Fox,* 274 U. S. 603; or require that certain districts be restricted to residence purposes only, *Zahn* v. *Board of Public Works of the City of Los Angeles,* 274 U. S. 325; or even prohibit the use of streets for advertising purposes, *Fifth Avenue Coach Co.* v. *New York,* 221 U. S.

467, 482; but be without power to adopt ordinances to prevent the streets of the community from being littered with trash.

Since abridgment of free speech is not the end sought to be attained by the ordinance, any interference with such right is incidental and does not make the ordinance void. *San Francisco Shopping News Co.* v. *South San Francisco,* 69 F. 2d 879, 892; cert. den. 293 U. S. 606; *Sieroty* v. *Huntington Park,* 111 Cal. App. 377, 381; *People* v. *St. John,* 108 Cal. App. 779, 784; *Milwaukee* v. *Kassen,* 203 Wis. 383, 384; *Almassi* v. *Newark,* 8 N. J. Misc. 420, 422; 150 A. 217, 218; *Commonwealth* v. *Kimball,* 13 N. E. 2d 18, 21; *Lovell* v. *Griffin,* 303 U. S. 444, 451.

It is obvious that the effect of the distribution of handbills, dodgers, etc., on the streets will be substantially the same whether they contain printed matter of a commercial nature or political or religious matter. *Milwaukee* v. *Kassen,* 203 Wis. 383, 385.

A police regulation intended as such and not operating unreasonably beyond the occasion of its enactment is not rendered invalid by the fact that it may incidentally affect some right guaranteed by the Constitution. Cf. op. of Roberts, J., in the *Hague* case, 307 U. S. 496; *State* v. *Gibbes,* 171 S. C. 209, 218; *People* v. *Alterie,* 356 Ill. 307, 309; *Francis* v. *People,* 11 F. 2d 860, 865.

Since the object of the ordinance is not censorship or the restriction of the right of free speech, the reasonableness of the ordinance is not to be determined by the rule of "clear and present danger." See, *Herndon* v. *Lowry,* 301 U. S. 242.

It is beside the issue whether other means might be employed to prevent the littering of the city streets. Under the police power any practice which tends to endanger the health, safety or welfare of the public may be prevented. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201;

Hebe Co. v. *Shaw,* 248 U. S. 297, 304; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; *Maxcy, Inc.,* v. *Mayo,* 103 Fla. 552, 577.

Since the ordinance is not a censorship measure, it is not subject to the criticism made of the ordinances involved in *Hague's* case, *supra,* and *Lovell* v. *Griffin,* 303 U. S. 444.

The distinction pointed out by Mr. Justice Roberts in the *Hague* case between the ordinance involved in that case and the one in *Davis* v. *Massachusetts,* 167 U. S. 43, is the feature which distinguishes the *Hague* case from the case at bar.

By reason of the nature of the contents of the handbill, freedom of the press is not involved in this case.

Mr. A. W. Richter, with whom *Mr. Osmond K. Fraenkel* was on the brief, for petitioner in No. 18.

Mr. Carl F. Zeidler argued the cause, and *Mr. Walter J. Mattison* was on the brief, for respondent in No. 18.

The ordinance was enacted under ample authority. *Lovell* v. *Griffin,* 303 U. S. 444; *Philadelphia* v. *Brabender,* 201 Pa. 574; 51 A. 374; *Milwaukee* v. *Kassen,* 203 Wis. 383; 234 N. W. 352; *San Francisco Shopping News Co.* v. *South San Francisco,* 69 F. 2d 879, cert. den., 293 U. S. 606; *In re Thornburg,* 9 N. E. 2d 516; *People* v. *Horwitz,* 27 N. Y. Cr. Rep. 237; 140 N. Y. S. 437, 439; *Allen* v. *McGovern,* 169 A. 345; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Goldblatt Bros. Corp.* v. *East Chicago,* 6 N. E. 2d 331; McQuillin, Mun. Corp. (2d Ed.), Vol. 3, § 948.

Freedom of the press is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, as long as the right itself is neither suspended nor abrogated. *Gitlow* v. *New York,* 268 U. S. 652, 666, 667; *Whitney* v. *California,* 274 U. S. 357, 371; *Stromberg* v. *California,* 283 U. S. 359, 368; *Near* v. *Minnesota,* 283 U. S. 697, 707,

708; *DeJonge* v. *Oregon,* 299 U. S. 353, 364; *Frend* v. *United States,* 100 F. 2d 691.

The means adopted are legitimate and reasonable means of regulation.

Messrs. Sidney S. Grant and *Osmond K. Fraenkel* for appellants in No. 29.

Mr. Edward O. Proctor, Assistant Attorney General of Massachusetts, with whom *Mr. Paul A. Dever,* Attorney General, was on the brief, for appellee in No. 29.

The ordinance is a valid regulation under the police power for the preservation of public order, and the prevention of misuse, by littering, of the public ways; and its specific provisions do not offend against the constitutional guarantees of the Fourteenth Amendment. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496.

The construction by the court below of the word "distribution," as used in the ordinance, should be adopted.

The historic concept of liberty of the press set forth by this Court in *Near* v. *Minnesota,* 283 U. S. 697, and like cases is not at war with this regulation. Here there is no intent to stop all free dissemination of literature and opinion, but only such a particular exercise of it as will interfere with travelers in the public way. See op. of court below. Cf. *Commonwealth* v. *Kimball,* 13 N. E. 2d 18; *In re Anderson,* 69 Neb. 686; *Milwaukee* v. *Kassen,* 203 Wis. 383; *Davis* v. *Massachusetts,* 167 U. S. 43.

By leave of Court, *Messrs. Arthur Garfield Hays, Richard G. Green,* and *Perry J. Stearns* filed a brief in No. 18 on behalf of the American Civil Liberties Union, Inc., as *amicus curiae,* urging reversal.

Mr. Justice Roberts delivered the opinion of the Court.

Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance

abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution.[1]

No. 13.

The Municipal Code of the City of Los Angeles, 1936, provides:

"Sec. 28.00. 'Hand-Bill' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

"Sec. 28.01. No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle."

The appellant was charged in the Municipal Court with a violation of § 28.01. Upon his trial it was proved that he distributed handbills to pedestrians on a public sidewalk and had more than three hundred in his possession for that purpose. Judgment of conviction was entered and sentence imposed. The Superior Court of Los Angeles County affirmed the judgment.[2] That court being the highest court in the State authorized to pass upon such a case, an appeal to this court was allowed.

The handbill which the appellant was distributing bore a notice of a meeting to be held under the auspices of "Friends Lincoln Brigade" at which speakers would discuss the war in Spain.

The court below sustained the validity of the ordinance on the ground that experience shows littering of the

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[1] On account of the importance of the question we granted certiorari in two of the cases, and noted jurisdiction in the others.

[2] 33 Cal. App. 2d 747; 85 P. 2d 231.

streets results from the indiscriminate distribution of handbills.[3] It held that the right of free expression is not absolute but subject to reasonable regulation and that the ordinance does not transgress the bounds of reasonableness. *Lovell* v. *City of Griffin,* 303 U. S. 444, was distinguished on the ground that the ordinance there in question prohibited distribution anywhere within the city while the one involved forbids distribution in a very limited number of places.

No. 18.

An ordinance of the City of Milwaukee, Wisconsin, provides: "It is hereby made unlawful for any person . . . to . . . throw . . . paper . . . or to circulate or distribute any circular, hand-bills, cards, posters, dodgers, or other printed or advertising matter . . . in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee. . . ."

The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians hand-bills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it. Some of the bills were thrown in the street by the persons to whom they were given and it resulted that many of the papers lay in the gutter and in the street. The police officers who arrested the petitioner and charged him with a violation

[3] On the hand-bill were the words "Admission 25¢ and 50¢." The Superior Court adverted to these and said: "Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views. But if this be so, our conclusion is not thereby changed."

of the ordinance did not arrest any of those who received the bills and threw them away. The testimony was that the action of the officers accorded with a policy of the police department in enforcement of the ordinance to the effect that, when such distribution resulted in littering of the streets the one who was the cause of the littering, that is, he who passed out the bills, was arrested rather than those who received them and afterwards threw them away. The Milwaukee County court found the petitioner guilty and fined him. On appeal the judgment was affirmed by the Supreme Court.[4]

The court held that the purpose of the ordinance was to prevent an unsightly, untidy, and offensive condition of the sidewalks. It distinguished *Lovell* v. *City of Griffin, supra,* on the ground that the ordinance there considered manifestly was not aimed at prevention of littering of the streets. The court approved the administrative construction of the ordinance by the police officials and felt that this construction sustained its validity. The court said: "Unless and until delivery of the hand-bills was shown to result in a littering of the streets their distribution was not interfered with."

No. 29.

An ordinance of the City of Worcester, Massachusetts, provides: "No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description. . . ."

The appellants distributed in a street leaflets announcing a protest meeting in connection with the administration of state unemployment insurance. They did not throw any of the leaflets on the sidewalk or scatter them.

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[4] 230 Wis. 131; 283 N. W. 301.

Some of those to whom the leaflets were handed threw them on the sidewalk and the street, with the result that some thirty were lying about.

The appellants were arrested and charged with a violation of the ordinance. The Superior Court of Worcester County rendered a judgment of conviction and imposed sentence. The Supreme Judicial Court overruled exceptions.[5] That court held the ordinance a valid regulation of the use of the streets and sought thus to distinguish it from the one involved in *Lovell* v. *City of Griffin, supra,* which the court said was not such a regulation. Referring to the ordinance the court said: "It interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private."

No. 11.

An ordinance of the Town of Irvington, New Jersey, provides: "No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters." It further enacts that a permit to canvass shall specify the number of hours or days it will be in effect; that the canvasser must make an application giving his name, address, age, height, weight, place of birth, whether or not previously arrested or convicted of crime, by whom employed, address of employer, clothing worn, and description of project for which he is can-

[5] Mass. Adv. 1938, 1969; 18 N. E. 2d 166.

vassing; that each applicant shall be fingerprinted and photographed; that the Chief of Police shall refuse a permit in all cases where the application, or further investigation made at the officer's discretion, shows that the canvasser is not of good character or is canvassing for a project not free from fraud; that canvassing may only be done between 9 A. M. and 5 P. M.; that the canvasser must furnish a photograph of himself which is to be attached to the permit; that the permittee must exhibit the permit to any police officer or other person upon request, must be courteous to all persons in canvassing, must not importune or annoy the town's inhabitants or conduct himself in an unlawful manner and must, at the expiration of the permit, surrender it at police headquarters. Persons delivering goods, merchandise, or other articles in the regular course of business to the premises of persons ordering, or entitled to receive the same, are exempted from the operation of the ordinance. Violation is punishable by fine or imprisonment.

The petitioner was arrested and charged with canvassing without a permit. The proofs show that she is a member of the Watch Tower Bible and Tract Society and, as such, certified by the society to be one of "Jehovah's Witnesses." In this capacity she called from house to house in the town at all hours of the day and night and showed to the occupants a so-called testimony and identification card signed by the society. The card stated that she would leave some booklets discussing problems affecting the person interviewed; and that, by contributing a small sum, that person would make possible the printing of more booklets which could be placed in the hands of others. The card certified that the petitioner was an ordained minister sent forth by the society, which is organized to preach the gospel of God's kingdom, and cited passages from the Bible with respect to the obligation so to preach. The petitioner left, or

offered to leave, the books or booklets with the occupants of the houses visited. She did not apply for, or obtain, a permit pursuant to the ordinance because she conscientiously believed that so to do would be an act of disobedience to the command of Almighty God.

The petitioner was convicted in the Recorder's Court. The Court of Common Pleas affirmed the judgment. On a further appeal the Supreme Court affirmed.[6] The Court of Errors and Appeals affirmed the judgment of the Supreme Court.[7]

The Supreme Court held that the petitioner's conduct amounted to the solicitation and acceptance of money contributions without a permit, and held the ordinance prohibiting such action a valid regulation, aimed at protecting occupants and others from disturbance and annoyance and preventing unknown strangers from visiting houses by day and night. It overruled the petitioner's contention that the measure denies or unreasonably restricts freedom of speech or freedom of the press. The Court of Errors and Appeals thought *Lovell* v. *City of Griffin, supra,* not controlling, since the ordinance in that case prohibited all distribution of printed matter and was not limited to ways which might be regarded as consistent with the maintenance of public order or as involving disorderly conduct, molestation of inhabitants, or misuse or littering of the streets, whereas the ordinance here involved is aimed at canvassing or soliciting, subjects not embraced in that condemned in the *Lovell* case. The court said: "A municipality may protect its citizens against fraudulent solicitation and, when it enacts an ordinance to do so, all persons are required to abide thereby. The ordinance in question was evidently designed for that purpose . . ."

[6] 120 N. J. Law 460; 200 A. 799.

[7] 121 N. J. Law 542; 3 A. 2d 609.

The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.[8]

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against

[8] *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Stromberg* v. *California*, 283 U. S. 359; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Lovell* v. *City of Griffin*, 303 U. S. 444. There is no averment or proof in any of the cases that the appellants or petitioners are citizens of the United States, and in the *Young* case, No. 13, the applicable provisions of the municipal code were challenged on the sole ground that they infringed the due process clause of the Fourteenth Amendment. Cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Comm'n*, 297 U. S. 471 at 473.

throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties.[9] The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Lovell* v. *City of Griffin, supra,* this court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager. The opinion pointed out that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of

[9] *Grosjean* v. *American Press Co., supra,* p. 244; *DeJonge* v. *Oregon, supra,* p. 364; *Lovell* v. *City of Griffin, supra,* p. 450.

streets, and was without limitation as to time or place of distribution. The court said that, whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the ordinance was void on its face, because it abridged the freedom of the press. Similarly in *Hague* v. *C. I. O.*, 307 U. S. 496, an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.

The Los Angeles, the Milwaukee, and the Worcester ordinances under review do not purport to license distribution but all of them absolutely prohibit it in the streets and, one of them, in other public places as well.

The motive of the legislation under attack in Numbers 13, 18, and 29 is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that

officer's judgment evidence as to his good character and as to the absence of fraud in the "project" he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

As said in *Lovell* v. *City of Griffin, supra,* pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment in each case should be affirmed.

NEIRBO CO. ET AL. *v.* BETHLEHEM SHIPBUILDING CORP., LTD.

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

No. 38. Argued October 17, 18, 1939—Decided November 22, 1939.

1. Section 51 of the Judicial Code, as amended, which provides that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," merely accords to the defendant a personal privilege of objecting to the venue of suits brought against him in districts wherein under the section he may not be compelled to answer. P. 168.

2. The privilege accorded by § 51 may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. P. 168.
3. Such surrender of the privilege may be regarded negatively as a waiver or positively as a consent to be sued. P. 168.
4. A designation by a foreign corporation, in conformity with a valid statute of a State and as a condition of doing business within it, of an agent upon whom service of process may be made, *held* an effective consent to be sued in the federal courts of that State. Pp. 170, 174.
5. Prior to the amendment of 1887, the provision was that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or *in which he shall be found . . .*" *Held,* the omission by that amendment of the words "in which he shall be found" was not intended to affect the implications of a consent to be sued and was not directed toward any change in the status of a corporate litigant. *Ex parte Schollenberger,* 96 U. S. 369, and *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, reconciled. P. 171.
6. A State constitutionally may require a foreign corporation, as a condition of doing a local business, to designate an agent upon whom service of process may be made. P. 175.
7. The finding in this case that the foreign corporation, by its designation under the state law of an agent for the service of process, had consented to be sued in the courts of the State, federal as well as state, is not a subjection of federal procedure to the requirements of state law, but a recognition that state legislation and consent of parties may bring about a state of facts which will authorize the federal courts to take cognizance of a case. P. 175.

103 F. 2d 765, reversed.

CERTIORARI, 307 U. S. 619, to review the affirmance of an order of the district court quashing service of process on the respondent corporation and dismissing as to it the petitioners' bill.

Messrs. Robert P. Weil and *Laurence Arnold Tanzer* for petitioners.

Mr. William D. Whitney for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here to review the affirmance by the Circuit Court of Appeals for the Second Circuit of an order of the District Court for the Southern District of New York setting aside service of process upon Bethlehem Shipbuilding Corporation, Ltd. (hereafter called Bethlehem) and dismissing as to it petitioners' bill, 103 F. 2d 765. The suit was based on diversity of citizenship and was not brought "in the district of the residence of either the plaintiff or the defendant." (§ 51 of the Judicial Code, Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.[1]) We took the case, 307 U. S. 619, because of the uncertainties in application of § 51, emphasized by conflict between the views below and those of the Circuit Court of Appeals for the Tenth Circuit. *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 100 F. 2d 770. The sole question in the case is whether § 51 is satisfied by the designation by a foreign corporation of an agent for service of process, in conformity with the law of a state in which suit is brought against it in one of the federal courts for that state.

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But

[1] Section 112 reads as follows: "Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. After a period of confusing deviation it was firmly reëstablished in *General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, and *Lee* v. *Chesapeake & Ohio Ry. Co., ibid.* 653, over-ruling *Ex parte Wisner,* 203 U. S. 449, and qualifying *In re Moore,* 209 U. S. 490. All the parties may be non-residents of the district where suit is brought. *Lee* v. *Chesapeake & Ohio Ry. Co., supra.* Section 51 "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election." *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179.

Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Commercial Ins. Co.* v. *Stone Co., supra.* Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind § 51, which is "to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found." *General Investment Co.* v. *Lake Shore Ry. Co., supra,* at 275.

When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law. The

corporate device is one form of associated enterprise, and what the law in effect has done is to enforce rights and duties appropriate for collective activity. Cf. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476. It has done so largely by assimilating corporations to natural persons. The long, tortuous evolution of the methods whereby foreign corporations gained access to courts or could be brought there, is the history of judicial groping for a reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the powers of these artificial creations.[2]

It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction,[3] citizenship in the chartering state for jurisdictional purposes. Compare *Lafayette Ins. Co.* v. *French,* 18 How. 404 with *Hope Ins. Co.* v. *Boardman,* 5 Cranch 57. Throughout, the mode of thought was metaphorical. The classic doctrine was that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta* v. *Earle,* 13 Pet. 519, 588. Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there.[4] And such was the practice of the circuit courts[5] until the opinion of Chief Justice Waite in *Ex parte Schollenberger,* 96 U. S. 369, displaced metaphor with common sense. The essential difference

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[2] See Henderson, "The Position of Foreign Corporations in American Constitutional Law," *passim,* and especially the illuminating analysis, pp. 163–194.

[3] See Gray, "The Nature and Sources of the Law," 184, and Henderson, *op. cit. supra,* note 2, pp. 50–76.

[4] See *St. Clair* v. *Cox,* 106 U. S. 350, 355.

[5] "We are aware that the practice in the circuit courts generally has been to decline jurisdiction in this class of suits." 96 U. S. 369, 378.

between the practice which Mr. Justice Nelson [6] initiated at circuit and the decision in *Schollenberger's* case was not a matter of technical legal construction, but a way of looking at corporations. Men's minds had become habituated to corporate activities which crossed state lines. The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of *Schollenberger's* case.

To be sure, that case arose under the Judiciary Act of 1875, 18 Stat. 470, the language of which differed from the Act of 1887, now § 51 of the Judicial Code. The earlier provision was as follows: "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found . . ." The Act of 1887 omitted the words "in which he shall be found." But, of course, the Phoenix and the Clinton Insurance Company in *Ex parte Schollenberger, supra,* were not geographically "found" in Pennsylvania, and Chief Justice Waite so recognized. They were "found" in the Eastern District of Pennsylvania only in a metaphorical sense, because they had consented to be sued there by complying with the Pennsylvania law for designating an agent to accept service. Not less than three times does the opinion point

[6] *Day* v. *Newark India-Rubber Mfg. Co.,* 1 Blatch. 628; Fed. Cas. No. 3,685; *Pomeroy* v. *New York, N. H. & H. R. Co.,* 4 Blatch. 120; Fed. Cas. No. 11,261. Both these cases were decided by Mr. Justice Nelson, on circuit.

out that the corporation gave "consent" to be sued; and because of this consent the Chief Justice added that the corporation was "found" there. But the crux of the decision is its reliance upon two earlier cases, *Railroad Company* v. *Harris,* 12 Wall. 65 and *Lafayette Ins. Co.* v. *French,* 18 How. 404, recognizing that "consent" may give "venue." The Phoenix and the Clinton Insurance Company consented not to be "found" but to be sued. Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in that state. As to diversity cases, Congress has given the federal courts "cognizance, concurrent with the courts of the several States." The consent, therefore, extends to any court sitting in the state which applies the laws of the state.[7]

The notion that the 1887 amendment, by eliminating the right to sue a defendant in the district "in which he shall be found," was meant to affect the implications of a consent to be sued—implications which were the basis of the *Schollenberger* decision—derives from a misapplication of the purpose of Congress to contract diversity jurisdiction, based upon a misunderstanding of the legislative history of the 1887 amendment.[8] The deletion of "in which he shall be found" was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the

[7] "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." 96 U. S. 369, 377. See *Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 255–56. Cf. *Louisville & N. R. Co.* v. *Chatters,* 279 U. S. 320, 329.

[8] A cognate misconception as to the purpose of the Act of 1887–88 in contracting the jurisdiction of the circuit courts underlay the decision in *Ex parte Wisner,* 203 U. S. 449, overruled in *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653, 659.

defendant's consent, to the district of his physical habitation. Insofar as the 1887 legislation sheds any light upon the status of a corporate litigant in diversity suits, its significance lies outside the omission of the "he shall be found" clause. The form in which that Act passed the House of Representatives contained a provision, wholly distinct from the general venue section, restricting the growing volume of litigation drawn to the federal courts by the fiction of corporate citizenship.[9] It prohibited resort to the federal courts by foreign corporations authorized to do a local business. The Senate rejected, as it had done upon three previous occasions, this House proposal.[10] But the bill, as it left the House, also contained the venue provision, with its omission of the "found" clause. It would be strange indeed if the House in § 1 had dealt with the "venue" of suits against corporate litigants who, like those involved in the *Schollenberger* case, by § 3 of the same bill were completely barred from the federal courts. It would be stranger still if, after passing a drastic measure curtailing resort by foreign corporations to the federal courts, the House had only succeeded in giving discriminatory freedom to foreign corporations—discriminatory in that, by nullifying the significance of consent through obedience to state law to be sued in the federal courts, it would allow a

[9] The Culberson Bill, which passed the House in 1887, was H. R. 2441, 49th Cong., 1st Sess. It provided in its original form that the lower federal courts should not take "cognizance of any suit" between "a corporation created or organized by or under the laws of any State and a citizen of any State in which such corporation at the time the cause of action accrued may have been carrying on any business authorized by the law creating it. . . ." There were likewise provisions forbidding removal of such suits to the lower federal courts. See 18 Cong. Rec. 613; H. Rep. No. 1078, 49th Cong., 1st Sess.

[10] 10 Cong. Rec. 1304–1305; 14 Cong. Rec. 1270; 15 Cong. Rec. 4909.

foreign corporate defendant freedom either to remain in the state courts or to remove to a federal court.

And so, after the Act of 1887 and despite its elimination of "in which he shall be found" from the Act of 1875, lower federal courts continued to apply the doctrine of *Schollenberger's* case by considering the designation of an agent for service of process an effective consent to be sued in the federal courts.[11] This practice in the lower federal courts continued until 1892, when *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, was decided. But that case involved an entirely different situation. The Court was there concerned with a Texas statute which not merely regulated procedure for suit but sought to deny foreign corporations access to the federal courts. This Court held the act unconstitutional, as the Texas court had in fact already done.[12] Inasmuch as the Texas act was found to be void, it "could give no validity or effect to any agreement or action of the corporation in obedience to its provisions." [13] To be sure, the Court went on to interpret the agreement "if valid" [14] and to suggest that had it been valid the agreement might have subjected the corporation to jurisdiction "so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was 'found.'" [15] Such, as we

[11] *Riddle* v. *New York, L. E. & W. R. Co.,* 39 F. 290 (C. C., W. D. Pa., 1889); *Consolidated Store-Service Co.* v. *Lamson Consol. Store-Service Co.,* 41 F. 833 (C. C. Mass., 1890) approvingly cited in *Haight & Freese Co.* v. *Weiss,* 156 F. 328 (C. C. A. 1st, 1907).

[12] *Texas Land & Mortgage Co.* v. *Worsham,* 76 Tex. 556.

[13] 146 U. S. at 207.

[14] 146 U. S. at 207.

[15] 146 U. S. at 207. The *Denton* case was based on *Shaw* v. *Quincy Mining Co.,* 145 U. S. 444, in which there was no consent derivable from the designation of an agent for service. Both opinions were written by Mr. Justice Gray, who later accurately delimited the scope of the holdings in both the *Shaw* and the *Denton* cases. *In re Keasbey & Mattison Co.,* 160 U. S. 221, 229. The decisive difference be-

have seen, was not the true basis of the decision in *Schollenberger's* case. As decisions, the two cases are wholly consistent. But, disregarding the situation before the Court in the *Denton* case—the absence of any valid consent to be sued because of the invalidity of the statute by which the alleged "consent" was obtained—several of the lower courts have taken language from the *Denton* opinion and have made it govern situations where valid consent did exist because given in conformity with the provisions of a valid statute.[16] Other courts have adhered to the practice established by *Schollenberger's* case.[17] We deem this practice sound, and it controls the present case.

In conformity with what is now § 210 of the General Corporation Law of New York,[18] Bethlehem designated

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tween the present case and *In re Keasbey & Mattison Co.*, is that in the latter case the designation under state law which is the basis of consent had in fact not been made. But the requirement of "residence" in the Act of 1887 is as much satisfied by a consent to be sued as was the requirement "to be found" in the 1875 Act satisfied by such a consent.

[16] *Platt* v. *Massachusetts Real Estate Co.*, 103 F. 705 (C. C. Mass., 1900); *Hagstoz* v. *Mutual Life Ins. Co.*, 179 F. 569 (C. C. E. D. Pa., 1910); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 F. 271 (S. D. N. Y., 1921); *Jones* v. *Consol. Wagon Co.*, 31 F. 2d 383, 384 (D. Idaho, 1929); *Kerfoot & Co.* v. *United Drug Co.*, 38 F. 2d 671 (D. Del., 1930); *Standard Stoker Co.* v. *Lower*, 46 F. 2d 678 (D. Md., 1931); *McLean* v. *Mississippi*, 96 F. 2d 741 (C. C. A. 5th, 1938); *Gray* v. *Reliance Ins. Co.*, 24 F. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 F. Supp. 215 (N. D. Ill., 1939); *Toulmin* v. *James Mfg. Co.*, 27 F. Supp. 512 (W. D. N. Y., 1939). *Cf. Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. 2d 596 (C. C. A. 2nd, 1926).

[17] *Shainwald* v. *Davids*, 69 F. 704 (N. D. Cal., 1895); *Dodge Mfg. Co.* v. *Patten*, 23 F. 2d 852 (D. Ind., 1928), aff'd 60 F. 2d 676 (C. C. A. 7th, 1932); *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 100 F. 2d 770 (C. C. A. 10th, 1938).

[18] Originally enacted as c. 687, Laws of 1892, pp. 1805–1806.

"William J. Brown as the person upon whom a summons may be served within the State of New York." The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served'. . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person." *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, 436–7. A statute calling for such a designation is constitutional, and the designation of the agent "a voluntary act." *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93.

In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case." *Ex parte Schollenberger, supra,* at 377. The judgment below is

Reversed.

MR. JUSTICE ROBERTS, dissenting.

The Circuit Court of Appeals, in a careful and discriminating opinion,[1] has held that to deny the respondent's motion to dismiss it from the suit would be to dis-

[1] 103 F. 2d 765.

regard the long settled construction of § 51 of the Judicial Code and the equally well settled application of that section. I think its judgment should be affirmed.

Whatever may be said in support of the original adoption of a different rule, it has been the law for a century that, as respects the jurisdiction of the federal courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and of no other state. I do not understand the court's opinion to repudiate the rule.

The statute which is now § 51 of the Judicial Code took its present form in 1888. In 1892 the court held, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453, that, under the statute, "a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State." This construction has been followed in this court without deviation and with practical unanimity by the lower federal courts.[2]

At the next term, in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205, 207, the ruling was reaffirmed in a case where the defendant had registered as a foreign corporation under a state law and, as a condition of registration, had agreed that service of process might be made upon a designated agent.

[2] *In re Keasbey & Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Male* v. *Atchison, T. & S. F. Ry. Co.*, 240 U. S. 97; *General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, 271; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363; *Luckett* v. *Delpark, Inc.*, 270 U. S. 496; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211. The decisions in the federal courts are cited and discussed by the Circuit Court of Appeals, 103 F. 2d 767.

The earlier Act of 1875 provided that no civil suit could be brought against a defendant in a United States court "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process . . ."

Ex parte Schollenberger, 96 U. S. 369, applied that earlier statute. The court held that a foreign corporation which had registered and consented to the service of process upon a designated agent had thereby agreed "to be found" within the state and might therefore be impleaded in a federal court sitting in the state although it was not a citizen or a resident of the state. The case was cited in the opinions in both the *Shaw* and the *Southern Pacific* cases. In the latter the court said, referring to the foreign corporation's agreement as to service: (pp. 207-8) "It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. . . . But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

In re Keasbey & Mattison Co., 160 U. S. 221, the court held (p. 228): "Under the provision of that act [the earlier act of 1875], which allowed a defendant to be sued in the district of which he was an inhabitant, or in that in which he was found, a corporation could doubtless have been sued either in the district in which it was incorporated, or in any district in which it carried on business and had a general agent." For this statement the court cited *Ex parte Schollenberger, Shaw* v. *Quincy*

Mining Co., and *Southern Pacific Co.* v. *Denton.* The opinions in the last two, and that in the *Keasbey* case, were written for the court by Mr. Justice Gray, who summed up their effect by saying: "And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State."

This interpretation of § 51 has since remained unchanged. Congress must have known of and acquiesced in the courts' construction of the section, particularly as there have been efforts to amend it, and no alteration has been adopted.

Upon principle, and under the authorities, the mere fact that service of process valid under state law can be had on an officer or agent of a foreign corporation doing business within the state is irrelevant; for although the corporation may be served in conformity to local law, it cannot be compelled to try its case in a federal court sitting in the state. I do not understand the opinion of the court to hold to the contrary.

But it is said that registration and designation of an agent upon whom service may be made under compulsion of state law amounts to a waiver of the requirements of § 51 as to venue, or to a consent to be sued in a federal court sitting within the state.

As has been shown by quotation from the opinion, this contention was made in *Southern Pacific Co.* v. *Denton, supra,* and was overruled. The holding was one of the alternative grounds of decision. The *Southern Pacific*

case settled the application of § 51, in the circumstances here disclosed, and the decision has never been qualified or overruled. The lower federal courts have understood and applied that decision with practical uniformity to enable the foreign corporation to contest the venue of suits against it.[3]

I see no reason at this late day to attribute a new effect to the statute when Congress has not seen fit to express a view contrary to that embodied in this court's construction of the law; though this might at any time be done. The principle of *stare decisis* seems to me to make against such a change.

The court below has analyzed the applicable New York statute and has satisfactorily demonstrated that it deals with service of process on foreign corporations in the courts of New York. The state could not, by its laws, affect the jurisdiction of federal courts or the venue of suits therein,—a matter solely within the control of Congress.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

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[3] Some of the cases are cited by the Circuit Court of Appeals in its opinion. 103 F. 2d 769.

Syllabus.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* BARTELS.

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

No. 33. Argued November 9, 1939.—Decided December 4, 1939.

1. Subsections (a) to (r) of § 75 of the Bankruptcy Act do not provide that a petition for composition or extension shall be dismissed in the absence of a reasonable probability of the financial rehabilitation of the debtor, nor do they warrant the imputation of lack of good faith to a farmer-debtor because of that plight. P. 184.
2. The purpose of § 75 of the Bankruptcy Act is to afford relief to debtors in economic distress, however severe, by giving them a chance to seek an agreement with their creditors, under subsections (a) to (r) and, failing this, to ask for the other relief afforded by subsection (s). P. 184.

   The farmer-debtor may offer to pay what he can, and he is not to be charged with bad faith in taking the course for which the statute expressly provides.
3. Section 75 (i) of the Bankruptcy Act in providing that before confirming proposals for composition or extension the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided by the statute, hits at secret advantages to favored creditors or other improper or fraudulent conduct. P. 185.
4. A farmer-debtor, having failed to obtain the acceptance under § 75 of the Bankruptcy Act, subsections (a) to (r), by the requisite majority of creditors, of a proposal for composition or extension of time to pay his debts, filed his amended petition under subsection (s) praying that he be adjudged a bankrupt, that his property be appraised, that his exemptions be set aside, and that he be permitted to retain possession of his property under the supervision of the court. *Held*, that he was entitled to be so adjudged and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection; and that the court of bankruptcy erred in dismissing the petition upon the ground that under the evidence there was no reasonable probability of his financial rehabilitation and because in the judge's opin-

ion no offer had been made by the debtor which could be construed as an offer in good faith for extension and composition. P. 183.

100 F. 2d 813, affirmed.

CERTIORARI, 307 U. S 617, to review the reversal of a decree dismissing the petition of a farmer-debtor to be adjudged a bankrupt under § 75 (s) of the Bankruptcy Act.

Mr. L. M. Bickett, with whom *Messrs. John H. Bickett, Jr.* and *Byron K. Elliott* were on the brief, for petitioner.

Messrs. T. E. Mosheim, Elmer McClain, and *William Lemke,* with whom *Messrs. Alfred Aram, Harold M. Sawyer,* and *Francis R. Taylor* were on the brief, for respondent.

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

In this proceeding brought by a farmer under § 75 of the Bankruptcy Act, the District Court dismissed the debtor's petition. The Circuit Court of Appeals held that this action was contrary to the requirements of the statute and directed the proceeding to be reinstated. 100 F. 2d 813. Because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited,[1] and because of the importance of the question, we granted certiorari, 307 U. S. 617.

Respondent Bartels presented his petition to the District Court on December 2, 1937, asking that he be afforded an opportunity to effect a composition or exten-

[1] See *Baxter* v. *Savings Bank of Utica,* 92 F. 2d 404; *In re Henderson,* 100 F. 2d 820; *Wilson* v. *Alliance Life Insurance Co.,* 102 F. 2d 365.

sion of time to pay his debts under § 75. The court referred the matter to a conciliation commissioner, directing the debtor to appear before the commissioner and to submit to such orders as might be made in proceedings under that section. A meeting of the creditors was held on December 21, 1937, at which the debtor was present and was examined. It appeared that his debts amounted to about $10,000 of which about $8,000 (including interest and attorney's fees) was owing to the John Hancock Mutual Life Insurance Company and was secured by a lien upon his home. As the debtor was unable to obtain an agreement with a majority of his creditors in number and amount, he notified the commissioner that he would apply to be adjudged a bankrupt under subsection (s) of § 75. That application was filed on January 10, 1938. The debtor asked that "his property be appraised," that "his exemption be set aside to him" and that he be permitted "to retain possession of his property under the supervision of the court." On the same day, the District Judge entered an order adjudging the debtor a bankrupt and requiring further proceedings before the commissioner acting as referee under subsection (s).

On March 23, 1938, the John Hancock Company moved to set aside the adjudication and to dismiss the debtor's petition on the ground that the debtor was not entitled to avail himself of the provisions of subsection (s); that he had not presented any feasible plan for a composition and extension of his debts, and that his petition "was not filed in good faith" or "with any hope or expectation of working out his debts and paying up his delinquencies but apparently for the sole purpose of hindering and delaying his creditors." The Company also alleged that at the fair market value of the real property held by it as security there was no equity for the debtor and that the Company would suffer irreparable loss unless the adjudication was set aside and the proceeding dismissed.

The debtor denied these allegations and alleged that the land on which the Company had a lien was worth unimproved more than $7,000 and that the improvements were worth $6,000 and that he thus had a large equity which would be lost to him unless he obtained the benefits sought under the applicable law.

At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (100 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at $70 an acre and the improvements at $5,000 or $6,000, while witnesses for the creditor valued the land at about $40 an acre and the improvements at about $2,000. He thought that there was no reasonable probability of the property being sold for enough to give any substantial equity to the debtor and accordingly found that there was no reasonable probability of the debtor's financial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the cause dismissed."

We think that the District Judge failed to follow the mandate of the statute and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

Subsection (s) of § 75 as amended by the Act of August 28, 1935,[2] prescribes a definite course of procedure. That

[2] 49 Stat. 943; *Wright* v. *Vinton Branch*, 300 U. S. 440.

subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts. That was Bartels' situation. Provisions for proceedings by a farmer to obtain a composition or extension, when he is insolvent or unable to pay his debts as they mature, are found in subsections (a) to (r) of § 75. For that relief Bartels had presented his petition under subsection (c) and the District Court had approved the petition as properly filed. According to the report of the conciliation commissioner, to whom the matter was referred according to the statute, Bartels had appeared at the meeting of the creditors and had submitted to a detailed examination concerning his financial condition. He proposed to sell certain property and to apply the proceeds to the payment in part of the amounts due to the John Hancock Company, the secured creditor. He succeeded in obtaining an agreement with certain unsecured creditors for an extension but the secured creditor refused consent, as Bartels could not meet all his arrears. Bartels was thus precisely in the condition prescribed in subsection (s).

The subsections of § 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.[3] Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor because of that plight. The plain purpose of § 75 was to afford relief to such debtors who found themselves

[3] What is said upon this point in Note 6 in *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute.

in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in § 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudicated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exemptions be set aside to him as provided by state law, and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.

The procedure under subsection (s) is intended to protect all interests. It provides, in paragraph (1), that after the value of the debtor's property has been fixed by the prescribed appraisal, the referee shall set aside the debtor's unencumbered exemptions and direct his retention of possession of the rest of his property subject

to all liens and to the court's supervision and control. Under paragraph (2), if there has been compliance with the statutory conditions, the court is directed to stay all proceedings against the debtor or his property for a period of three years, and during that time the debtor may retain possession of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually. That rental is to be paid into court and is to be used first for the payment of taxes and the upkeep of the property and the remainder is to be distributed among the creditors as their interests may appear. If the court finds it necessary to protect the creditors "from loss by the estate," or "to conserve the security," the court may order any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, to be sold at public or private sale, and the court, in addition to the prescribed rental, may require payments to be made by the debtor on the principal of his debts in the manner set forth. Then it is provided, in paragraph (3), that at the end of the three-year period, or at any time before that, the debtor may pay into court the appraised value of the property of which he retains possession, "including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal," for appropriate distribution to his creditors. There is the proviso that upon the request of any creditor, or of the debtor, the court shall cause the debtor's property to be reappraised, or in its discretion set a date for hearing, and thereafter fix the value of the property in accordance with the evidence, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to his creditors. In that way, by the order of the court, the debtor may regain full possession and title of such property, the ascertained

value of which has thus been devoted to the payment of his debts. There is the further proviso, for the protection of secured creditors, that upon request in writing by any secured creditor the court shall order the property upon which the secured creditor has a lien to be sold at public auction. See *Wright* v. *Vinton Branch, supra,* pp. 458–461. The debtor is to have ninety days to redeem the property so sold by paying the amount for which it was sold, with interest, into court, and he may apply for his discharge as provided in the Act. If, however, the debtor at any time fails to comply with the provisions of the section or with any orders of the court made thereunder, or is unable to refinance himself within three years, the court may order the appointment of a trustee and direct the property to be sold or otherwise disposed of as provided in the Act.

The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra; Adair* v. *Bank of America Assn.,* 303 U. S. 350, 354–357; *Wright* v. *Union Central Life Insurance Co.,* 304 U. S. 502, 516, 517.

We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe. We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection.

The judgment of the Circuit Court of Appeals reversing that of the District Court and directing the proceeding to be reinstated is affirmed and the cause is remanded to the District Court with direction to proceed in conformity with this opinion.

Affirmed.

UNITED STATES *v.* BORDEN COMPANY ET AL.

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

No. 397. Argued November 15, 1939.—Decided December 4, 1939.

1. A judgment quashing a count upon the ground of duplicity is not appealable to this Court under the Criminal Appeals Act. P. 193.
2. The construction of an indictment by the District Court binds this Court on an appeal under the Criminal Appeals Act. P. 194.
3. A decision of the District Court holding that an indictment failed to charge an offense under the Sherman Anti-Trust Act because of the effect on that Act of later statutes, *held* a construction of the Sherman Act and reviewable under the Criminal Appeals Act. P. 195.
4. Repeals by implication are not favored. When there are two Acts upon the same subject, effect should be given to both if possible. P. 198.
5. The Agricultural Marketing Agreement Act of 1937 does not operate to repeal the Sherman Anti-Trust Act in its application to agreements of producers, distributors and others, restricting interstate commerce in milk, when such agreements are not participated in or directed by the Secretary of Agriculture in pursuance of the former Act. Pp. 196–202.

   With respect to interstate commerce in agricultural commodities or their products, an agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the immunity described by §§ 8 (b) and 3 (d), would be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

6. A license issued by the Secretary of Agriculture with respect to the marketing of milk in a given area is not a defense to an indictment under the Sherman Act for conspiracies in restraint of that commerce, alleged to have been continued after the license had expired. P. 202.
7. An order issued under the Agricultural Marketing Agreement Act regulating marketing of milk is not a defense to an indictment of producers, distributors and others under the Sherman Act charging conspiracies engaged in before the period covered by the order. P. 202.
8. The Capper-Volstead Act, in authorizing producers of agricultural products, including dairymen, to act together in collectively processing, preparing for market, handling and marketing their products, in interstate and foreign commerce, and to have marketing agencies in common and make necessary agreements to effect these purposes, did not authorize a conspiracy of dairymen with distributors, labor officials, municipal officials, and others, to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, which would compel independent distributors to exact a like price from their customers, and would control the supply of fluid milk permitted to be brought to the city. P. 203.
9. Under § 2 of the Capper-Volstead Act, the Secretary of Agriculture is authorized to determine, subject to judicial review, whether any such cooöperative association monopolizes or restrains interstate trade to such an extent that the price of any agricultural product is unduly enhanced, and to issue a cease and desist order. But this qualifying procedure was not intended to replace, postpone, or prevent prosecution under § 1 of the Sherman Act for the punishment of conspiracies by producers and others such as are described in the last preceding paragraph. P. 205.
10. Where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. Distinguishing *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. P. 206.

28 F. 2d 177, in part, reversed.

APPEAL from a judgment of the District Court sustaining demurrers and dismissing an indictment charging com-

bination and conspiracy in violation of § 1 of the Sherman Anti-Trust Act. As to one of the counts, the appeal is dismissed.

Assistant Attorney General Arnold, with whom *Solicitor General Jackson* and *Messrs. Hugh B. Cox, Leo F. Tierney, Robert K. McConnaughey, Maurice L. A. Gellis,* and *William J. Campbell* were on the brief, for the United States.

Mr. Loy N. McIntosh, with whom *Messrs. Bernhardt Frank* and *Frederick Secord* were on the brief, for Sidney Wanzer & Sons, Inc. et al.; *Mr. William C. Graves,* with whom *Messrs. Edward J. Hennessy* and *Martin Burns* were on the brief, for Pure Milk Assn. et al.; *Mr. Joseph A. Padway,* with whom *Mr. Abraham W. Brussell* was on the brief, for Robert G. Fitchie et al.; *Mr. Frederic Burnham,* with whom *Messrs. Miles G. Seeley, Louis E. Hart, Irving Herriott,* and *Isidore Fried* were on the brief, for The Borden Co. et al.; *Mr. Daniel D. Carmell* submitted for Leslie G. Goudie; *Messrs. Charles S. Deneen, Roy Massena,* and *Donald N. Schaffer* submitted for Hunding Dairy Co. et al.; *Messrs. Ben H. Matthews* and *James P. Dillie* submitted for Leland Spencer; *Mr. Louis M. Mantynband* submitted for Western United Dairy Co. et al.; and *Messrs. Ben H. Matthews, Harry J. Dunbaugh,* and *James P. Dillie* were on a brief for Associated Milk Dealers, Inc. et al.,—appellees.

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

The Government appeals from a judgment of the District Court sustaining demurrers and dismissing an indictment charging combination and conspiracy in violation of § 1 of the Sherman Anti-Trust Act. 28 F. Supp. 177.

The trade and commerce alleged to be involved is the transportation to the Chicago market of fluid milk produced on dairy farms in Illinois, Indiana, Michigan and Wisconsin and the distribution of the milk in that market. The Government divides the defendants into five groups,—(1) distributors and allied groups which include a number of corporations described as major distributors and their officers and agents, the Associated Milk Dealers, Inc., a trade association of milk distributors, and its officers and agents, and the Milk Dealers Bottle Exchange, a corporation controlled by the major distributors; (2) the Pure Milk Association, a coöperative association of milk producers incorporated in Illinois, and its officers and agents; (3) the Milk Wagon Drivers Union, Local 753, engaged in the distribution of milk in Chicago, and certain labor officials; (4) municipal officials, including the president of the Board of Health of Chicago and certain subordinate officials; (5) two persons who arbitrated a dispute between the major distributors and the Pure Milk Association, fixing the price of milk to be paid to the members of the association.

The indictment, which was filed in November, 1938, contains four counts. The several defendants challenged it by demurrers and motions to quash on various grounds. The District Court held with respect to counts one, two and four, that the production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246); also with respect to all four counts, according to the formal terms of its judgment, that the Pure Milk Association, as an agricultural coöperative association, its officers and agents, are exempt from prosecution under § 1 of the Sherman Act by § 6 of the Clayton Act (15 U. S. C. 17), §§ 1 and 2 of the Capper-Volstead Act (7 U. S. C. 291,

292), and the Agricultural Marketing Agreement Act. With respect to count three, the District Court held that it was duplicitous, in the view that it charged several separate conspiracies and also that it did not definitely charge a restraint of interstate commerce.

The judgment expressly overruled the demurrers and motions to quash so far as they challenged the constitutionality of the Sherman Act or the sufficiency of the allegations of unlawful conspiracy, and also so far as it was contended that interstate commerce was not involved in counts one, two and four. The court added that it overruled all the defendants' contentions which it had not specifically overruled or sustained. The judgment ends by dismissing the indictment as to all defendants.

The first question presented concerns our jurisdiction. The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified.[1] The provision invoked here is the

[1] This Act (18 U. S. C. 682, Jud. Code, § 238, 28 U. S. C. 345) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. . . .

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

one which permits review where a decision quashing or sustaining a demurrer to an indictment or any of its counts is based upon the "construction of the statute upon which the indictment is founded." The decision below was not predicated upon invalidity of the statute.

The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case.

First. The first two of these principles, as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. *United States* v. *Keitel,* 211 U. S. 370, 397–399; *United States* v.

Carter, 231 U. S. 492, 493; *United States* v. *Hastings,* 296 U. S. 188, 192–194. The appeal as to count three must be dismissed.

Second. After a general description of the averments of the indictment, which was explicitly founded on § 1 of the Sherman Act, the District Court construed counts one, two and four as follows:

"Count 1 charges a conspiracy 'to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the states of Illinois, Indiana, Michigan and Wisconsin', and shipped to Chicago."

"Count 2 charges a conspiracy 'to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan and Wisconsin.' "

"Count 4 charges a conspiracy 'to restrict, limit and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan and Wisconsin.' "

The District Court further summarized the allegations in these counts as to the methods by which the alleged conspiracies were intended to be effected. 28 F. Supp. pp. 179–181. This construction of the indictment is binding upon this Court on this appeal. *United States* v. *Patten,* 226 U. S. 525, 535, 540; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301; *United States* v. *Schrader's Son,* 252 U. S. 85, 98; *United States* v. *Yuginovich,* 256 U. S. 450, 461; *United States* v. *Hastings, supra,* p. 192.

Third. The District Court, thus construing counts one, two and four, held as a matter of substance that, because

of the effect of the later statutes, these counts did not charge an offense under § 1 of the Sherman Act. This was necessarily a construction of the Sherman Act. *United States* v. *Patten, supra; United States* v. *Birdsall,* 233 U. S. 223, 230; *United States* v. *Kapp,* 302 U. S. 214, 217. We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.

We have jurisdiction under the Criminal Appeals Act to determine whether the construction thus placed upon the Sherman Act is correct.

Fourth. In reaching its conclusion, the District Court referred to § 6 of the Clayton Act, §§ 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act of 1933, as amended in 1935, and as reënacted and amended by the Agricultural Marketing Agreement Act of 1937.

With respect to the Clayton Act,[2] the court said in its opinion: "By that act labor, agricultural or horticultural cooperative organizations were excepted from the

[2] Section 6 of the Clayton Act (38 Stat. 730, 15 U. S. C. 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws." 28 F. Supp. 183. But the court did not hold that, by these provisions of the Clayton Act, either the defendants Pure Milk Association and its officers and agents or the defendants Milk Wagon Drivers Union, Local 753, and its officials, (albeit these organizations were not in themselves illegal combinations or conspiracies) were rendered immune from prosecution under the Sherman Act for their alleged participation in the combinations and conspiracies charged in counts one, two and four of the indictment. The Sherman Act was not construed by the District Court as having been limited to that extent by the Clayton Act.

The court invoked the Capper-Volstead Act,[3] as its judgment shows, only in relation to certain defendants, that is, the Pure Milk Association, an agricultural cooperative oganization, and its officers and agents. We shall consider later the effect of that statute upon the charge against those defendants.

The court dismissed the indictment as to *all* defendants, and we think it manifest that this ruling in its bearing upon counts one, two and four was due to the effect upon the Sherman Act which the court attributed to the Agricultural Marketing Agreement Act.[4]

(1). As to that Act, the court said:

"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Execu-

[3] 42 Stat. 388, 7 U. S. C. 291, 292.

[4] The District Court referred, in passing, to the Cooperative Marketing Act of July 2, 1926 (44 Stat. 803, 7 U. S. C. 455), and to the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), which was followed by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

tive Department, acting through the Secretary of Agriculture, full, complete and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

"To what extent he should act, the quantum of regulation, is solely one for his judgment and decision. If conditions require, he must act; if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Non-action by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

"It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act." 28 F. Supp. p. 187.

It will be observed that the District Court attributes this effect to the Agricultural Marketing Agreement Act *per se,* that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the au-

thority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions." [5]

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States* v. *Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652, 657; *General Motors Acceptance Corp.* v. *United States,* 286 U. S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." *Red Rock* v. *Henry,* 106 U. S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States,* 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There

[5] See *General Motors Acceptance Corp.* v. *United States,* 286 U. S. 49, 61.

must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." See, also, *Posados* v. *National City Bank,* 296 U. S. 497, 504.

The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act [6] declares it to be the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, 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" described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed. The methods which the Agricultural Act permits to attain that result are twofold, marketing agreements and orders. To give validity to marketing agreements the Secretary must be an

[6] 7 U. S. C. Supp. IV, 602 (1).

actual party to the agreements. § 8b.[7] The orders are also to be made by the Secretary for the purpose of regulating the handling of the agricultural commodity to which the particular order relates. § 8c (3) (4).[8] That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

It is not necessary to labor the point, for the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. That definition is found in § 8 (b)[9] of the Agricultural Adjustment Act carried into the Agricultural Marketing Agreement Act in relation to marketing agreements, and provides as follows:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in

[7] 7 U. S. C. Supp. IV, § 608b.
[8] 7 U. S. C. Supp. IV, § 608c (3) (4).
[9] 7 U. S. C. Supp. IV, § 608b.

such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this chapter."

Another provision is found in § 3 (d)[10] of the Agricultural Marketing Agreement Act, relating to awards or agreements resulting from the arbitration or mediation by the Secretary of Agriculture or by a designated officer or employee of the Department of Agriculture as provided in § 3 (a),[11] and meetings for that purpose and awards or agreements resulting therefrom which have been approved by the Secretary of Agriculture as provided in § 3 (b).[12] Section 3 (d) provides:

"No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States."

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.[13] If Congress had desired to grant any further immunity, Congress doubtless would have said so.

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly

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[10] 50 Stat. 249.

[11] 50 Stat. 248.

[12] 50 Stat. 248.

[13] See 77 Cong. Rec., Pt. II, p. 1977; Pt. III, p. 3117.

agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

We have no occasion to decide whether in any particular case an indictment under the Sherman Act by reason of its particular terms would be subject to demurrer, or to a motion to quash, upon the ground that the indictment ran against the provisions of such an agreement or order. We have no such situation here. There is indeed a contention that there was a license (No. 30) issued by the Secretary of Agriculture in 1934, amended in January, 1935, and in force until March 2, 1935, which related to the marketing of milk in the Chicago area, and hence that defendants operating under that license were not subject to the charges of the conspiracies alleged to have begun in January, 1935. But the allegations of the indictment are that the unlawful conspiracies continued throughout all the period mentioned in the indictment, that is, up to the time of its presentment in November, 1938. This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance. *United States* v. *Kissel,* 218 U. S. 601, 607, 608; *Hyde* v. *United States,* 225 U. S. 347, 369; *Brown* v. *Elliott,* 225 U. S. 392, 400. It is also said that there is a recent marketing order under date of August 29, 1939,[14] which relates to the Chicago marketing area, and hence that this cause is moot. But that order affects a period subsequent to the time covered by the indictment. These contentions are unavailing in relation to the question before us.

Our conclusion is that the Agricultural Adjustment Act as reënacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing

[14] Federal Register, August 30, 1939, Order No. 41, Vol. 4, pp. 3764–3768, 3770.

the Sherman Act as inapplicable to the charges contained in counts one, two and four.

(2) There remains the question whether the court below rightly held that the Capper-Volstead Act [15] had modified the Sherman Act so as to exempt the Pure Milk Association, a coöperative agricultural organization, and its officers and agents, from prosecution under these counts.

As to the Capper-Volstead Act the court said:

"This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned. . . .

"The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

"Under this act farmers are favored under the antitrust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

" . . . The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce

[15] 42 Stat. 388, 7 U. S. C. 291, 292.

'to such an extent that the price of any agricultural product is unduly enhanced'. Until the Secretary of Agriculture acts, the judicial power cannot be invoked." 28 F. Supp., pp. 183, 184.

We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914,[16] had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the antitrust laws should not be construed to forbid members of such organizations "from lawfully carrying out the legitimate objects thereof." They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922,[17] was made applicable as well to coöperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in § 1 as producers of agricultural products, "as farmers, planters, ranchmen, dairymen, nut or fruit growers." They are authorized to act together "in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce" their products. They may have "marketing agencies in common," and they may make "the necessary contracts and agreements to effect such purposes."

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of

[16] 38 Stat. 731.

[17] 42 Stat. 388.

trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." 28 F. Supp. 180–182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act.

Nor does the court below derive its limitation of the Sherman Act from § 1. The pith of the court's conclusion is that under § 2 an exclusive jurisdiction with respect to the described coöperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked. Section 2 of the Capper-Volstead Act does provide a special procedure in a case where the Secretary of Agriculture has reason to believe that any such association "monopolizes" or restrains interstate trade "to such an extent that the price of any agricultural product is unduly enhanced." Thereupon the Secretary is to serve upon the association a complaint, stating his charge with notice of hearing. And if upon such hearing the Secretary is of the opinion that the association "monopolizes," or does restrain interstate trade to the extent above mentioned, he then is to issue an order directing

the association "to cease and desist" therefrom. Provision is made for judicial review.

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to coöperative agricultural producers by § 1, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under § 1. But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.

Fifth. Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits

of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. *United States* v. *Keitel, supra; United States* v. *Kissel, supra,* p. 606; *United States* v. *Miller,* 223 U. S. 599, 602; *United States* v. *Carter, supra; United States* v. *Colgate & Co., supra; United States* v. *Schrader's Son, supra; United States* v. *Hastings, supra.* The case of *United States* v. *Curtiss-Wright Corporation,* 299 U. S. 304, is not opposed, as there the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity, and the jurisdiction of this Court extended to the consideration of the rulings of the District Court which dealt with that question.

The limitation applicable in the instant case to the question of the District Court's construction of the Sherman Act disposes of the contention urged by some of the defendants that counts two and four do not show such a direct restraint upon interstate commerce as to bring the acts charged within the statute. The District Court said in its opinion that, in view of its rulings (above discussed) as to counts one, two and four, it was unnecessary to decide "whether or not the allegations of the indictment show that interstate commerce was or was not restrained." 28 F. Supp., p. 187. In its judgment the court formally overruled all objections to these counts so far as the objections rested on the ground that interstate commerce was not involved. If these rulings be treated as dealing merely with the construction of the indictment, they must be accepted here. *United States* v. *Patten, supra; United States* v. *Colgate & Co., supra; United States* v. *Hastings, supra.* But, apart from that, the District Court certainly has not construed the Sher-

man Act as inapplicable upon the ground that interstate commerce is not involved, and the question of the bearing upon that commerce of the acts charged is not before us.

Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question.

The appeal as to count three is dismissed. The judgment is reversed as to counts one, two and four, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

CITIES SERVICE OIL CO. *v.* DUNLAP ET AL.

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

No. 28. Argued November 8, 9, 1939.—Decided December 4, 1939.

A local rule of law, established by decisions of the state court, which, on an issue of *bona fide* purchase without notice for value, rests the burden of proof upon him who attacks the legal title and asserts a superior equity, must be followed by the federal court in a suit to quiet title brought by the legal owner of record. P. 210.

This is not a matter of practice in courts of equity but a matter of substantial right—a valuable assurance in favor of the legal title.

100 F. 2d 294; 101 *id.* 314, reversed.

CERTIORARI, 307 U. S. 617, to review the affirmance of a decree of the District Court in favor of the respondents in a suit by the petitioner to quiet its title to a piece of land.

Mr. Clayton L. Orn, with whom *Messrs. David B. Trammell* and *Hayes McCoy* were on the brief, for petitioner.

Mr. Angus G. Wynne for respondents.

Opinion of the Court by MR. JUSTICE MCREYNOLDS, announced by MR. CHIEF JUSTICE HUGHES.

This cause is here in order that we may decide whether the Circuit Court of Appeals wrongly declined to follow the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. We have considered that point only and conclude the ruling below was error. In consequence the challenged judgment must be reversed. The cause will be remanded for final determination upon the entire record consistent with this opinion.

Prior to 1899 Louisa Rogers owned a rectangular tract of land—320 acres—in Gregg County, Texas. In February of that year her heirs—J. F. Rogers and his three brothers—divided this by deeds, duly executed and recorded. One of these conveyed to J. F. Rogers sixty-eight acres out of the northwest portion of the tract, described by metes and bounds. The north line was said to begin at a specified point and to run thence west 440 yards to "Wiley Davis N. E. corner." There the boundary turns south and runs for eight hundred and eighty yards, thence east, &c. Measured on the ground, 440 yards ends sixty-six feet east of Davis' corner. This discrepancy gave occasion for the present controversy over the sixty-six foot strip lying between a south-line from Davis' corner and a parallel one, sixty-six feet to the east. The interest asserted by respondents rests upon the theory that by intention this was left undivided.

In 1930 J. F. Rogers' heirs granted an oil and gas lease to all land described in the 1899 deed to him. By assignments and succession, petitioner Oil Company became owner of this. The conveyances were duly recorded.

In 1934 respondent Dunlap obtained from the three brothers of J. F. Rogers and his heirs, a lease of the major part of the sixty-six foot strip above described. Title to this is the subject of the present controversy.

Claiming that the land described in the Dunlap lease of 1934 was within the boundaries of its earlier one (1930), petitioner filed an original bill in the United States District Court to remove the cloud. Dunlap and the Rogers appeared and denied the material allegations. A cross-bill set up their recorded deed and alleged that the call in the 1899 deed to J. F. Rogers for "Davis' northeast corner" was inserted through inadvertence and mistake; that the distance call controlled; that the purpose of the parties was to establish the western terminus of the north line sixty-six feet east of Davis' corner and leave a strip on the west in common ownership.

Petitioner denied the allegations of the cross-bill and asserted that it and its predecessors were purchasers of the recorded legal title for value in good faith and without notice of mistake.

The District Court ruled in favor of Dunlap. The Circuit Court of Appeals affirmed. 100 F. 2d 294; 101 *id.* 314.

In the latter court petitioner maintained that under the established Texas rule, on an issue of bona fide purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts a superior equity. It cited *White* v. *Hix,* (Texas) 104 S. W. 2d 136, 139–140,[1] and insisted that *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, required observance of the local rule.

[1] "It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the

The court recognized the existence of the Texas rule as claimed but thought a different and better one was generally approved and should be followed. It said—

"In the present case the appellant is the original complainant, seeking a decree quieting its title. It has entered a court of equity, asking equity and bound to do equity. The defendants in their answer set up a mistake, correctable in equity, in the partition deed made to complainant's grantor, J. F. Rogers. Complainant replies, denying the alleged mistake and alleging additionally in very general terms that it and its predecessors in title purchased in good faith, paying value for the oil and gas lease it holds in reliance on the deed as written, and without notice or knowledge of the claim now asserted that the call for the Wiley Davis northeast corner was inserted by mistake. There was no further pleading."

"Issue stands joined on the new facts alleged by this complainant's reply concerning its purchase for value without knowledge or notice. It seems to us that the burden of proving these facts ought reasonably to rest on the complainant, both because it has alleged them and they are essential to its success, and because they are peculiarly within its knowledge. . . . What the complainant itself paid, and with what knowledge, it of course knows and could easily prove. There is a failure of evidence, not only as to bona fides and want of notice,

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legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity. *Teagarden* v. *R. B. Godley Lumber Co.*, 105 Tex. 616, 154 S. W. 973; *Commonwealth B. & L. Ass'n* v. *Howard* (Tex. Civ. App.) 61 S. W. (2d) 546; *Moore* v. *Humble Oil & Ref. Co.* (Tex. Civ. App.) 85 S. W. (2d) 943, 944; *Tarkenton* v. *Marshall* (Tex. Civ. App.) 91 S. W. (2d) 473. The same rule applies in favor of lien holders. *Texas Loan Agency* v. *Taylor*, 88 Tex. 47, 29 S. W. 1057; *McAlpine* v. *Burnett*, 23 Tex. 649, 650." And see *Ritch* v. *Jarvis*, (Texas) 64 S. W. 2d 831, 834–835.

but as to what was paid and to whom, and when and how; the details of which the maker of this plea has from the earliest time been held bound to allege and, when put in issue, to prove."

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in *Erie R. Co.* v. *Tompkins,* and the cases following it."

"We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title.

Central Vermont Ry. Co. v. *White,* 238 U. S. 507, 512, considered an analogous situation and pointed out the principle presently applicable. Proof that petitioner did not purchase for value and in good faith was "part of the very substance" of respondents' cause.

Sundry arguments advanced here to support respondents' demand for affirmance, notwithstanding the er-

roneous pronouncement below, will be matter for consideration when the cause comes again before the Circuit Court of Appeals.

Reversed.

UNION STOCK YARD & TRANSIT CO. *v.* UNITED STATES ET AL.

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

No. 40. Argued November 10, 13, 1939.—Decided December 4, 1939.

1. Transportation of livestock by rail begins with its delivery to the carrier for loading on its cars, and ends only after unloading, for delivery or tender to the consignee, at the place of destination. P. 219.
2. The Union Stock Yard and Transit Company of Chicago loads and unloads livestock using platforms and chutes which it owns and which are the necessary and only means of loading and unloading at its yard, to and from which the livestock is shipped interstate. Its charges to the railroads for these services are included in the charges for transportation collected by the railroads from the shippers. Its yard is the principal railroad terminal in Chicago for the receipt of livestock in carload lots. It holds itself out to the public as performing the loading and unloading service, and permits it to be performed by no other. *Held,* that it is engaged in providing "terminal facilities" in the performance of "transportation service" and is a "common carrier . . . railroad" within the meaning of the Interstate Commerce Act; and as such its charges are subject to regulation by the Interstate Commerce Commission. P. 219.
3. The Stock Yard Company is such a common carrier and is subject to regulation of its rates under the Act notwithstanding that, as an incident to the service it renders to shippers and to the line-haul carriers, it acts as agent of the latter, and notwithstanding that its terminal service includes no rail haul. Distinguishing *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434. P. 220.
4. In as much as the Interstate Commerce Act places the loading and unloading facilities and services under the authority of the Interstate Commerce Commission, they are excluded from the

jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act by the terms of § 406 of the latter enactment. P. 221.

5. To the issue whether the service rendered by the Stock Yard Company in loading and unloading livestock is such as to bring it within the jurisdiction of the Interstate Commerce Commission, the practices by others at other yards are irrelevant, and their bearing on the administrative construction of the statute in the present circumstances is *held* too remote and indecisive to compel a burdensome inquiry by the Commission into collateral issues. P. 222.

Mere inaction, through failure of the Commission to institute proceedings under § 15 (7), is not an administrative ruling and does not imply decision as to the Commission's jurisdiction.

Affirmed.

APPEAL from a decree dismissing a suit to set aside an order of the Interstate Commerce Commission.

Mr. Frederick H. Wood, with whom *Messrs. Ralph M. Shaw, William F. Riley, Guy A. Gladson, Thomas T. Cooke,* and *Bryce L. Hamilton* were on the brief, for appellant.

Mr. Daniel W. Knowlton, with whom *Solicitor General Jackson, Assistant Attorney General Arnold* and *Mr. Elmer B. Collins* were on the brief, for the United States et al.; *Mr. Lee J. Quasey* for National Live Stock Marketing Assn.; and *Mr. Douglas F. Smith,* with whom *Mr. Kenneth F. Burgess* was on the brief, for the intervening railroad companies,—appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

The principal question for decision upon this appeal is whether, in the services performed by appellant in loading and unloading livestock at its stockyards in Chicago, and specified by its tariffs filed with the Interstate Commerce Commission, it is a common carrier subject

to the Interstate Commerce Act, 24 Stat. 379, as amended in 1920, 41 Stat. 474, 49 U. S. C., §§ 1–27.

The case comes here on appeal from the final decree of a district court of three judges,[1] dismissing appellant's suit to set aside an order of the Interstate Commerce Commission, which directed the cancellation of appellant's supplemental schedule proposing cancellation of its rate schedules previously filed with the Commission. Cancellation of Livestock Services, 227 I. C. C. 716. Appellant here, as below, assails the Commission's order on the ground that in performing the scheduled services appellant is not within the jurisdiction of the Commission as defined by the Interstate Commerce Act.

As appears in the Commission's report, appellant was incorporated in 1865 with authority to build and operate a railroad and a stockyard, and with power of eminent domain. Acting under its charter it constructed a stockyard in Chicago and approximately three hundred miles of railroad tracks, consisting of a main line connecting with the trunk lines entering Chicago and switches to various industries located adjacent to its tracks.

Prior to 1912 it had tried various methods of operating its tracks and stockyards. At that time it did not control any of its railroad properties other than platforms and facilities for loading and unloading at its yard. The Chicago Junction Railway Co., which, with appellant, was controlled by a single holding company, operated the railroad under a fifty-year lease, paying to appellant as rental two-thirds of its net profits. In that year the United States brought suit to restrain appellant and the Junction Company from further operations in interstate commerce until they filed tariffs as required by § 6 of the Interstate Commerce Act. The litigation resulted

[1] §§ 210 and 238 (4) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 983, 28 U. S. C., §§ 47a, 345.

in the decision of this Court that both were common carriers subject to the Act. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286. Appellant then filed a rate schedule with the Commission specifying its charges for loading and unloading all rail-borne livestock, and continued its practice of performing services in loading and unloading from and to its livestock pens for the trunk line railroads, charging them the scheduled rates for the service.

In the following year the Junction Company lease was cancelled and a new one executed, under which appellant leased in perpetuity all of its railroad facilities, except those used for loading and unloading livestock, at an annual rental of $600,000 in lieu of a share of the profits. This was followed in 1917 by an attempt by the stockyard to charge shippers an additional amount for the loading and unloading service, which resulted in a reparation award by the Commission, sustained in *Adams* v. *Mills*, 286 U. S. 397. In the same year appellant sought to cancel its tariffs on the ground that by reason of the change in the lease it was no longer a common carrier. This contention was rejected by the Commission. Livestock Loading and Unloading Charges, 52 I. C. C. 209; 58 I. C. C. 164.

In 1922 the Junction Company, with the approval of the Commission, Chicago Junction Case, 71 I. C. C. 631, 150 I. C. C. 32, sublet the road for ninety-nine years, with a renewal option, to the Chicago River & Indiana Railroad Co., whose capital stock was acquired by the New York Central Railroad Company. A renewed attempt by the stockyard to cancel its tariffs failed in 1935, 213 I. C. C. 330, and its 1937 repetition resulted in the like order of the Commission, which is the subject of the present suit.

By ceasing to operate or control its railroad directly or indirectly appellant has restricted its transportation serv-

ice to the loading or unloading of livestock as specified in its tariff. It owns the platforms and chutes which are the necessary and only means of loading and unloading at its yard to and from which the livestock is shipped interstate by rail. For this service it charges the railroads the scheduled rates. Loading and unloading are included in the transportation service rendered by the railroads to shippers, the charge for it to shippers being covered by the line-haul tariffs. The Commission found that appellant's yard is the principal railroad terminal in Chicago for the receipt of livestock in carload lots, and that appellant holds itself out to the public as performing the loading and unloading service and permits it to be performed by no other.

Appellant contends that having divested itself of all control and participation in the operation of its railroad it is no longer within the jurisdiction of the Commission over "common carriers by railroad," conferred by the Interstate Commerce Act, but is subject to regulation by the Secretary of Agriculture, under the Packers and Stockyards Act of 1921, 42 Stat. 159, 7 U. S. C., §§ 181–229.

By § 305 of that Act rates and charges for stockyard services furnished at a stockyard or by a stockyard owner are required to be just and reasonable. And by §§ 309, 310, the Secretary is given authority to regulate such rates. By § 301 stockyard services are defined as "services or facilities furnished at a stockyard in connection with the receiving, buying or selling . . . marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock." It will be noted that the loading and unloading of livestock are not specifically included in the definition of stockyard services. Further, an important exception to the broad authority of the Secretary is made by § 406, which provides: "Nothing in this chapter shall affect the power or the jurisdiction of

the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." We accordingly turn to the provisions of the Interstate Commerce Act to determine the extent of the exception.

Section 6(1) of the Interstate Commerce Act provides that a common carrier subject to the provisions of the sections presently to be mentioned, where no joint rate is involved, shall file schedules of rates showing "the separately established rates . . . applied to the through transportation" and requires that the rate schedules shall "state separately all terminal charges . . . and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates . . . or the value of the service rendered to the passenger, shipper, or consignee."

Section 1(1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad . . ." Section 1(3) provides that the term railroad shall include ". . . all the road in use by any common carrier operating a railroad . . . all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation . . . of . . . persons or property . . . including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." It defines the term "transportation" as including "locomotives, cars, . . . and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit . . . and handling of property transported."

Section 15(5) provides, "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading enroute, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner . . ."

Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136. The same rule has been repeatedly applied since the statute was adopted. *Erie R. Co.* v. *Shuart,* 250 U. S. 465, 468; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, 198, and cases cited; *Denver Union Stock Yard Co.* v. *United States,* 304 U. S. 470; 2 Hutchison, Carriers, 3d ed. § 510. Appellant is thus engaged in the performance of a railroad transportation service and provides railroad "terminal facilities" and services. It is a "carrier" engaged in "transportation of property wholly by railroad" as those terms are defined by the words of the statute.

That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in *Adams* v. *Mills, supra,* 409, and also in *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.* There the Commission's order directing the discontinuance of appellant's yardage charge to consignees was set aside on the sole ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish.

The statute, it is true, does not purport to say when one who is a railroad carrier because engaged in furnishing railroad terminal facilities and services, is to be deemed a "common carrier." But that question was put at rest in *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296. There a local terminal company rendering terminal services as the agent of numerous rail carriers, was held to be engaged in a public or common calling, and hence to be a common carrier within the meaning of the Hours of Service Act, 34 Stat. 1415, which is applicable to any common carrier by railroad engaged in interstate commerce. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498; *United States* v. *California,* 297 U. S. 175, 181; *United States* v. *Sioux City Stock Yards Co.,* 162 F. 556.

It is not important, as appellant seems to think, that, as an incident to the service it renders to shippers and to the line-haul carriers, it acts as agent of the latter. The character of the service, in its relation to the public, determines whether the calling is a public one, and a common carrier does not cease to be such merely because in rendering service to the public it acts as the agent of another. *United States* v. *Brooklyn Eastern District Terminal, supra,* 307. Connecting common carriers frequently act in that capacity for each other without losing their status as such.

Nor is it of weight that the terminal service includes no rail-haul (see *Southern Pacific Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498) or that operation and control of the terminal facilities are wholly separate from those of any railroad. *United States* v. *Brooklyn Eastern District Terminal, supra,* 305. It is enough that the loading and unloading are rail transportation services performed at a railroad terminal as a common or public calling by one who, in rendering it, engages in the trans-

portation of property by railroad within the meaning of the Act.

Ellis v. *Interstate Commerce Comm'n,* 237 U. S. 434, on which appellant relies, does not hold otherwise. There the Commission sought a district court order to compel the examination of witnesses in a proceeding, instituted by the Commission of its own motion, for the investigation of a corporation which leased refrigerator cars to shippers and railroads and maintained icing plants at which it iced the cars, the railroad paying for the icing service. There was no allegation or proof that the corporation was engaged in a common calling or held itself out as ready or willing to supply cars or services on reasonable request. In holding that the case was not an appropriate one for the relief sought because the company was not within the jurisdiction of the Commission, the Court said, p. 443: "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour car lines lets to the railroads, but the definition is a preliminary to the requirement that the carrier shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

This Court has since recognized that loading and unloading services such as are here involved are common carrier services placed under the authority of the Commission by the Interstate Commerce Act. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra; Denver Union Stock Yard Co.* v. *United States, supra,* 477. And unless the restriction of § 406 of the Packers and Stockyards Act upon the authority of the Secretary of Agriculture in favor of that of the Commission refers to such services, the purpose of the section is not apparent. None other is suggested. See *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* 199. As we think the statute plainly places

appellant's loading and unloading facilities and services under the authority of the Commission, they are withdrawn from the jurisdiction of the Secretary of Agriculture by the terms of § 406 of the Packers and Stockyards Act,[2] and we find it unnecessary to consider the question, much argued at the Bar, whether the services could be more conveniently and advantageously regulated by the one administrative agency than by the other.

Appellant asks that the order be set aside for want of the "full hearing" by the Commission, required by § 15(7) of the Interstate Commerce Act. In the course of the hearings before the Commission appellant offered in a variety of ways to prove the conditions prevailing at stockyards other than appellant's, and that the Commission had not asserted jurisdiction over loading and

[2] If this were doubtful, doubt would be removed by the legislative history. S. 3944, 66th Congress, in providing a Federal Livestock Commission to regulate packers and stockyards did not contain such a saving clause. The House Committee on Agriculture proposed a substitute bill giving control of the stockyards to the Interstate Commerce Commission because "the Commission already has control over transportation of cattle, which does not end until they are unloaded at the yards. . . ." H. Rept. 1297, 66th Cong., 3rd Sess., p. 9.

In the 67th Congress the House Committee on Agriculture proposed the bill substantially in the form finally adopted as the Packers and Stockyards Act, containing the saving clause in favor of the Commerce Commission. The Chairman in introducing the bill in the House said: "It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of livestock and live-stock products in interstate commerce; that is the Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads." Cong. Rec., Vol. 61, Part 2 p. 1800.

unloading services performed at those yards. Appellant states that the evidence would have shown that there are one hundred and thirty-five other stockyards in the United States under regulation by the Secretary of Agriculture,[3] which perform loading and unloading services, for which the railroads pay, under conditions similar to those in the Chicago yard; that although, to the knowledge of the Commission, this has been the case for many years, it has not asserted its jurisdiction over any of these yards. This, it is argued, would have established a practical construction of the statute by the Commission, relevant and material to the inquiry because of the rule that a settled or uniform administrative construction of a doubtful statute is of weight in determining its meaning. *Boston & Maine Railroad* v. *Hooker,* 233 U. S. 97; *Pocket Veto Case,* 279 U. S. 655, 688, 689; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740. The exclusion of the proffered evidence by the Commission and its alleged failure to make a proper record of the offer, it is urged, have deprived the appellant of a full hearing.

We think the record adequately shows that the Commission excluded the offered proof as appellant has characterized it here, but we conclude that the Commission was free to reject it. The issue to be resolved in the present proceeding is whether the service rendered by appellant at its Chicago stockyard brought it within the jurisdiction of the Commission. To this issue the practices by others at other yards are irrelevant and their bearing on the administrative construction of the statute

[3] The Secretary has not asserted jurisdiction over the loading and unloading service at public stockyards. Secretary of Agriculture v. Denver Union Stock Yard Co., Bureau of Animal Industry Docket No. 450, p. 10 (1937); see letter to Chairman of Senate Committee on Agriculture and Forestry, Hearings on S. 2129, 75th Cong., 1st Sess., p. 6.

in the present circumstances is, we think, too remote and indecisive to compel a burdensome inquiry into collateral issues.

The Commission has consistently ruled that appellant's loading and unloading services are within its jurisdiction under conditions which appear of record to have remained unchanged since 1922. Appellant is free, as it has been throughout, to show any ruling or action taken by the Commission involving an administrative construction of the statute, although it is plain that in the face of the present record such rulings could not establish a consistent acceptance by the Commission of the construction for which appellant contends. See *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U. S. 1; cf. *Estate of Sanford* v. *Helvering, ante,* p. 39. But mere inaction, through failure of the Commission to institute proceedings under § 15 (7), is not an administrative ruling and does not imply decision as to the Commission's jurisdiction. If the failure to act in the case of yards other than the present one is to be taken as an administrative construction of the statute persuasive here, we would be forced to conclude that a jurisdiction which the statute has plainly conferred either on the Secretary or the Commission, has been lost, although, with respect to this appellant, jurisdiction has been consistently asserted by the Commission, while the Secretary has as consistently remained passive. There is a practical limit to which inquiry into collateral issues may be extended in pursuit of the trivial. We think that limit was reached here.

Affirmed.

UNITED STATES ET AL. *v.* LOWDEN ET AL., TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., ETC.

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

No. 343. Argued November 6, 1939.—Decided December 4, 1939.

Section 5 (4) (b) of the Interstate Commerce Act provides that the Commission may authorize carriers to consolidate or lease their properties where it finds that that action, subject to such conditions and modifications as it shall find to be just and reasonable, will be in harmony with and in furtherance of the plan of consolidation of railway properties established pursuant to paragraph (3) of that section and will promote the public interest. Upon an application to the Interstate Commerce Commission for authority to lease the road and properties of one railroad to another with consequent large savings in the operating costs of the road, the Commission found that the proposed lease would promote the public interest, and authorized it upon conditions which it found to be just and reasonable, *viz.* that the employees of the leased road be compensated for a limited time for any reduction of salary; that dismissed employees be paid partial compensation for the loss of their employment; and that transferred employees be paid moving and traveling expenses including losses incurred through their being forced to sell their houses. *Held:*

1. The term "public interest" as used in the statute may be understood for the purposes of this case as relating not to public interest in general but to public interest in the maintenance of an adequate and efficient transportation service. P. 230.

2. The policy of consolidating the railways is so intimately related to the maintenance of an adequate and efficient rail transportation system that the "public interest" in the one can not be dissociated from that in the other. P. 232.

3. In determining whether conditions attached to an order authorizing a lease will promote the public interest under § 5 (4) (b), the Commission may consider their effect upon the national policy of consolidation as well as their more immediate effect upon the adequacy and efficiency of the transportation system. P. 232.

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4. Interpreting the term "public interest" not in a general sense but as meaning public interest in maintaining an adequate and efficient transportation system, an order of the Commission authorizing a lease under § 5 (4) (b) may affix reasonable conditions for the compensation of railway employees who will be seriously affected. Pp. 228, 238.

5. It cannot be said as a matter of law, that the prescribed conditions whose justice and reasonableness are not challenged will not advance the public interest in the statutory sense by facilitating the national policy of railroad consolidation and by promoting the adequacy and efficiency of the railroad transportation system by preventing interruption of interstate commerce through labor disputes and by their effect on employee morale. P. 238.

6. The Act as so applied is within the commerce power. P. 239.

7. The carrier is not deprived of property without due process of law in being required to devote part of the savings resulting from the exercise of the leasing privilege to compensate employees for losses resulting from it. P. 240.

29 F. Supp. 9, reversed.

APPEAL from a decree of the District Court of three judges which set aside conditions attached by the Interstate Commerce Commission to an order permitting one carrier to lease its railroad to another.

Mr. James C. Wilson, with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Elmer B. Collins, Richard H. Demuth, Daniel W. Knowlton,* and *Edward M. Reidy* were on the brief, for appellants.

Mr. W. F. Peter, with whom *Messrs. Otis F. Glenn* and *M. L. Bell* were on the brief, for appellees.

By leave of Court, *Messrs. Frank L. Mulholland, Clarence M. Mulholland,* and *Willard H. McEwen,* on behalf of the Railway Labor Executives' Association, filed a brief, as *amici curiae,* urging reversal.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal raises the question whether the Interstate Commerce Commission, in approving and authorizing a lease of a railroad by one railroad company to another, under § 5 (4) (b) of the Interstate Commerce Act as amended, (48 Stat. 217, 49 U. S. C., § 5 (4) (b) enacted in substance as § 407 (5) (6) of the Transportation Act of 1920, 41 Stat. 481), has authority to prescribe as a condition of its order, that certain employees of the lessor shall receive partial compensation for the loss which they may suffer, by reason of their discharge or transfer as a result of the lease.

Appellees are trustees of the Chicago, Rock Island & Gulf Company and of the Chicago, Rock Island & Pacific Railway Company, both in bankruptcy for purposes of reorganization under § 77 of the Bankruptcy Act. They applied to the Interstate Commerce Commission for authority under § 5 (4) (b) to lease the railroad and properties of the Gulf Company to themselves as trustees of the Pacific Company at an annual rental equal to the net operating income of the leased property. On the application, which was twice heard by the Commission, evidence was submitted from which the Commission found that the Gulf Company, whose entire capital stock is owned by the Pacific Company, is owner of six hundred and thirty-two miles of railroad in Texas which it operates separately from the 8,138 miles of railroad of the Pacific Company; that the purpose of the proposed lease was to combine the operation of the two lines in order to effect savings in operating costs through the elimination of the Texas accounting offices of the Gulf Company.

The Commission found that the lease would not impose upon the public any change in conditions affecting

train operation; that it would have no effect on rates or routes and would result in no change of service to the public. It found that the elimination of the Texas accounting offices would result in an annual saving of $100,000, six or seven thousand dollars of which would accrue to the Gulf Company and the remainder to the Pacific Company, to be effected through the ultimate dismissal of forty-nine of the Gulf accounting employees and the transfer of twenty others to the Chicago offices of the Pacific Company. The Commission also found that the welfare of the employees affected by the elimination of the accounting office is one of the matters of public interest which the Commission must consider in proceedings under § 5 (4) (b).

It accordingly authorized the lease upon the conditions which it found to be just and reasonable: that for a period not exceeding five years each retained employee should be compensated for any reduction in salary so long as he is unable, in the exercise of his seniority rights under existing rules and practices to obtain a position with compensation equal to his compensation at the date of the lease; that dismissed employees unable to obtain equivalent employment be paid partial compensation for the loss of their employment in specified amounts and for specified periods depending on the length of their service, and that the transferred employees be paid their traveling and moving expenses including losses incurred through being forced to sell their homes. The maximum cost of compliance with the conditions, it was found, would be $290,000 spread over a period of five years, during which the savings effected by the lease would be not less than $500,000. The Commission found that the proposed lease, with the specified conditions "will be in harmony with and in furtherance of our plan for the consolidation of railroad properties and will promote the public interest."

In the present suit, brought by appellees, the district court of three judges (Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, 28 U. S. C., §§ 45, 47a), granted the relief sought, and decreed that the conditions of the Commission's order be set aside and that the Commission be enjoined from enforcing them. The case comes here on appeal under § 238 of the Judicial Code, 28 U. S. C., § 345.

Appellees contend, as the district court held, that the Commission was without the authority of any act of Congress to attach the prescribed conditions to its order. Consequently, they argue that the courts may appropriately set them aside as of no effect, leaving the remainder of the order to stand as the Commission's unqualified approval of the lease, although the Commission gave no indication that it would have authorized the lease without the conditions.

Section 5 (4) (a) provides that "it shall be lawful, with the approval . . . of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties . . . or for any carrier . . . to . . . lease . . . the properties . . . of another . . ." Subdivision (b) provides that the Commission on application by the carrier or carriers concerned may, after hearing, authorize such a consolidation or lease, and directs that "if after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation . . . [or] lease . . . will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving . . . such consolidation . . . [or] lease . . . upon the terms and conditions and with the modifications so found to be just and reasonable."

In *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, we pointed out that the phrase "public interest" in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission to secure a more adequate and efficient transportation system. See *New England Divisions Cases,* 261 U. S. 184; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277. Thus restricted, the term public interest "as used in the statute, is not a mere general reference to public welfare but as shown by the context and purposes of the Act has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities." *Texas* v. *United States,* 292 U. S. 522, 531.

Appellees do not challenge the Commission's contention that the conditions are germane to the transaction involved in the lease because the purpose of the conditions is to mitigate the direct effect of the lease upon the employees. See *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 324, 339, 340. But they insist that the conditions which the Commission is permitted by this section to attach to its order must also conform to the standard of public interest which the statute sets up to guide the Commission's action. From this premise they argue that the prescribed conditions are unauthorized because unrelated to the public interest in its statutory sense. They maintain that a carrier's employees, as such, are

not part of the public whose interest is to be promoted by the lease, and that their interest in keeping their employment without loss of compensation is of private concern and no part of that public interest in the maintenance of an adequate and efficient transportation system which the statute contemplates.

Accepting the premise, as we may for present purposes, without considering the contention of the Commission that the conditions if just and reasonable, need not be related to the other statutory standards, the issue is narrowed to a single question whether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

Appellees do not attack the sufficiency of the evidence on which the Commission's findings are based, and that evidence was not submitted to the district court for review. Hence we are free to disturb the findings only if we can say that there can be no rational basis for them. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146. Appellees do not deny that the use of part of the savings resulting from the lease to compensate the employees for the loss which it will occasion, is just and reasonable so far as the interest and relations of employer and employee are concerned; or that the lease will be in harmony with and further the Commission's plan for consolidation of the railroads as the Commission found. They urge only that the conditions imposed can have no relationship to the maintenance of an adequate and efficient transportation system

and in consequence cannot in any circumstances be said to promote the public interest in the statutory sense.

The proposed lease in its relation to the transfer or dismissal of employees and to an adequate and efficient transportation system, is not to be viewed as an isolated transaction or apart from the Commission's plan for consolidation of the railroads. As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy, and the effective consolidation of the railroads in conformity to the provisions of the Act and to the plan of consolidation which the Commission was directed to prepare became a matter of public interest. The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the "public interest" in the one cannot be dissociated from that in the other. Hence, in considering whether the public interest under § 5 (4) (b) will be promoted by the conditions of an order authorizing a consolidation or lease, the Commission is free to consider their effect upon the national policy of consolidation as well as their more immediate effect on the adequacy and efficiency of the transportation system.

Obedient to the mandate of § 5 (2) of the Act the Commission has prepared and published a plan under which it is proposed that the railroads of the country be consolidated into a limited number of large systems. Consolidation of Railroads, 159 I. C. C. 522, 185 I. C. C. 403. By § 5 of the Act the ban on consolidation of railway carriers was removed, and acting under it the Commission has granted authority for numerous consolidations and leases in furtherance of the plan. In the preparation and execution of the plan it speedily became apparent that the great savings which would result from consolidation could not be effected without profoundly

affecting the private interests of those immediately concerned in the maintenance of the existing nationwide railway system, the railroad security holders and employees. The security holders are usually, though not always favorably affected by economies resulting from consolidation.[1] But the Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself,[2] both of which are of public concern within the meaning of the statute.

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[1] In several cases the Commission has disapproved proposals for consolidations and for acquisition of control because of a failure to deal fairly with minority stockholders. Nickel Plate Unification, 105 I. C. C. 425; Unification of Southwestern Lines, 124 I. C. C. 401. In others it has approved the proposal on condition that these objections be removed. Buffalo, Rochester & Pittsburgh R. Co., 158 I. C. C. 779; Buffalo & Susquehanna R. Corp. Control, 162 I. C. C. 656; Upper Coos R. Control, 166 I. C. C. 76; Springfield Terminal Ry. Co. Control, 166 I. C. C. 90; Denver & Salt Lake R. Co. Control, 170 I. C. C. 4; St. Louis Southwestern Ry. Co. Control, 180 I. C. C. 175. See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 337.

[2] On several occasions strikes of railroad employees affected by consolidations of plant facilities have threatened. To avoid interruption of transportation service an Emergency Board was invoked in 1929

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system. As was pointed out by Commissioner Eastman in his concurring opinion in this case the protection afforded to employees by the challenged conditions is substantially that provided in event of consolidation by an agreement entered into in May, 1936, between 219, the great majority, of the railroad lines of the country, and 21 labor organizations.[3] He also directed attention to the fact that the Committee of Six, three of whom were railroad executives, in their report to the President of December 23, 1938, recommended that the federal agency passing upon railroad consolidation "require as a prerequisite to approval a fair and equitable arrangement to protect the interests of . . . employees,"[4] and that this report had been ap-

under the Railway Labor Act of 1926 to arbitrate the dispute between the railroad and the employees of the Texas & Pacific Railway Company. The Board awarded the employees compensation for loss from depreciation of the value of their homes (cf. Clause 4 in the order here involved). The Board, after extensive hearings, found that such a requirement was reasonable in view of the fact that railroads themselves had on several prior occasions compensated the employees affected. 28 Monthly Labor Review, 1191 (1929). See also 43 Monthly Labor Review, 867 (1936) where dismissal compensation was agreed upon in similar circumstances under threat of a strike.

[3] The Chicago, Rock Island & Pacific System, represented here by appellee, was a party to this agreement. 42 Monthly Labor Review 1503 (1936); 57 Traffic World 995 (1936).

[4] Report of Committee appointed September 20, 1938, by the President of the United States, to submit recommendations upon the general transportation situation (December 23, 1938).

proved by the directors of the Association of American Railroads.

We can hardly suppose that the railroads, in entering into this agreement and endorsing this recommendation left out of account their own interest in the maintenance of transportation service or that their interest in this respect differs or is separable from that of the public interest. In fact, before this action by the railroads the Commission itself had taken the view that the welfare of dismissed employees must be considered in passing upon proposed consolidations,[5] and in its sixth annual report in 1892 it declared in recognition of the same principle, that "relations existing between railway corporations and their employees are always of public interest."[6] The Federal Coordinator of Railroads, in his fourth annual report to Congress in 1936, recommended the enactment of a comprehensive system of dismissal compensation, stating that such a system "would enhance the safety or efficiency of railroad service." H. Doc. No. 394, 74th Cong., 2nd Sess., p. 56.[7]

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential

[5] Consolidation of Railroads, 185 I. C. C. 403, 427; Unification of Lines in Southern New Jersey, 193 I. C. C. 183, 198; St. Paul Bridge & Terminal Ry. Co. Control, 199 I. C. C. 588. For later cases to the same effect, see Associated Railways Company Acquisition and Securities, 228 I. C. C. 277, 336; Louisiana & Arkansas Ry. Co., Merger, 230 I. C. C. 156; Louisiana & Arkansas Ry. Co., Control, 233 I. C. C. 37, 123.

[6] Sixth Annual Report of Interstate Commerce Commission (1892), p. 323.

[7] For a similar conclusion, see J. Douglas Brown, et al., Railway Labor Survey, Social Science Research Council, Division of Industry & Trade (1933), 1, 94; Robertson, The Stake of Railroad Labor in the Transportation Problem, 187 Ann. Am. Acad. 88 (1936).

aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored. Title 3 of the Transportation Act of 1920,[8] which was enacted at the same time as the provisions reënacted in substance in § 5 (4) (b), set up a "Labor Board" to decide railroad labor disputes involving grievances, rules and working conditions, and declared in § 301 "it shall be the duty of all carriers and their officers, employees, and agents, to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier or employees or subordinate officials." Congress has passed successive measures for arbitration of railroad disputes between railroad employees and employers, all aimed at the prevention of interruptions of railroad service through such disputes, and culminating in the passage of the Railway Labor Act of 1926, 44 Stat. 577, and in its amendments in 1934, 48 Stat. 1185, 45 U. S. C., §§ 151, 163; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515. By the Wagner Labor Relations Act of 1935, 49 Stat. 449,

[8] This Act resulted from the experiences of the Director-General in operating the railroads during the World War period. Sharfman, The Interstate Commerce Commission, Vol. I, p. 181. The Director-General recognized the necessity of maintaining a loyal and devoted personnel in the interest of uninterrupted service. Thirty-third Annual Report of the Interstate Commerce Commission (1919), p. 4. In agreements executed by the Director-General with several railroad unions, provision was made for protection of seniority rights and for free transportation for the employee, his family and household goods (cf. Clause 3 of order here involved), when consolidations of facilities were ordered by the Director-General. See Agreement between the Director-General of Railroads and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (1920), Rule 77.

29 U. S. C., 151, it recognized and sought to prevent the interference with interstate commerce which may ensue from labor disputes arising in industry not engaged in transportation. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 42; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 604.

The Safety Appliance Act of 1893, 27 Stat. 531; see *Southern Railway Co.* v. *United States,* 222 U. S. 20; the Hours of Service Act of 1907, 34 Stat. 1415; see *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612, and the Federal Employers Liability Act of 1908, 35 Stat. 65; see *Second Employers' Liability Cases,* 223 U. S. 1, 51, were designed mainly to insure the safety and welfare of railroad employees and the constitutionality of those measures was sustained in part on the ground that they fostered the commerce in which the employees were engaged. In passing the Adamson Act of 1916, 39 Stat. 721, fixing the wages of railroad employees, Congress thought that it was safeguarding the railroads of the country from interruption which might result from labor disputes and the constitutionality of the Act was sustained on that ground. *Wilson* v. *New,* 243 U. S. 332, 351. And in the Act of 1934, as amended in 1937, 48 Stat. 1283; 50 Stat. 307, 45 U. S. C., §§ 201, 214, 228 (a) to (r), providing for a retirement and pension plan for railroad employees, Congress declared in terms that the plan was adopted for the purpose of "promoting efficiency and safety in interstate transportation."

In the last regular session of Congress, an act to amend the Interstate Commerce Act was passed by the Senate, S. 2009, 76th Cong., 1st Sess. The House passed a substitute bill embodying extensive changes. H. Rept. 1217, 76th Cong., 1st Sess. Both bills are now in conference. But both as passed contain a provision carrying into effect the recommendation of the Committee of Six, see

S. Rept. 433, 76th Cong., 1st Sess., p. 29, by directing the Commission to require "as a prerequisite to its approval of any proposed transaction [consolidation or lease under § 5 (4) (b)] a fair and equitable arrangement to protect the interest of the employees affected." Both bills as enacted declare it "to be the national transportation policy of the Congress . . . to encourage fair wages and equitable working conditions, all to the end of developing, coordinating and preserving a national transportation system . . . by . . . rail . . . adequate to meet the needs of the commerce of the United States . . ." Congress has thus declared that fair and equitable provision for the compensation of losses thrown upon employees as the result of an authorized consolidation or lease promotes the national transportation policy by developing, coördinating and preserving the railroad transportation system.

In the light of this record of practical experience and Congressional legislation, we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve. In the light of that record too we do not doubt that Congress, by its choice of the broad language of § 5 (4) (b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, to impose upon carriers conditions related, as these are, to the public policy of the Transportation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system.

The fact that a bill has recently been introduced in Congress and approved by both its houses, requiring as a matter of national railway transportation policy the protection of employees such as the Commission has given here, does not militate against this conclusion. Doubts which the Commission at one time entertained but later resolved in favor of its authority to impose the conditions, were followed by the recommendation of the Committee of Six that fair and equitable arrangements for the protection of employees be "required." It was this recommendation which was embodied in the new legislation. Sen. Rep. No. 433, 76th Cong., 1st Sess., p. 29. We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by § 5 (4) (b) by making the practice mandatory instead of discretionary, as it had been under the earlier act.

It is said that the statute, as we have construed it, is unconstitutional because not within the Congressional power to regulate interstate commerce and is a denial of due process. It is true that in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, in declaring the Railroad Retirement Act of June 27, 1934, 48 Stat. 1283, not to be a valid regulation of interstate commerce, it was said, among other reasons advanced to support that conclusion, that a compulsory retirement system for railroad employees can have no relation to the promotion of efficiency, economy or safety of railroad operation. But notwithstanding what was said there and even if we were doubtful whether the particular provisions made here for the protection of employees could have the effect which we have indicated upon railroad consolidation and upon the adequacy and efficiency of the railroad transportation system, we could not say that the Congressional judgment that those conditions have a relation to

the public interest as defined by the statute is without rational basis. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 191; *United States* v. *Carolene Products* Co., 304 U. S. 144, 147; *Pitman* v. *Home Owners' Loan Corp., ante,* p. 21.

If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. *Second Employers' Liability Cases, supra,* 47; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478; *United States* v. *Carolene Products Co., supra,* 147; *Mulford* v. *Smith,* 307 U. S. 38. Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. That was decided in principle in *Dayton-Goose Creek Ry. Co.* v. *United States, supra.* There it was held that the Fifth Amendment does not forbid the compulsory application of income, attributable to a privilege enjoyed by a railroad as a result of Commission action, to specified purposes "in the furtherance of the public interest in railroad transportation." § 422(10), Transportation Act, 41 Stat. 490. Moreover we cannot say that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process. *Second Employers' Liability Cases, supra; New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO.

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

No. 20. Argued November 6, 7, 1939.—Decided December 4, 1939.

1. Upon review of an order of the National Labor Relations Board, the Circuit Court of Appeals may consider additional facts, occurring before the decision and order of the Board had been promulgated, which the Board in a supplemental certificate certified as part of the record. P. 248.
2. Upon review of an order of the National Labor Relations Board, the Circuit Court of Appeals may not consider facts contained in briefs filed in the proceeding in that court, but which are not a part of the record certified by the Board. Such facts may be added to the certified record only in the manner prescribed by § 10 (e) of the Act. P. 249.
3. A finding by the National Labor Relations Board that an employer had dominated, given financial and other assistance to, and interfered with the administration of a labor organization of its employees, *held* supported by substantial evidence. P. 250.
4. A provision in a plan for the governance of a labor organization, whereby the plan may not be amended without the approval of the employer, deprives the employees of the complete freedom of action guaranteed to them by the National Labor Relations Act. P. 249.
5. An order of the National Labor Relations Board requiring an employer to withdraw recognition from an organization of its employees and to disestablish it—based upon the Board's finding, supported by evidence, that the employer had for years dominated and interfered with the organization, and the Board's conclusion, warranted by the record, that because of that history the organization was incapable of serving the employees as their genuine representative for the purpose of collective bargaining—sustained. P. 251.

Upon the record in this case, the Board was authorized to order the disestablishment of the labor organization, notwithstanding the facts that the organization had operated to the apparent satisfaction of the employees; that no serious labor disputes had

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occurred during its existence; and that in a referendum the employees had signified their desire for its continuance.
101 F. 2d 841, reversed.

CERTIORARI, 307 U. S. 617, to review a decree modifying and directing the enforcement, as modified, of an order of the National Labor Relations Board.

Mr. Charles Fahy, with whom *Solicitor General Jackson* and *Messrs. Charles A. Horsky, Robert B. Watts, Laurence A. Knapp, Mortimer B. Wolf,* and *A. Norman Somers* were on the brief, for petitioner.

Mr. H. H. Rumble, with whom *Messrs. Fred H. Skinner* and *John Marshall* were on the brief, for respondent.

Mr. Frank A. Kearney, with whom *Mr. Percy Carmel* was on the brief, for the Employees' Representative Committee, intervener, urging affirmance.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In a case duly instituted and heard, the National Labor Relations Board issued an order,[1] pursuant to the provisions of § 10 (c)[2] of the National Labor Relations Act, requiring the respondent, Newport News Shipbuilding & Dry Dock Company: (1) to cease and desist from (a) dominating or otherwise interfering with the administration of the Employees' Representative Committee, a labor organization,[3] or the formation or administration of any other labor organization of its employes; (b) from

[1] 8 N. L. R. B. 866.

[2] 49 Stat. 449, 454; 29 U. S. C. Supp. IV, § 160 (c).

[3] The Committee was granted leave to intervene, produced evidence, and participated in the argument before the Board, and was heard in the court below and in this Court.

interfering with, restraining, or coercing its employes in the exercise of the right guaranteed them by § 7 [4] of the Act. The order further required the company (2) to take affirmative action, namely: (a) to withdraw all recognition from the Committee as the representative of any of its employes for the purpose of dealing with the company concerning labor conditions and wages, and completely to disestablish the Committee as such representative; (b) to post copies of the order throughout the plant; (c) to maintain said notices for thirty days; and (d) to notify the Board's Regional Director of the steps taken to comply with the order.

The order was based upon findings that the respondent had dominated and interfered with the formation and administration of the Committee, had contributed to it financial and other support, and was still dominating and interfering with the Committee, contrary to § 8 (1) and (2) [5] of the Act.[6]

The Company petitioned the Circuit Court of Appeals for review. The Board answered praying that the court dismiss the company's petition and decree enforcement. The court held that the Board had jurisdiction of the cause, but that its holding that the company had dominated and interfered with the formation and administration of the Committee was without support in the evidence. The court decreed that § 1(a) and (b) and § 2 (b) (c) and (d) of the Board's order should be enforced but that § 2 (a), which required the withdrawal of recognition of the Committee and its disestablishment as a representative of the employes, should be stricken from

[4] 49 Stat. 449, 452; 29 U. S. C. Supp. IV, § 157.

[5] 49 Stat. 449, 452; 29 U. S. C. Supp. IV, § 158.

[6] The complaint also charged that the respondent had discharged certain employes for union activity and had thus violated § 8 (3) of the Act but the Board dismissed this charge.

the order. We granted certiorari because of asserted conflict with decisions of this court.[7]

The respondent does not press the claim advanced in the court below that the Board lacked jurisdiction. The sole issue here joined is as to the propriety of that portion of the Board's order which constrained the respondent to withdraw recognition of the Committee and to disestablish it as the bargaining representative of the employes. Resolution of the issue requires that we determine whether the Board's ultimate finding of domination and interference by the employer has substantial support in the evidence.

The Board's subsidiary findings of fact are not the subject of serious controversy. The respondent attacks the ultimate conclusion of fact as unjustified by the subsidiary findings and further contends that the conclusion could not have been reached had not the Board ignored and refused to find other relevant facts which were either stipulated or proved without contradiction.

The Board's findings were to the following effect: In 1927, in coöperation with its employes, the respondent put into effect a plan of employe representation known as "Representation of Employes." The preamble of the plan stated that its purpose was to give employes a voice in respect of the conditions of their labor and to provide a procedure for the prevention and adjustment of future differences. Under the plan the employes were to elect representatives each of whom was paid $100 per year for services as such. No one holding a supervisory position was eligible to serve as a representative or to vote for a representative. Administration of the plan was vested in certain joint committees each of which con-

[7] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

sisted of five elected representatives and not more than five representatives chosen from amongst the employes by the management. There was provision for a Management's Representative whose function was "to keep the management in touch with the representatives and represent the management in negotiations with their officers and committees." A provision calling for the arbitration of differences was to become operative only upon concurrence of the respondent's president.

Amendment of the plan could be made only by the affirmative vote of two-thirds of the full membership of the Joint Committee on Rules or of a majority of all the employes' representatives and all the representatives of the management, at an annual conference. The plan set forth that independence of action of elected representatives was guaranteed by permitting them to take questions of discrimination to any of the superior officers, to the Joint Committee, and to the president of the company. There was no provision for the payment of dues.

The original plan was revised in 1929, 1931, 1934, 1936, and 1937.

By the 1931 revision, which was not materially altered until 1937, a General Joint Committee was set up in lieu of several joint committees theretofore constituted, and two representatives were to be elected by the employes in each department while the respondent was to appoint an equal number of management representatives, a majority of each class of representatives constituting a quorum. The annual remuneration to be paid elected representatives by the company was reduced to $60.00. The secretary of the General Joint Committee was paid $5.00 monthly by the company. An Executive Committee was also established constituted of five elected employe representatives and five representatives of management.

Elections were arranged for by the management representatives but, in so far as possible, were conducted by the employes themselves.

A procedure was established for the adjustment of individual employe grievances, whereby, in event of failure of settlement, notice was to be given to the president of the company. Under the revised plan the General Joint Committee met monthly to take action upon matters presented by the Management Representative or by employe representatives or subcommittees; but finality of the action of the General Joint Committee was dependent upon approval by the respondent's president. Amendment of the plan, which could be accomplished by a two-thirds vote of the entire General Joint Committee, became effective when approved by the president of the company.

The last revision made in May 1937, after the validity of the National Labor Relations Act had been sustained by this court, originated in the General Joint Committee, one-half of whose members represented the interests of the respondent. The amended plan was referred to the Executive Committee, similarly constituted, and to the elected employe representatives, respectively. After announcement by the Management Representative that the revision was acceptable to the respondent it was adopted by the General Joint Committee. The personnel manager, and the general manager of the respondent, took part in the revision of the plan. The secretary of the Committee testified that this revision was undertaken in order to bring the plan within the letter, as well as within the spirit, of the Act.

The two principal changes made were the elimination of payment of compensation by the respondent to elected representatives of the employes and the substitution of an Employes' Representative Committee, composed solely of employe representatives elected by employes, for the

former General Joint Committee and the Joint Executive Committee. The revised plan provides that action of the Employes' Representative Committee "shall be final and become effective upon agreement by the company"; and, further, that any article of the plan may be amended by a vote of two-thirds of the entire membership of the committee; and "amendments shall be in effect at the time specified by the Employes' Representative Committee, unless disapproved by the company within fifteen days after their passage."

The grievance procedure permits the presentation of a grievance to the respondent's personnel manager, or its general manager, in the event no settlement has theretofore been effected.

Upon the basis of these findings the Board concluded that, from the inception of the plan in 1927 until its final revision in 1937, the respondent dominated, assisted, and interfered with the administration of the labor organization; and that the method followed for amendment of the plan in 1937, and the provisions of the final revision, left the company still in the position of dominating and interfering in the formulation and administration of the plan, contrary to the provisions of § 7 of the Act. The Board held that the Committee is, in the circumstances, incapable of serving the employes as their genuine representative for the purpose of collective bargaining.

The respondent criticises several of the findings as without support or contrary to uncontradicted evidence. We do not stop to consider these contentions, since, without such findings, there would still be a basis in the record for the Board's conclusions.

The principal contention of the respondent is that the Board ignored uncontradicted facts and refused to make findings respecting them. The Board replies that it did not ignore these facts, but omitted to find them because they were immaterial to the pivotal issues in the case. It

is uncontradicted that labor disputes have repeatedly been settled under the plan; that since 1927 no labor dispute has caused cessation of activities at the respondent's plant; that overwhelming majorities of the employes have participated in the election of representatives; that the company has never objected to its employes joining labor unions; that no discrimination has been practiced against them because of their membership in outside unions; and that neither officials nor superior employes not eligible to vote in the election of employes' representatives, have interfered, or attempted to interfere, or use any influence, in connection with the election of representatives.

Before the Board's decision and order had been promulgated a referendum was held at which a sweeping majority of the company's employes signified, by secret ballot, their satisfaction with the plan as revised in 1937 and their desire for its continuance. Counsel for the Committee requested the Board to certify these facts to the Circuit Court of Appeals as part of the record before the court. The Board, though not bound so to do, embodied these facts in a supplementary certificate. It now takes the position that the only proper way to bring these additional facts to the attention of the reviewing court would have been by application to the court to remand the cause for further findings, and as this was not done, the certificate was irregular and should not have been considered. We are unable to agree with this contention. We think the Circuit Court of Appeals cannot be convicted of error in accepting the Board's supplemental certificate.

The Board urges that, notwithstanding the facts on which the respondent relies, the structure of the Committee, under the 1937 plan, renders the organization incompetent to meet the requirements of the National Labor Relations Act; and further that, if its fundamental

law were free from defect, the history of its organization and administration would require that it be disestablished as the bargaining agency of the employes.

Prior to the adoption of the Wagner Act the plan did not run counter to any federal law, either in conception or administration. The respondent, however, concedes that sundry features of the plan, as then formulated, conflict with the provisions of the statute. Both employer and employes so recognized when they undertook the revision of 1937 for the purpose of bringing the plan within the spirit and the letter of the Act.

The Board has concluded that the provisions embodied in the final revision, whereby action of the Committee requires, for its effectiveness, the agreement of the company, and whereby amendment of the plan can become effective only if the company fails to signify its disapproval within fifteen days of adoption, still give the respondent such power of control that the plan is in the teeth of the expressed policy and the specific prohibitions of the Act. The respondent argues that these provisions affect only the company and not the employes; that, in collective bargaining, there is always reserved to the employer the right to qualify or to reject the propositions advanced by the employes. Whatever may be said of the first mentioned provision, this explanation will not hold for the second. The plan may not be amended if the company disapproves the amendment. Such control of the form and structure of an employe organization deprives the employes of the complete freedom of action guaranteed to them by the Act, and justifies an order such as was here entered. The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the provisions in question. It concludes, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to con-

sider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in § 10 (e) of the Act.

But we think that if the record disclosed such an alteration of the plan, the order of the Board could not be held erroneous. The Board held that, where an organization has existed for ten years and has functioned in the way that the Committee has functioned, with a joint control vested in management and men, the effects of the long practice cannot be eliminated and the employes rendered entirely free to act upon their own initiative without the complete disestablishment of the plan. On the record as made we cannot say this was error.

While the men are free to adopt any form of organization and representation whether purely local or connected with a national body, their purpose so to do may be obstructed by the existence and recognition by the management of an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law. Sec. 10(c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that section must be limited to the effectuation of the policies of the Act. One of these is that the employes shall be free to choose such form of organization as they wish.

As pointed out in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, disestablishment of a bargaining unit previously dominated by the employer may be the only effective way of wiping the slate clean and affording the employes an opportunity to start afresh in organizing for the adjustment of their relations with the employer. Compare *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 262.

The court below agreed with the respondent that, as the Committee had operated to the apparent satisfaction of the employes; as serious labor disputes had not occurred during its existence; and as the men at an election held under the auspices of the Committee had signified their desire for its continuance, it would be a proper medium and one which the employer might continue to recognize for the adjustment of labor disputes. The difficulty with the position is that the provisions of the statute preclude such a disposition of the case. The law provides that an employe organization shall be free from interference or dominance by the employer. We cannot say that, upon the uncontradicted facts, the Board erred in its conclusion that the purpose of the law could not be attained without complete disestablishment of the existing organization which had been dominated and controlled to a greater or less extent by the respondent. In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary purpose, and that the Board's conclusions are in accord with that purpose.

The decree must be reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* F. & R. LAZARUS & CO.

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

No. 56. Argued November 14, 1939.—Decided December 4, 1939.

1. In computing income tax under the Revenue Act of 1928, a taxpayer is entitled to the deduction for depreciation in respect of properties used in its business under leases from a trustee to whom the properties had been conveyed by the taxpayer in a transaction which in reality was a mortgage. P. 254.
2. A finding by the Board of Tax Appeals that a transaction between the taxpayer and a trustee bank—in written form a transfer of ownership with a lease back—was in reality a mortgage, is conclusive on the courts although the evidence on the subject permits conflicting inferences. Pp. 254–255.
3. Proceedings before the Board of Tax Appeals are equitable in nature. P. 255.

101 F. 2d 728, affirmed.

CERTIORARI, *post*, p. 537, to review the affirmance of a decision of the Board of Tax Appeals, 32 B. T. A. 633, upholding a taxpayer's claim for allowance of a deduction for depreciation in computation of income tax.

Mr. Norman D. Keller argued the cause, and *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for petitioner.

Messrs. Murray Seasongood and *Robert P. Goldman,* with whom *Mr. Harry Stickney* was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In computing its net taxable income for 1930 and 1931, respondent claimed depreciation on three buildings occupied and used in its business as a department store.

During those years, the legal title to two of these properties and an assignment of a ninety-nine year lease to the third were in a bank as trustee for certain land-trust certificate holders. These properties had been transferred to the trustee by the respondent in 1928 and the trustee had at the same time leased all three back to respondent for ninety-nine years, with option to renew and purchase. In claiming the deduction, respondent insisted that the capital loss from wear, tear, and exhaustion of the buildings was falling upon it, thus entitling it to the statutory allowance for depreciation of buildings.[1] The Commissioner disallowed this deduction on the ground that the statutory right to depreciation follows legal title. Reviewing the evidence, the Board of Tax Appeals concluded that the transaction between respondent and the trustee bank was in reality a mortgage loan and ordered the deduction allowed,[2] and the Circuit Court of Appeals affirmed.[3] Upon facts which it considered "in all essential respects identical," the Court of Appeals for the Dis-

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[1] Revenue Act of 1928, c. 852, 45 Stat. 791, 799–800. In computing net income there shall be allowed as deductions: . . .

Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

[2] 32 B. T. A. 633. The Board found the depreciable life of the property to be fifty years, instead of forty as originally claimed by respondent.

[3] 101 F. 2d 728; cf. *Commissioner* v. *H. F. Neighbors Realty Co.*, 81 F. 2d 173.

trict of Columbia held depreciation not allowable.[4] Because of the different results reached by the Courts of Appeal, we granted certiorari.[5]

The federal income tax is aimed at net income determined from gross income less items such as necessary expenses incurred or capital consumed in earning it. Thus, the controlling statute permits a taxpayer in computing net income to deduct a "reasonable allowance for . . . exhaustion, wear and tear." While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment. Where it has been shown that a lessee using property in a trade or business must incur the loss resulting from depreciation of capital he has invested, the lessee has been held entitled to the statutory deduction.[6]

Here, the taxpayer used business property in which it had a depreciable capital investment, provided it had not recovered its investment through a sale. The Board in substantial effect found that the instrument under which the taxpayer purported to convey legal ownership to the trustee bank was in reality given and accepted as no more than security for a loan on the property; the "rent" stipulated in the concurrently executed ninety-nine year "lease" back was intended as a promise to pay an agreed five per cent interest on the loan; and the "depreciation fund" required by the "lease" was intended as an amortization fund, designed to pay off the loan

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[4] *City National Bank Building Co.* v. *Helvering,* 68 App. D. C. 344; 98 F. 2d 216, 217.

[5] *Post,* p. 537.

[6] *Duffy* v. *Central R. Co.,* 268 U. S. 55; Appeal of Gladding Dry Goods Co., 2 B. T. A. 336, 338; *Cogar* v. *Commissioner,* 44 F. 2d 554. See, *Bowman Co.* v. *Commissioner,* 59 App. D. C. 13; 32 F. 2d 404, 405; *National City Bank* v. *United States,* 64 C. Cls. 236, cert. den. 276 U. S. 620; *Commissioner* v. *H. F. Neighbors Realty Co., supra.*

in forty-eight and one-half years. These findings are supported by evidence which permits, at most, conflicting inferences and are, therefore, conclusive here. And, unless the Board committed error of law we must affirm.[7]

We think the Board justifiably concluded from its findings that the transaction between the taxpayer and the trustee bank, in written form a transfer of ownership with a lease back, was actually a loan secured by the property involved. General recognition has been given the "established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money."[8] In the field of taxation, administrators of the laws, and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before the Board of Tax Appeals by requiring the Board to act "in accordance with the rules of evidence applicable in courts of equity of the District of Columbia." 26 U. S. C. 611.

The Government relies in part upon *Senior* v. *Braden,* 295 U. S. 422. Whatever the significance of that case, it can have no application here. In the *Braden* case, the equitable doctrine—here controlling—of looking to extrinsic evidence behind a transfer absolute on its face to determine whether only a security transaction was contemplated by the parties, was neither invoked nor passed upon.

Judgment below is

Affirmed.

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

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[7] 26 U. S. C. 641 (c).

[8] *Peugh* v. *Davis,* 96 U. S. 332, 336; *Hughes* v. *Edwards,* 9 Wheat. 489, 495; *Russell* v. *Southard,* 12 How. 139; *Teal* v. *Walker,* 111 U. S. 242. See cases collected in 79 A. L. R. 937.

UNITED STATES *v.* SPONENBARGER ET AL.

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

No. 72. Argued November 7, 8, 1939.—Decided December 4, 1939.

An owner of land within the area of the Boeuf Floodway, part of a diversion project embraced in the comprehensive plan of flood control adopted by the Mississippi River Flood Control Act of 1928, brought suit against the United States under the Tucker Act, alleging that the Flood Control Act and operations contemplated by and carried on pursuant to it involved damage to the land and a taking of it for public use. A right to just compensation under the Fifth Amendment and a right of recovery under the Flood Control Act itself were asserted. The owner's use and possession of the land had not been interfered with; there had been no flooding of the land since the passage of the Act; and it appeared that the floodway project in question had been abandoned. *Held:*

1. Upon the facts of this case, there was no "taking" of the land within the meaning of the Fifth Amendment. P. 265.

(a) A finding that the program of improvement under the 1928 Act had not increased the flood hazard to which the owner's land theretofore had been subject, was amply supported by the record. P. 265.

(b) An undertaking by the Government to lessen the hazard of damages by floods which were inevitable but for such undertaking, does not constitute a taking of those lands which are not afforded as much protection as others. The Fifth Amendment does not require payment of compensation to a landowner for flood damage not caused in any wise by action of the Government. P. 265.

(c) The finding was justified that the benefits accruing to the owner's land from the program of the 1928 Act outweighed any damage occasioned. P. 267.

(d) The finding that the proposed Boeuf Floodway was a natural floodway was supported by the evidence. P. 265.

(e) The claim that there was a taking of the land when the 1928 Act went into effect and work began pursuant to it, because the Act involved an imposition of a servitude for the purpose of intentional future flooding of the proposed floodway,—examined and rejected. P. 267.

(f) The United States did not, by the 1928 Act, assume complete control over all levees to the exclusion of the States and local authorities. P. 268.

(g) The owner's "right of self defense" against floods through locally built levees was not taken away. None of the levees on which the owner here could rely was "built by" or "acquired by" the United States; and § 14 of the Act of March 3, 1899, is therefore inapplicable. P. 268.

This conclusion is consistent with the administrative construction of the Act.

2. The lands of the owner in this case having been not damaged but actually benefited, there was no right of recovery under the 1928 Act. P. 270.

101 F. 2d 506, reversed.

CERTIORARI, 307 U. S. 621, to review the reversal of a judgment for the Government in a suit under the Tucker Act, brought by a landowner to recover compensation for property alleged to have been taken by the Government for public use.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Charles A. Horsky,* and *Aaron B. Holman* were on the brief, for the United States.

The lands in the Boeuf Floodway now have more flood protection than ever before. Respondent's lands are almost certain to be inundated by a very severe flood, but this was the case before. It would be a travesty upon the principle of "just compensation" to hold the Government liable for a taking because of conjectured flood waters when, from 1912 to 1927, the lands were six times flooded, while from 1928 to 1939 they have not once been flooded, although the latter period includes three great floods.

Respondent must show not only that the project involved a taking of her flowage rights, but also that the taking has already happened. The Floodway was never completed and has been abandoned under an Act of Congress. Respondent's position, in essence, is that because

the Government once intended to link the various projects with the Boeuf Floodway the land in that floodway must be held to have been taken though the project has been abandoned. This would impose an impossible burden upon flood control.

Any decrease in the value of respondent's land was not due to any act on the part of the United States but largely to extraneous factors, such as the low price of cotton, burdensome taxation, and the flood of 1927.

The passage of the 1928 Act did not effect a taking of property. *Willink* v. *United States,* 240 U. S. 572. Nor did the proclamations of the President approving the proposed policy and method of flood control and authorizing the construction of guide levees in the Boeuf Basin.

The United States has power to control the height of levees in the interests of commerce and navigation, without liability to landowners injured thereby. *Jackson* v. *United States,* 230 U. S. 1.

The work done by the United States in the instant case did not effect a taking. *Jackson* v. *United States, supra; Hughes* v. *United States,* 230 U. S. 24.

The work done elsewhere along the river did not effect a taking. The projected Boeuf Floodway was a separate project included in the entire plan. There is no deterministic doctrine that a plan to take crystallizes into a completed taking as soon as the first shovelful of earth is turned. There must be at least work which constitutes an actual interference with property rights. A present apprehension of a future taking does not warrant the recovery of compensation. *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Co.* v. *United States,* 260 U. S. 327. Under the rule of those cases, no "abiding purpose" to take respondent's property could be shown in this case.

Section 4 of the Act does not affect the liability of the United States in any way. It does not authorize any ac-

tion against the United States but is merely a direction to federal officers that flowage rights must be acquired before water is actually diverted.

Even if the section undertook to establish a liability beyond the Constitution, it would be inapplicable here. The language of the statute and its legislative history unite to show that it relates only to the case where (1) there is a deliberate diversion, (2) with the result, or reasonably predictable result, (3) that additional damage will result from floodwaters which would not otherwise have passed over the land.

Such has been the administrative construction.

Mr. Lamar Williamson, with whom *Mr. Joseph W. House* was on the brief, for respondent Sponenbarger.

The plan enacted into law by the Flood Control Act of May 15, 1928, is a single, comprehensive project, of which the Boeuf Floodway is an essential feature. When work began on any part it affected property in the Floodway. *Hurley* v. *Kincaid,* 285 U. S. 95; *United States* v. *Hess,* 70 F. 2d 142; 71 *id.* 78.

The Boeuf Floodway is in operative condition, certain to function as designed. The proposed guide levees, which have not been built, are unnecessary and immaterial to respondent's cause of action.

The Boeuf Floodway is an artificial diversion for which the United States is solely responsible. Absolute federal control over the fuse plug levee authorized by the Flood Control Act of May 15, 1928, creates the Boeuf Floodway.

The established physical facts prove a "taking" of respondent's private property for public use. Actual physical invasion of her land is irrelevant. No consequential damages are involved. Citing many authorities.

The Boeuf Spillway has not been abandoned.

Mr. Samuel A. Mitchell was on a brief for Mercantile-Commerce Bank & Trust Co. et al., respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent sued the United States under the Tucker Act,[1] alleging that the Mississippi Flood Control Act of 1928[2] and construction contemplated by that Act involved an "intentional, additional, occasional flooding, damaging and destroying" of her land located in Desha County, Arkansas. She maintained that her property had thus been taken for a public use for which the Government is required to pay just compensation by the Fifth Amendment.[3] In addition, she asserted a statutory right of recovery under the Act itself. After full hearing, judgment for the Government was entered in the District Court.[4] The Circuit Court of Appeals reversed.[5] Because of the importance of both the legislation and the principles involved, we granted certiorari.[6]

A summary of the history behind the Mississippi Flood Control Act of 1928 clarifies the issues here. Respondent's land is in the alluvial valley of the Mississippi River. Alluvial soil, rich in fertility, results from deposits of mud and accumulations produced by floods or flowing water. Thus, floods have generously contributed to the fertility of the valley. However, the floods that have given fertility have with relentless certainty undermined the security of life and property. And occupation of the alluvial valley of the Mississippi has always been subject to this constant hazard.

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[1] 28 U. S. C. 41 (20).

[2] c. 569, 45 Stat. 534; 33 U. S. C. 702 (a).

[3] Cf. *Jacobs* v. *United States*, 290 U. S. 13, 16.

[4] 21 F. Supp. 28.

[5] 101 F. 2d 506.

[6] 307 U. S. 621. Respondent primarily claims that governmental operations under the Flood Control Act have resulted in taking for public use her lands lying in the proposed Boeuf Floodway. This Floodway was originally intended to cover a vast area roughly fifteen miles wide and one hundred and twenty-five miles long.

To enjoy the promise of its fertile soil in safety has, for generations, been the ambition of the valley's occupants. As early as 1717, small levees were erected in the vicinity of New Orleans. Until 1883, piecemeal flood protection for separate areas was attempted through uncoördinated efforts of individuals, communities, counties, districts and States. Experience demonstrated that these disconnected levees were utterly incapable of safeguarding an ever increasing people drawn to the fertile valley. Under what was called the Eads plan, the United States about 1883 undertook to coöperate with, and to coördinate the efforts of the people and authorities of the various river localities in order to effect a continuous line of levees along both banks of the Mississippi for roughly nine hundred and fifty miles—from Cape Girardeau, Missouri, to the Gulf of Mexico.[7] Recurrent floods, even after the eventual completion of this tremendous undertaking, led to the conclusion that levees alone, though continuous, would not protect the valley from floods. And in 1927 there occurred the most disastrous of all recorded floods. In congressional discussion of the 1928 Act, it was said—as the evidence here discloses—that "There were stretches of country [in Arkansas] miles in width and miles in length in which . . . every house, every barn, every outbuilding of every nature, even the fences, were swept away. It was as desolate as this earth was when the flood subsided."[8] Respondent's land, under fifteen to twenty feet of water, was left bare of buildings of any kind in this 1927 flood.

The 1928 Act here involved accepted the conception—underlying the plan of General Jadwin of the Army Engineers—that levees alone would not protect the valley from floods. Upon the assumption that there might be

[7] For the background of this legislation, see *Jackson* v. *United States*, 230 U. S. 1.

[8] 69 Cong. Rec., Part 8, p. 8191.

floods of such proportions as to overtop the river's banks and levees despite all the Government could do, this plan was designed to limit to predetermined points such escapes of floodwaters from the main channel. The height of the levees at these predetermined points was not to be raised to the general height of the levees along the river. These lower points for possible flood spillways were designated "fuse plug levees." Flood waters diverted over these lower "fuse plug levees" were intended to relieve the main river channel and thereby prevent general flooding over the higher levees along the banks. Additional "guide levees" were to be constructed to confine the diverted flood waters within limited floodway channels leading from the fuse plugs. The suggested fuse plug which respondent claims would damage her property was to be at Cypress Creek, within two to two and one-half miles of her land, and her land lies in the path of the proposed floodway to stem from this particular fuse plug.

The 1928 Act provided for a comprehensive ten-year program for the entire valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds. However, before any part of this program was actually to be carried out, the Act required extensive surveys "to ascertain . . . the best method of securing flood relief in addition to levees, before any flood control works other than levees and revetments are undertaken." Lands intended for floodways were, pending completion of the floodways, to enjoy the protection already afforded by levees.

The District Court found—

Respondent's land lies in that part of the Boeuf Basin which the plan of the 1928 Act contemplated as a diversion channel or floodway. This Basin has always been

a natural floodway for waters from the Mississippi,[9] and respondent's lands, and other lands similarly situated, have been repeatedly overflowed by deep water despite the presence of strong levees.[10] The United States has not caused any excessive flood waters to be diverted from the Mississippi through the proposed Boeuf fuse plug (at Cypress Creek) or floodway, and respondent's property has not been subjected to any servitude from excessive floodwaters, which did not already exist before 1928. She still enjoys the same benefits from the Cypress Creek drainage system as when it was created before 1928, and the government program has not "in any wise, nor to any extent increased the flood hazard thereto." No work was ever commenced or done within the area of the proposed Boeuf floodway, and the fuse plug heading into it was never established. This floodway as a whole has been abandoned and the Eudora floodway substituted. However, work done under the 1928 Act has shortened the river by cut-offs and dredging and the river has been lowered five or six feet, with the greatest improvement in the vicinity of the proposed fuse plug. Levee protection to lands such as plaintiff's has not been reduced. In fact, plaintiff's land has been afforded additional protection by virtue of the fact that this government improvement program has materially reduced the crest of the river at all times, including flood crests, and her land has also been protected by the Government's reconstruction of levees on the Arkansas River pursuant to its general program. In 1935, her property would have been flooded but for the work done by the Government which has kept her land free of overflow since 1928. Lands,

[9] This Basin also was found to be a floodway for waters from the Arkansas and "Flat" (White) Rivers.

[10] Her lands were found to have been flooded in 1912, 1913, 1919, 1921, 1922, 1927.

such as respondent's, located immediately behind levees along the main stem of the Mississippi, are liable to be inundated and destroyed by the breaking of river front levees and from natural crevassing, regardless of the height and strength of the levee. Loss in market value of respondent's property, since 1927, has not been caused by any action of the Government, but is due to the flood of 1927, the depression and other causes unconnected with the governmental program under the 1928 Act. The United States has in no way molested respondent's possession or interfered with her right of ownership. She has remained in uninterrupted possession of her property operating it as a farm and borrowing money upon it as security.

From these findings the District Court concluded as a matter of law that—

(1) Respondent's property had not been taken within the meaning of the constitutional prohibition against taking without compensation;

(2) Under the facts of this case, respondent had no statutory right of recovery under the 1928 Act itself.

In reversing the District Court's judgment, the Circuit Court of Appeals decided that the Boeuf floodway had not been abandoned by the Government, but was in operative existence notwithstanding that the proposed guide levees along the floodway had not been built and levees on the Mississippi both immediately above and below the proposed fuse plug had not been raised above the height of what would have been the fuse plug levee. The Circuit Court of Appeals said that "By the provisions of this plan of flood control . . . [respondent's land] is subjected to a planned and practically certain overflow in case of the major floods contemplated and described. No one can foretell when such may occur, but that is the only remaining uncertainty. . . . If, and when, such floods do occur, serious destruction must be conceded."

Upon these conclusions, the Circuit Court held that there was a taking of respondent's property.

First. This record amply supports the District Court's finding that the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent's land had always been subject. Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind. So to hold would far exceed even the "extremest" [11] conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused.

An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect. In the very nature of things the degree of flood protection to be afforded must vary. And it is obviously more difficult to protect lands located where natural overflows or spillways have produced natural floodways.

The extent of swamps and overflowed lands in the Boeuf floodway and the history of recurrent floods that have passed through it, support the District Court's finding that the proposed Boeuf floodway is a naturally created floodway. And the Government's problem was by

[11] Cf. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 642; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166.

channel stabilization, dredging, cut-offs or any effective means, to prevent diversions from the Mississippi at all points if possible. But if all diversions could not be prevented, the Government sought to limit the flooding to the least possible number of natural spillways heading into natural floodways. If major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken respondent's property. And this is true, although other property may be the beneficiary of the project. The Government has not subjected respondent's land to any additional flooding, above what would occur if the Government had not acted; and the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.

The far reaching benefits which respondent's land enjoys from the Government's entire program precludes a holding that her property has been taken because of the bare possibility that some future major flood might cause more water to run over her land at a greater velocity than the 1927 flood which submerged it to a depth of fifteen or twenty feet and swept it clear of buildings. Enforcement of a broad flood control program does not involve a taking merely because it will result in an increase in the volume or velocity of otherwise inevitably destructive floods, where the program measured in its entirety greatly reduces the general flood hazards, and actually is highly beneficial to a particular tract of land.

The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would

be to grant him a special bounty. Such activities in substance take nothing from the landowner. While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage,[12] it has never held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred.[13] And here, the District Court justifiably found that the program of the 1928 Act has greatly reduced the flood menace to respondent's land by improving her protection from floods. Under these circumstances, respondent's land has not been taken within the meaning of the Fifth Amendment.

Second. Even though the Government has not interfered with respondent's possession and as yet has caused no flooding of her land,[14] respondent claims her property was taken when the 1928 Act went into effect and work began on its ten-year program because the Act itself involves an imposition of a servitude for the purpose of intentional future flooding of the proposed Boeuf floodway. But, assuming for purposes of argument that it might be shown that such supposed future flooding would inflict damages greater than all benefits received by respondent, still this contention amounts to no more than the claim that respondent's land was taken when the statutory plan gave rise to an apprehension of future flooding. This apprehended flooding might never occur for many reasons—one of which is that the Boeuf floodway might never be begun or completed. As previously pointed out, the Act directed comprehensive surveys be-

[12] *Jacobs* v. *United States, supra; United States* v. *Cress,* 243 U. S. 316; *United States* v. *Lynah,* 188 U. S. 445; *Pumpelly* v. *Green Bay Co., supra;* cf. *Sanguinetti* v. *United States,* 264 U. S. 146.

[13] Cf. *Bauman* v. *Ross,* 167 U. S. 548, 574.

[14] Cf. *Marion & R. Valley Ry. Co.* v. *United States,* 270 U. S. 280, 282, 283.

fore utilization of any means of flood control other than levees and revetments. In general language it adopted a program recommended by the Chief of Army Engineers, but Congress did not sweep into the statute every suggestion contained in that recommendation.

Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress.[15] Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

Here, it is clear that those charged with execution of the program of the 1928 Act abandoned the proposed Boeuf floodway and substituted another. Whatever the original general purpose of Congress as to that floodway and its fuse plug at Cypress Creek, congressional hearings, reports and legislation have approved their abandonment. Thus, respondent's contention at most is that the Government should pay for land which might have been in a floodway if that floodway had not been abandoned. We think this contention without merit.[16]

Third. Respondent's "right of self defense" against floods through locally built levees has not been taken away. The 1928 Act does not represent a self-executing assumption of complete control over all levees to the exclusion of the States and local authorities. Respondent's argument that it does rests upon § 9 of the Act making § 14 of the Act of March 3, 1899 (33 U. S. C.

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[15] Cf. *South Carolina* v. *Georgia*, 93 U. S. 4, 13. As to when legislation does not constitute self-executing appropriation, see *Bauman* v. *Ross*, 167 U. S. 548, 596–7; *Willink* v. *United States*, 240 U. S. 572.

[16] Whether recovery at law could be had upon a similar contention was left open by *Hurley* v. *Kincaid*, 285 U. S. 95. Cf. *Peabody* v. *United States*, 231 U. S. 530, 539, 540.

408), which forbids interference with levees, "applicable to all lands, waters, easements and other property and rights acquired or constructed under the provisions of this [1928] Act." But § 14 of the 1899 Act relates only to levees and other structures "built by the United States," and no local levees on which respondent could rely have as yet been "built by the United States" or "acquired . . . under the provisions of" the 1928 Act. In fact, a proposal that the Government assume control of local levees appeared in the original draft of the 1928 Act but was stricken out by amendment.[17] And the War Department, charged with its administration, has treated the Act as leaving local interests free to raise proposed fuse plug levees if they wish.[18]

Fourth. It is argued that the 1928 Act itself requires judgment for respondent even though her property was not "taken" within the Fifth Amendment. The pertinent provisions are—

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so

[17] 69 Cong. Rec., Part 7, pp. 7114, 7115.

[18] Com. Doc. No. 2, House Committee on Flood Control, 71st Cong., 1st Sess.

subjected to overflow and damage or floodage rights over such lands.

". . . The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: . . ."

This Court has previously decided that "the construction of levees on the opposite" bank of the Mississippi River which resulted in permanently flooding property across the river did not amount to a "taking" of the flooded area within the Fifth Amendment.[19] We need not here determine whether the provisions of the 1928 Act would themselves grant a statutory right to recover if respondent's land had been damaged as a result of levees constructed on the river's opposite bank. For § 4 of the Act contains the further specific reservation "That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid." On this record it is clear that respondent's lands were not damaged, but actually benefited.

We do not find it necessary to discuss other questions presented.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

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[19] *Jackson* v. *United States*, *supra*, 22, 23.

DANFORTH *v.* UNITED STATES.

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

No. 309. Argued November 8, 1939.—Decided December 4, 1939.

1. Under § 4 of the Flood Control Act of May 15, 1928, the Secretary of War may agree to purchase easements for flowage purposes, subject to the perfecting of the title through condemnation. P. 282.
2. Such an agreement fixes the value in condemnation proceedings brought later by the Government against the landowner to make good title. Pp. 282–283.
3. The jurisdiction of the Court in such condemnation proceedings depends upon § 4 of the Flood Control Act and not upon the Tucker Act or the general statute of condemnation; the landowner may plead an agreement by the United States as fixing the amount that the Government must be adjudged to pay as compensation. P. 282.
4. Just compensation under the Fifth Amendment for property taken for public use is determined as of the time of the taking. P. 283.
5. Unless a taking has occurred previously, in actuality or by a statutory provision fixing it otherwise, the time of the taking in condemnation under the Flood Control Act of May 15, 1928, is the time of the payment of the money award by the United States, and no interest is due upon the award. P. 284.

   In the absence of statutory direction, no interest accrues before the taking.
6. Fluctuations in the value of property which occur by reason of legislation authorizing a governmental project, or by reason of the beginning or completion of such project, are incidents of ownership; and a reduction in value so occurring can not be considered as a "taking" in the constitutional sense. P. 285.
7. The mere enactment of legislation authorizing condemnation of property can not constitute a taking; the legislation may be repealed or modified, or appropriations may fail. P. 286.
8. In this case, there was no taking by the commencement or completion of a set-back levee (between which levee and a riverside levee the owner's land lay); nor by the dynamiting of a levee by Army officers during a flood emergency (the levee later having been restored to its previous height); nor by the retention of water

from unusual floods for a somewhat longer period or its increase in depth or destructiveness as an incidental consequence of the set-back levee. Pp. 286–287.

102 F. 2d 5, 105 F. 2d 318, modified.

CERTIORARI, *post*, p. 538, to review the affirmance of a judgment against the United States in a proceeding in condemnation under the Flood Control Act of May 15, 1928.

Mr. J. L. London for petitioner.

There was a taking when the set-back levee was started (or at any rate when it was completed) or when Congress passed the Flood Control Act and adopted a definite plan of flood control.

The plan contemplated the practical taking over of the riverside levee by the Government; and the undisputed evidence shows that the Government asserted complete dominion over it. The program of the levee district for raising the levee was halted. Appellant's free use and enjoyment of his lands and the property herein involved were materially interfered with from the time the work began, if not before. If at any time he wished to sell or dispose of the land, he could only do so subject to the easement of the Government and at a reduced price. The security of his land was materially reduced as soon as the work started. His right to have the levee stand intact, or to be raised and improved as a protection to his land, disappeared.

Would the Government permit any levee district or any group of individuals or any person to build the riverside levee up to sixty-five feet, which would be a complete protection of the land of this petitioner and others situated in the floodway area? Would not the Government immediately invoke the applicable provisions of the Rivers and Harbors Act of 1899?

Though Congress could repeal the Flood Control Act prior to the time that anything was begun pursuant to it, yet as soon as work started under the Act there was a taking of the easement in question and an obligation on the part of the Government to compensate the owner. Could the petitioner have sold this land free and clear of the servitude imposed by the Act at any time after the Government began construction of the set-back levee? It is obvious that anybody buying the land would buy it subject to that servitude. Therefore, there must have been a taking.

Even in the absence of an answer or counterclaim, or any other pleading, the landowner would be entitled to prove his damages and the contract would have been admissible and binding upon the parties. *Chicago* v. *Chicago R.,* 166 U. S. 226; *Springfield Ry. Co.* v. *Calkins,* 90 Mo. 538; 3 S. W. 82; *Missouri Power & Light Co.* v. *Creed,* 32 S. W. 2d 783.

The offer to purchase came voluntarily from the Government after a thorough investigation, after three separate appraisals.

Where the Government voluntarily comes into court there is jurisdiction to litigate all of the rights of the parties growing out of the transaction or subject matter involved and to do complete justice between the parties in the matter. *Bull* v. *United States,* 295 U. S. 247. This is not a case where the petitioner had a separate transaction with the Government, that it is now seeking to enforce in this suit. It is a situation where the parties by contract fixed the damages or agreed upon the value of the flowage rights. The cases which hold that parties can only sue the Government under some statute authorizing it, are wholly without application.

The Government contends that the rule of the *Thekla* case, 266 U. S. 328, applies only in admiralty cases, but

this Court has not limited the rule to admiralty cases. See *The Paquete Habana,* 189 U. S. 453.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Littell,* and *Mr. Jacob N. Wasserman* were on the brief, for the United States.

The District Court did not have jurisdiction to adjudicate petitioner's contract claim.

The United States can not be sued without its consent, either by direct suit or by counterclaim against it. *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106; *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 504–505; *North Dakota-Montana W. G. Assn.* v. *United States,* 66 F. 2d 573, 577–578, cert. den. 291 U. S. 672; *Owen* v. *United States,* 8 F. 2d 992, 993.

The United States is not liable for interest on a contract claim unless either the contract itself or a statute shows a contrary intention. *Smyth* v. *United States,* 302 U. S. 329, 353; *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Co.,* 253 U. S. 330, 336; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304.

The United States has not as yet taken a flowage easement over petitioner's property. There was no taking on the date when the work began. The existing riverside levee had not been altered and thus it afforded to the petitioner's land the same protection it had formerly enjoyed.

Nothing had been done at that time to increase the possibility of overflow.

The petitioner has not been deprived of his right to protect his land against floods.

The provisions of § 14 of the Act of March 3, 1899 (c. 425, 30 Stat. 1152; 33 U. S. C. § 408), which forbid

interference with levees and other structures and which are made applicable by § 9 of the 1928 Act, apply only to levees and other structures built by the United States, and consequently have no application to this levee, which was built by local interests. The restoration of the portions of the riverside levee unlawfully dynamited during the 1937 flood obviously did not transform the entire levee, as petitioner contends, or even the dynamited portions, into a levee "built by the United States" within the meaning of the 1899 Act.

Furthermore, even if it could be said that the Government has now deprived the petitioner of his right to improve and raise the levee, this would not constitute a taking. *Matthews* v. *United States,* 87 Ct. Cls. 662; *Jackson* v. *United States,* 230 U. S. 1; *Hughes* v. *United States,* 230 U. S. 24.

There was no taking on the date the set-back levee was virtually completed. Nothing had been done to increase the possibility of the overflow. The riverside levee had not been altered, and the existence of the set-back levee would not affect the frequency of flooding.

Furthermore, under § 1 of the Flood Control Act, nothing could be done which would subject petitioner's land to more frequent overflow until the floodway was completed.

The fact that the set-back levee would confine the floodwaters did not cause a taking. Only waters which had already overtopped the unreduced riverside levee would be confined by the set-back; and that would not constitute a taking, but merely consequential damage. *Hughes* v. *United States,* 230 U. S. 24; *Sanguinetti* v. *United States,* 264 U. S. 146; *Jackson* v. *United States,* 230 U. S. 1; *Bedford* v. *United States,* 192 U. S. 217; *Gibson* v. *United States,* 166 U. S. 269; *Christman* v. *United States,* 74 F. 2d 112; *Kirk* v. *Good,* 13 F. Supp. 1020, appeal dismissed upon stipulation, 64 F. 2d 1015.

No taking can be predicated upon unauthorized acts of Government officers. *Hooe* v. *United States,* 218 U. S. 322; *Hughes* v. *United States,* 230 U. S. 24. The latter case held that if the act of an officer of the United States in dynamiting a levee in an emergency was wrongful, it was not the act of the United States and did not amount to a taking of the property overflowed as a result of the dynamiting.

Since the petitioner's land would have been overflowed during the 1937 flood regardless of the project, clearly no taking occurred at that time.

The entry of judgment did not constitute a taking. *Barnidge* v. *United States,* 101 F. 2d 295, 298; *Kanakanui* v. *United States,* 244 F. 923; *Johnson & Wimsatt* v. *Reichelderfer,* 66 F. 2d 217; *Miller* v. *United States,* 57 F. 2d 424; *District of Columbia* v. *Hess,* 35 App. D. C. 38. Since the fuse-plug section can not be reduced until the necessary flowage easements are acquired, no taking will occur until the judgment is paid.

Mr. Justice Reed delivered the opinion of the Court.

A writ of certiorari was granted [1] to review the judgment of the Court of Appeals for the Eighth Circuit [2] affirming a judgment of the District Court for the Eastern District of Missouri which awarded to a property owner, against the United States, compensation in condemnation less in amount than a sum fixed by an arrangement between the parties prior to the institution of the condemnation. This judgment provided for payment of the award into the registry of the court and that upon such payment the United States should be entitled to the relief sought. Although the issue was raised by the landowner, no pro-

[1] *Post,* p. 538.

[2] 102 F. 2d 5, 105 F. 2d 318.

vision was made as to interest. The writ was granted to determine important questions of federal law as to the effect in condemnation, of prior agreements by the United States as to the amount of awards and as to the running of interest.

This proceeding arose in the course of carrying out the protection from destructive floods of the alluvial valley of the Mississippi between Cape Girardeau, Missouri, and Head of Passes, Louisiana. This work of internal improvement was begun under the Flood Control Act of May 15, 1928.[3] The passage of this Act followed the disastrous experience with the flood of 1927 and was based upon a comprehensive report and plan known as the Jadwin Plan, Major General Edgar Jadwin, then Chief of Engineers of the United States Army, being in charge of its development.[4] The plan covers the great alluvial valley of the Mississippi through its entire length from the Ohio to the delta. In essence, the plan in its entirety is based upon a levee system which constricts the water to a moderate degree and allows in periods of extreme floods the escape from some lower levees, known as fuse-plugs, of the water from the main channel to back waters and floodways.

The particular portion of the plan involved here is known as the Birds Point-New Madrid Floodway. Prior to the passage of the Flood Control Act, there were levees along the west bank of the Mississippi between Birds Point, Missouri, and New Madrid, Missouri, which substantially followed the meanderings of the river. To get a greater area for the spreading of flood waters, the plan

[3] 45 Stat. 534, 33 U. S. C. § 702a–702m.

[4] The plan is found in "Flood Control in the Mississippi Valley," H. R. Doc. No. 90, 70th Cong., 1st Sess. Reference is also made in the Flood Control Act to a plan recommended by the Mississippi River Commission and authority is granted to adjust the engineering differences between the two plans.

provided for a second levee to be set back about five miles from the riverbank levee running from Birds Point to St. Johns Bayou, just east of New Madrid. Near its upstream connection with the set-back levee the present riverbank levee would be lowered some five feet by what is called a fuse-plug, so that at high flood the water will begin to flow into the wide floodway below. It is expected that this enlarged channel will keep anticipated floods from rising above the levees protecting Cairo, Illinois. The set-back levee will confine its diverted water to the floodway area between the set-back levee and the riverside levee and will return the water to the Mississippi through a lower fuse-plug section where a gap is left in the levee system to permit complete drainage. The land involved in this condemnation is situated in this floodway immediately east of the set-back levee and about midway between Birds Point and New Madrid.

The Flood Control Act stipulates that the United States "shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River." The same section authorizes the Secretary of War to "cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which . . . are needed in carrying out this project. . . ." Jurisdiction of the proceeding is given to the United States district court for the district in which the property is located. Commissioners were authorized to view and value. It was further provided: "When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; . . ." [5]

There is the additional provision in § 1 of this same Act that "pending completion of any floodway, spillway,

[5] 45 Stat. 534, c. 569, § 4.

or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway."

Construction work began on the set-back levee on October 21, 1929, and was substantially complete on October 31, 1932. The riverside levee is maintained at its original height of about 58 feet and the upper fuse-plug, which is designed to admit water into the floodway, has not yet been created.

In January, 1937, the Mississippi River attained its highest flood stage in recorded history. Late in that month the United States Army officer in charge of Memphis Engineers, District No. 1, directed a subordinate to proceed to the area and place the Birds Point-New Madrid Floodway in operation. These instructions were issued by the officer in charge of the district without orders from any superior. The directions were carried out after flood waters were trickling over the riverside levee into the floodway area through a natural crevasse and when pursuant to these orders an artificial crevasse was created by dynamiting the northern portion of the upper fuse-plug section. Later another artificial crevasse was created and other natural crevasses developed. Through these crevasses petitioner's land was flooded. As the river would have reached a stage sufficiently high to overtop the riverside levee, even with extraordinary high-water maintenance, the land of the petitioner would have been flooded without the crevassing. The set-back levee did confine the diverted water to the floodway. It increased its depth and destructiveness on petitioner's land. After the flood subsided, the riverside levee, including the upper fuse-plug section, was restored to its previous height.

Prior to the institution of this action, orders had been issued by the Secretary of War, under the provisions of

§ 4 of the Flood Control Act, to purchase this tract of land. A letter containing the offer for the flowage rights here involved, dated January 14, 1932, had been received by the petitioner and the offer accepted by him within an agreed extension of the limited time. The letter, so far as pertinent, reads as follows:

"2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100—Dollars ($31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, over your land designated as Tract No. 243, as indicated on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

"3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses."

After its acceptance, there was an attempted withdrawal of this offer by a letter of July 8, 1932, which advised the owner that "after a careful review of the question of flowage over these tracts it was found by higher authority that the prices first suggested could not be properly recommended to the Court."

After this letter, a petition was filed by the United States to condemn over the land here in question a perpetual right, power easement, and privilege to overflow, as contemplated by said project and described in House Document 90. After the appointment and report of the commissioners for the determination of an award, petitioner filed an answer and counterclaim. In the answer he set up that prior to the filing of the suit a "written offer of settlement for the damages and for the purchase

of an easement" for floodway purposes was made by the United States and accepted by petitioner. Petitioner further alleged an offer of title to the easement sought and a request for the payment of the agreed sum. Judgment against the United States was asked in that amount, "with interest," to be paid into court for the benefit of the defendants, in accordance with their respective rights and against the defendants for the perpetual flowage easements "upon payment into Court" of the agreed sum. Changing the designation of the pleading from answer to counterclaim, these allegations were repeated as a counterclaim. The Court sustained a motion of the United States to strike this answer and counterclaim on the ground that the petitioner had waived his rights under the written agreement because of his failure to plead them prior to the entry of the interlocutory order allowing the condemnation and appointing commissioners. Subsequently the reports of the first and second commissions appointed to view the property were set aside for reasons which are immaterial here. To the report of the third commission, awarding $17,921.70, the petitioner renewed the objection that the agreement between the United States and him was decisive in fixing the award at $31,681.98; asked for interest "from such time as the Court may find that plaintiff [the United States] appropriated the flowage easement in question" and sought new viewers to determine the award as claimed by petitioners or in the alternative that the Court enter judgment for the sum claimed with appropriate terms to create the flowage easement in the United States.

Upon this exception a hearing was had and findings and judgment entered confirming this report and adjudging the condemnor the easement sought upon payment of the award. Nothing appeared in the order as to interest. By assignments of error on appeal to the Court of Appeals and in the statement of questions involved

and reasons for granting the writ of certiorari, petitioner has preserved the issues of his right to an award in the agreed amount and to interest from the date found to mark the taking from him of the land.

Determination of Value.—By answer and exception to the report of the commissioners, the petitioner pleaded the agreement on the value of the easement evidenced by the letter and acceptance referred to above. The Government contends that the "relevance of the contract . . . as a measure of the value of the easement is not in issue; the petitioner pitches his case solely on the proposition that he can enforce the contract." With this contention we do not agree. In the answer, it is true, judgment is prayed against the United States for the agreed amount. But a judgment is offered to the United States for the perpetual flowage easement upon payment of the sum into court. In the objection to the commissioners' report the prayer is for entry of a judgment in the agreed sum "and upon payment of the same that the Court decree an appropriate judgment in favor of plaintiff for the said easement." We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. Paragraph 3 of the letter shows condemnation was in mind.

This action is brought under the provisions of § 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act[6] or the general statute on condemnation.[7] We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement

[6] Judicial Code § 24 (20), 28 U. S. C. § 41 (20).

[7] 25 Stat. 357.

is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title.[8] In dealing with a stipulation to waive a requirement of filing a claim for tax refund with the Commissioner of Internal Revenue, we held such waiver enforceable in the face of a statutory requirement for such filing.[9] The convenience of preparation for trial and the interest of orderly procedure was decisive there. Here the same reasons with the supporting language as to the power of purchase leads to the conclusion that the trial court erred in striking the answer and refusing the motion to determine the value at the agreed price.[10] We need not consider the counterclaim as the answer covers the entire subject of the determination of value.

Interest.—Petitioner seeks interest on the judgment from the time of the taking or appropriation of the flowage easement. Petitioner fixes this appropriation at the time of the enactment of the Flood Control Act of May 15, 1928, on the theory that the passage of that Act diminished immediately the value of this property because the plan contemplated the ultimate use of the floodway. Alternatively the date of the taking is fixed by petitioner as of October 21, 1929, when work began on the set-back levee or October 31, 1932, when the set-back levee was completed.

There is no disagreement in principle. Just compensation is value at the time of the taking. The Congress, in other situations, has adopted the time of taking as the

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[8] Cf. *Wachovia Bank & Trust Co.* v. *United States,* 98 F. 2d 609 (C. C. A. 4th).

[9] *Tucker* v. *Alexander,* 275 U. S. 228.

[10] Cf. *Judson* v. *United States,* 120 F. 637 (C. C. A. 2d) (U. S. District Attorney's agreement to submit matter of damages to arbitration, in condemnation, in accordance with the state statute is binding).

date for determination of value.[11] For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.[12] Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action,[13] we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award. Until taking, the condemnor may discontinue or abandon his effort.[14] The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources.[15] Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does

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[11] 46 Stat. 1421; 47 Stat. 722, § 305.

[12] *Kindred* v. *Union Pacific R. Co.*, 225 U. S. 582, 597; in *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 10, the precedents are collected.

[13] See various statutory means of determining the time of taking in Nichols, The Law of Eminent Domain, 1917, § 436.

[14] See *Bauman* v. *Ross*, 167 U. S. 548, 598, 599, where there was a statutory provision relating to condemnation for streets in the District of Columbia which made the failure of the Congress to appropriate, after six months in session, for the payment of the award of damages an event which terminated the proceedings. "This provision," this Court said, "secures the owners from being compelled to part with their lands without receiving just compensation, and is within the constitutional authority of the legislature." "The Constitution does not require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings."

Cf. *Kanakanui* v. *United States*, 244 F. 923 (C. C. A. 9th); *Johnson & Wimsatt* v. *Reichelderfer*, 62 App. D. C. 237; 66 F. 2d 217; *Barnidge* v. *United States*, 101 F. 2d 295, 298 (C. C. A. 8th).

[15] See Lewis, Law of Eminent Domain, 3rd Ed., § 955.

not pass until compensation has been ascertained and paid, . . ." [16] A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

In *Brown* v. *United States* [17] this Court had occasion to consider whether interest should be allowed on the value of the property from the date of summons, the day fixed by the state statute to determine compensation and damages. In that case condemnation proceeded under the federal conformity statute which directs federal courts to conform to state practice and procedure, "as near as may be." [18] Interest, it was thought, was not governed by the conformity act,[19] but should be allowed in accordance with the state law from the date of summons. This conclusion flowed from the acceptance by this Court, without question, of the day of summons as the date for the determination of value, the day of taking.[20] Here proceedings are under a Flood Control Act prescribing

[16] *Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587.

[17] 263 U. S. 78, 84 *et seq.*

[18] 25 Stat. 357.

[19] 263 U. S. at 87.

[20] 263 U. S. at 85–86: "In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damage arising from the inability to sell or lease after the blight of the summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings." At p. 87: "But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take possession, interest allowed from the date of the summons is not a provision making for just compensation."

jurisdiction and procedure. Where the condemnation is free from statutory direction, as here, there would be no interest before the taking.[21]

This leaves for consideration the contention that there was a taking by the enactment of the legislation, when work began on the set-back levee or when that levee was completed. The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.[22]

For completion of the set-back levee to amount to a taking, it must result in an appropriation of the property to the uses of the Government.[23] This levee is substantially complete. The Government has condemned the land upon which the set-back is built. The tract now in litigation lies between the set-back and riverbank levees. The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The riverbank levee at the fuse-plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking. We agree with the Court of Appeals that this is

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[21] *Shoemaker* v. *United States,* 147 U. S. 282, 321.

[22] *Willink* v. *United States,* 240 U. S. 572; *Bauman* v. *Ross,* 167 U. S. 548, 596; *United States* v. *Sponenbarger, ante,* p. 256.

[23] Obviously if there was not a taking at the completion of the set-back levee, there could not be a taking by the beginning of construction.

"an incidental consequence" of the building of the set-back levee.[24] Nor can we conclude that a taking occurred through the act of the Army officers in dynamiting the levee during the emergency of the 1937 flood. It was restored to its previous height. Up until this time, the plan for a fuse-plug to permit the escape of destructive flood waters was not in effect. Indeed, the petitioner disclaims any contention that the crevassing of the levee by the Government was a taking. The taking, he urges, took place before and this use is only evidence of the control obtained by the prior taking.

Reversed in part and affirmed in part.

BRUNO *v.* UNITED STATES.

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

No. 300. Argued November 6, 1939.—Decided December 4, 1939.

1. Under the Act of March 16, 1878, the accused in a criminal case in the federal court is entitled, upon request, to have the jury instructed, in substance, that his failure to avail himself of the privilege of testifying does not create any presumption against him and must not be permitted by the jury to weigh against him. P. 292.
2. Refusal to grant such an instruction is not a "technical error" to be disregarded upon review or motion for new trial, within the meaning of 28 U. S. C. § 391. P. 293.

105 F. 2d 921, reversed.

CERTIORARI, *post*, p. 536, to review error in the affirmance of a criminal conviction.

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[24] Compare *Bedford* v. *United States*, 192 U. S. 217; *Jackson* v. *United States*, 230 U. S. 1; *Sanguinetti* v. *United States*, 264 U. S. 146.

Mr. Samuel B. Wasserman, with whom *Mr. M. Michael Edelstein* was on the brief, for petitioner.

The requested charge should have been granted by the trial court.

Such a charge is mandatory under the Fifth Amendment to the Constitution of the United States and 28 U. S. Code § 632.

At common law, a defendant could not be compelled to give evidence against himself. The Fifth Amendment incorporated this rule into the Constitution. *McKnight* v. *United States,* 115 F. 972, 981, 982.

Had the statute not specifically provided that no presumption arises from non-exercise of the privilege to testify, the constitutional provision would have implied as much, so that silent defendants might be protected from any hostile comment.

If everybody believes that a person failing to take the stand is actuated by fear, then the privilege of testifying creates a presumption which extinguishes the constitutional protection of the Fifth Amendment. Section 632 has been in existence so long that jurors today know that a defendant may testify, but do not know of the constitutional protection provided by the rule against self-incrimination. Obviously, the only way to make the defendant's rights known to the jury is by a clear, correct statement of the applicable law. If the eyes of the jury see the taint of guilt on every defendant who remains silent, then the necessity of a charge such as that requested, is conclusively established. See, 4 Wigmore on Evidence, pp. 811, 814, 815; *Stout* v. *United States,* 227 F. 799; *Michael* v. *United States,* 7 F. 2d 865; *Hersh* v. *United States,* 68 F. 2d 799; *Swenzel* v. *United States,* 22 F. 2d 280.

Assistant Attorney General Rogge, with whom *Solicitor General Jackson* and *Messrs. William W. Barron, George*

F. Kneip, Fred E. Strine, and *W. Marvin Smith* were on the brief, for the United States.

The requested instruction was properly refused. *Wilson* v. *United States,* 149 U. S. 60; *Reagan* v. *United States,* 157 U. S. 301, 304–305; *McKnight* v. *United States,* 115 F. 972, 981–983; *Swenzel* v. *United States,* 22 F. 2d 280; *Stout* v. *United States,* 227 F. 799, 803; *Michael* v. *United States,* 7 F. 2d 865.

In several States the statutes have been construed as forbidding all reference by the trial judge in his charge to the silence of the accused. *Times* v. *Commonwealth,* 25 Ky. Law Rep. 1233; *Hanks* v. *Commonwealth,* 248 Ky. 203; *State* v. *Pearce,* 56 Minn. 226; *State* v. *Long,* 324 Mo. 205; *Mason* v. *State,* 53 Okla. Cr. R. 76; *Thompson* v. *State,* 88 Tex. Cr. 29; *Kinney* v. *State,* 36 Wyo. 466; cf., *State* v. *Ford,* 109 Conn. 490; *Tucker* v. *State,* 29 Ga. App. 221.

In approximately 42 States there exist statutes prohibiting any inference to be drawn from an accused's failure to testify. See, Wigmore on Evidence, 2d ed., § 488, Note 2. These statutes provide either (1) that the failure of the defendant to testify shall not create any presumption against him, (2) that such failure shall not be the subject of comment by counsel or by either court or counsel, or (3) contain both such provisions. See, 31 Mich. L. Rev. 40–43; Wigmore on Evidence, 1934 Supp. § 2272, Note 2. In Indiana (Burns Ann. Stat. 1926, § 2267), Nevada (Rev. Laws 1912, § 7161), and Washington (Comp. St. 1922, § 2148), the statutes specifically require the trial judge, upon request, to instruct the jury in accordance with the statute.

In England, the Criminal Evidence Act of 1898, § 1 (St. 61 & 62, Vict. c. 36), provides that the accused's failure to give evidence "shall not be made the subject of any comment by the prosecution." But the judge is not prevented from commenting thereon. *R.* v. *Rhodes,* 1 Q.

B. 77, 83 (1899); cf., *The King* v. *Parker,* 1 K. B. 850 (1933).

Several state courts, construing their statutes, have held that, upon request, it is proper for the court to instruct the jury as to the defendant's silence, and that the refusal to do so is error, *Cox* v. *State,* 173 Ark. 1115; *People* v. *Greben,* 352 Ill. 582; *State* v. *Landry,* 85 Me. 95; *People* v. *Provost,* 144 Mich. 17; *Funches* v. *State,* 125 Miss. 140; *State* v. *Walker,* 94 W. Va. 691. But the failure to instruct, without request, is not error. *Bradley* v. *State,* 35 Ariz. 420; *People* v. *Mitsunaga,* 91 Cal. App. 298; *State* v. *Williams,* 90 Conn. 126; *State* v. *Reid,* 200 Iowa 892; *State* v. *Younger,* 70 Kan. 226; *State* v. *Lesh,* 27 N. D. 165; *Bosley* v. *State,* 69 Tex. Cr. 100; *State* v. *Comer,* 176 Wash. 257.

The jury will, despite instruction, draw an adverse inference from the accused's failure to testify. See, 31 Mich. L. R. 226, 229; *Michael* v. *United States, supra;* Wigmore on Evidence, 2d Ed., § 2272, p. 901. *A fortiori* if they are reminded by an instruction that he may testify. Consequently, refusal to instruct does not adversely affect his substantial rights.

The statute is primarily intended to prevent the use of accused's failure to testify as an inference of guilt by prohibiting both court and prosecutor from commenting, in the presence of the jury, on that fact. The accused is only protected from having the fact of his silence being used, to his prejudice, as evidence of his guilt, in violation of his right to be silent until his guilt is established beyond a reasonable doubt. There is nothing in the statute which protects him from an unfavorable inference which the jury might naturally draw from the exercise of his privilege to remain silent.

Nor is there any merit in the petitioner's assertion that the constitutional privilege of an accused not to be com-

pelled to be a witness against himself (Fifth Amendment) requires the giving of the instruction requested in the instant case.

Mere self-incrimination is not prohibited by the Fifth Amendment. It is only when that incrimination becomes compulsory that the proscription of the Constitution becomes applicable. Since, under the statute, "it is a matter of choice whether he [the accused] become a witness or not," (*Reagan* v. *United States,* 157 U. S. 301, 305) his failure to exercise such choice cannot be said to involve such compulsory self-incrimination as to require an instruction that no inference shall result because of the accused's election not to testify.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In affirming the conviction of Jerry Bruno, who, with eighty-seven others, was convicted of a conspiracy to violate the narcotic laws, the Circuit Court of Appeals for the Second Circuit, dealt with an important question in the administration of federal criminal justice in such a way as to lead us to grant certiorari.

Some of Bruno's co-defendants took the witness-stand. He did not. The trial court gave the following instructions to the jury regarding the attitude to be observed by them towards the accused as a witness:

"It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

Bruno requested this additional instruction:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

The trial judge declined this request, saying "I feel that I've already covered that." The exception to this denial having been saved, the Circuit Court of Appeals found no error in the refusal, although confessing that the guidance which had been given the jury "was not the equivalent of what the defendant had requested," *Bruno* v. *United States,* 105 F. 2d 921. By this, we take it, the court below meant that the topic on which Bruno proffered an instruction had not been charged at all.

Therefore, the narrow question before us is whether in these circumstances Bruno had the indefeasible right to have the jury told in substance what he asked the judge to tell it. The issue is determined by a proper application of the Act of March 16, 1878, 20 Stat. 30, now 28 U. S. C. § 632.[1]

That Act freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him. The accused could "at his own request but not

[1] Section 632: "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Such was the command of the law-makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. *Sparf* v. *United States,* 156 U. S. 51. By legislating against the creation of any "presumption" from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind. It laid down canons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it.

A subsidiary question remains for determination. It derives from the Act of February 26, 1919, 40 Stat. 1181, 28 U. S. C. § 391,[2] whereby appellate courts are under duty in criminal as well as in civil cases to disregard "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not. It would be idle to predetermine the scope of such a remedial provision as § 391 by anticipating the myriad varieties of rulings made in trials and attempting an

[2] Section 391: "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

abstract, inclusive definition of "technical errors." Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.

To the suggestion that it benefits a defendant who fails to take the stand not to have the attention of the jury directed to that fact, it suffices to say that, however difficult it may be to exercise enlightened self-interest, the accused should be allowed to make his own choice when an Act of Congress authorizes him to choose. And when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary assumption and not without support in experience. It was for Congress to decide whether what it deemed legally significant was psychologically futile. Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause "shall not create any presumption against him."

We conclude that the substance of the denied request should have been granted, and the judgment therefore is

Reversed.

MR. JUSTICE MCREYNOLDS concurs in the result.

PEPPER *v.* LITTON.

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

No. 39. Argued November 9, 10, 1939.—Decided December 4, 1939.

1. The overruling by a state court of a motion made by the trustee of a bankrupt corporation to set aside a judgment against the corporation, where such motion was based exclusively upon the ground that the state practice governing confession of judgments was not followed in obtaining the judgment, and upon the ground that the agent purporting to act for the corporation in the matter was not authorized, does not bar the trustee, acting in the bankruptcy court on behalf of other creditors, from attacking the validity or priority of the claim underlying the judgment,—matters which were not in issue and could not have been decided in the state court proceeding. P. 302.
2. Courts of bankruptcy, in passing upon the validity and priority of claims, exercise equity powers and have not only the power but the duty to disallow or subordinate claims if equity and fairness so require. That power and duty are especially clear where the claim seeking allowance accrues to the benefit of an officer, director or stockholder of the bankrupt. P. 303.
3. Merger of a claim in a judgment does not change its nature in so far as provability in bankruptcy is concerned; the court of bankruptcy may look behind the judgment to the essence of the liability. P. 305.
4. A dominant and controlling stockholder has a fiduciary duty to creditors in dealing with the corporation and with them, and when his transactions are challenged must prove the good faith of the transactions and their inherent fairness from the viewpoint of the corporation and those interested therein. This obligation is enforceable by the trustee in bankruptcy of the corporation. P. 306.
5. A dominant or controlling stockholder or group of stockholders are fiduciaries, as are directors. Their powers are powers in trust. P. 306.
6. The dominant and controlling stockholder of a corporation, scheming to defraud one of its creditors, sued the corporation on accumulated unpaid salary claims, the amounts of which were fixed by himself, and which he sought to collect only when the corporation was in financial difficulties; caused the corporation to con-

fess judgment; used the judgment to delay the other creditor; levied on part of the corporate property and bought it in at sheriff's sale for much less than his judgment or the other claim; transferred the property to a second "one-man" corporation for six times what it cost him at the sale, payable in stock; caused the first corporation to go into voluntary bankruptcy for the sole purpose of avoiding payment of the other creditor's claim; bought up other debts; and presented his judgment as a claim, preferred in part, against the remaining assets of the bankrupt. *Held*, that the judgment claim was properly disallowed by the court of bankruptcy either as a secured or as an unsecured claim. P. 310.

7. The fact that the judgment lien was perfected more than four months preceding bankruptcy can not affect the result. P. 312.

100 F. 2d 830, reversed.

CERTIORARI, 307 U. S. 620, to review the reversal of a judgment disallowing a claim in bankruptcy.

Mr. M. M. Heuser, with whom *Mr. Geo. M. Warren* was on the brief, for petitioner.

Mr. Henry Roberts for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The case presents the question of the power of the bankruptcy court to disallow either as a secured or as a general or unsecured claim a judgment obtained by the dominant and controlling stockholder of the bankrupt corporation on alleged salary claims. The judgment of the District Court disallowing the claim was reversed by the Circuit Court of Appeals (100 F. 2d 830). We granted certiorari because of an apparent restriction imposed by that decision on the power of the bankruptcy court to disallow or to subordinate such claims in exercise of its broad equitable powers.

The findings of the District Court, amply supported by the evidence, reveal a scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope. But for the use of a so-called

"one-man" or family corporation, Dixie Splint Coal Company, of which respondent was the dominant and controlling stockholder, that scheme followed an ancient pattern.

In 1931 Pepper, the petitioner, brought suit in a state court in Virginia against Dixie Splint Coal Company and Litton, the respondent, for an accounting of royalties due Pepper under a lease.[1] While this suit was pending and in anticipation that Pepper would recover, Litton caused Dixie Splint Coal Company to confess a judgment in Litton's favor in the amount of $33,468.89, representing alleged accumulated salary claims dating back at least five years. This was done by P. H. Smith, secretary and treasurer of Dixie Splint Coal Company, who, according to the District Court, was "an employee of Litton and subservient to the latter's will." This was on June 2, 1933. Execution was issued on this judgment the same day but no return was made thereon, Litton waiting "quietly until the outcome of the Pepper suit was definitely known." On February 19, 1934, Pepper obtained a judgment against Dixie Splint Coal Company for $9,000. On motion of the company, execution on the judgment was suspended for ninety days to permit an appeal. But defendant in that suit did not appeal.[2] Instead, on March 19, 1934, while execution on the Pepper judgment was suspended, Litton caused an execution to issue on his confessed judgment and levy to be made thereunder. Yet Litton "had no intention of trying to satisfy his confessed judgment" against his corporation "unless and until it became necessary to do so"; he was using it "only as a shield against the Pepper debt." Thus, when execution and levy were made March 19, 1934, no steps were

[1] During this litigation A. P. Pepper, the plaintiff, died and the suit was continued in the name of Jean McNeil Pepper, as his executrix.

[2] Plaintiff, however, did appeal on certain phases of the case. See *Pepper* v. *Dixie Splint Coal Co.*, 165 Va. 179; 181 S. E. 406.

taken for over two months towards a sale of the property on which levy had been made. On May 31, 1934, Pepper caused an execution to issue on her judgment, and levy was made June 2, 1934. On this latter date the sheriff "who seems to have been cooperating with Litton" advertised the property for sale under the Litton levy made in the previous March. On June 14, 1934, the sale was held and Litton became the purchaser of the property sold at the sum of $3,200.

The next step in the "planned and fraudulent scheme" was the formation by Litton of "another of his one-man corporations," Dixie Beaver Coal Company, to which Litton transferred the property he had acquired at the execution sale at a valuation of $20,135.36 to be paid for in stock of the new company.[3]

On September 4, 1934, the third step in Litton's scheme was taken. On that date Dixie Splint Coal Company, pursuant to a resolution of the board of directors, passed June 16, 1934, (two days after the Litton execution sale) filed a voluntary petition in bankruptcy. This step, according to the findings below was "plainly for the sole purpose of avoiding payment of the Pepper debt." The bankrupt at that time had $4,500 on bank deposit and $12,000 in accounts receivable, most of which was good. The cash on deposit was then more than sufficient to pay all creditors with the exception of Pepper. And Litton caused the voluntary petition to be filed "feeling confident that his confessed judgment would cover and consume" the remaining assets. Adjudication followed on September 7, 1934.

[3] The resolution of the board of directors of this new company certified that in their opinion the property "formerly owned by Dixie Splint Coal Company and now owned by Scott Litton is worth $20,135.36 in current money of the United States and we fix the value of the same at this sum, which is to be paid for in stock."

Litton's next step in his scheme to defeat the Pepper claim was to purchase wage claims against the bankrupt and to cause "in some manner" other claims to be withdrawn. This was done, according to the District Court, so that Pepper might be made to appear as the only general creditor—a situation designed to give Litton a decided technical advantage, as we shall see.

On June 13, 1934, Pepper had instituted suit in the Virginia state court to have the Litton judgment declared void. On June 15, 1934, the day following the sale under the Litton execution, the sheriff instituted an interpleader action joining Litton, Pepper and the Clinchfield Coal Corporation and alleging, *inter alia,* that that corporation had a prior lien on all the property sold for a debt of $2,153. Litton and Pepper both answered admitting the prior lien of the corporation, Pepper answering "without prejudice to her rights" asserted in the chancery cause to have the Litton judgment set aside. On July 18, 1934, an order in the interpleader suit was entered directing payment of $2,153.00 to the Clinchfield Coal Corporation.

Thereafter the trustee, with the authority of the bankruptcy court, moved in the state court to set aside the judgment and to quash the execution thereof on the ground that the judgment was void since it had not been confessed in the manner required by the Virginia statute.[4]

[4] At the first meeting of creditors held on September 26, 1934, the strategic position of Litton was further improved by two other events which later the District Court quite properly denounced. In the first place, P. H. Smith, secretary and treasurer of Dixie Splint Coal Company and the one who had caused the entry of the Litton judgment on June 2, 1933, by confession against the company, was elected trustee. In the second place, Smith was authorized to employ, and did in fact employ, as attorney for the trustee, one I. M. Quillen. Quillen, or his firm, was attorney for Dixie Splint Coal Company. As such he or his firm had prepared and filed the petition in bankruptcy for the com-

The court concluded that the Litton judgment was void but denied the motion on the grounds that the trustee was estopped to challenge it. The court held that Pepper in the interpleader suit had treated the fund derived from the execution sale under the Litton judgment as valid and consequently had elected to recognize the validity of the judgment. Since Litton had acquired, or caused to have withdrawn, all the remaining claims against the

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pany. And he appeared at the first meeting of creditors as counsel for the bankrupt and yet at that time, as attorney for Litton, filed the claim of Litton for $33,468.89 as a preferred or secured claim. And at the time these appointments were made the controversy between Pepper and Litton over the latter's judgment was known and recognized, although formal proof of the Pepper claim was not filed until November 8, 1934. The grave impropriety of these appointments became striking as administration of the estate was commenced.

On October 6, 1934, Pepper moved in her state court action to quash all execution issued and outstanding on the Litton judgment. Quillen, attorney for the bankruptcy trustee, appeared in opposition to the motion, acting as attorney for Litton, and contended that the intervention of bankruptcy had deprived the state court of jurisdiction. The state court reserved decision. On October 15, 1934, Pepper petitioned the referee to direct the trustee to contest the Litton judgment in the state court proceeding. Quillen, stating that he acted as attorney for Litton, opposed the petition. After some delay, new counsel for the trustee were obtained who soon asked the court for authority to institute a new and independent suit in the state court to have the Litton judgment declared void. This authority was granted.

The District Court, though condemning such steps, stated it did not suggest that Smith and Quillen were acting "with any fraudulent plan or intention of utilizing their positions in aid of Litton and to the detriment of the estate." Yet he denounced the impropriety of such conduct and emphasized the incompatible and conflicting positions which these persons occupied. On the professional ethics of the conduct of Quillen, the District Court aptly observed: "It is generally accepted that an attorney for the bankrupt should not be chosen attorney for the trustee in any case. And it is even more evident that an attorney who represents a creditor whose claim is under attack should not be chosen as attorney for the trustee who, on behalf of other creditors, is charged with the duty of making that attack."

estate, the trustee in this suit was representing only Pepper. Therefore, since Pepper was estopped, so was the trustee. On appeal that judgment was affirmed on those grounds. *Smith* v. *Litton,* 167 Va. 263; 188 S. E. 214.

Thereafter the question of the allowance of the Litton judgment came before the bankruptcy court on exceptions previously made by Pepper. That court concluded that the decision by the state court that the trustee was estopped to attack the Litton judgment there, did not prevent the bankruptcy court from considering its validity. It therefore reviewed all the facts and concluded (1) that Litton and the Dixie Splint Coal Company had made a "deliberate and carefully planned attempt" to avoid "the payment of a just debt"; (2) that Litton and the Dixie Splint Coal Company were "in reality the same"; and (3) that the alleged salary claims underlying the Litton judgment did not represent an "honest debt" of the bankrupt corporation, being merely bookkeeping entries for the double purpose of lessening income taxes and of enabling Litton to appear as a creditor of the corporation in case it became financially involved.[5] Accordingly, the

[5] This conclusion was based on the history and nature of the claims for salary. Litton's alleged claim of $33,468.89 represented $7,427.25 owed Litton and $26,041.64 owed P. H. Smith which the latter had assigned to Litton for $1 and "other considerations" which Litton was unable to recall. As we have noted, these claims date back over a number of years. The regular salaries paid Litton and Smith were entered on the corporation's books under a "payroll" account; the salary claims here in question were carried under separate accounts, "P. H. Smith—Personal" and "Scott Litton—Personal." No sums were paid Smith from that personal account. The District Court concluded that it was hard to believe that Smith, a bookkeeper and clerk, who had been paid $2,700 a year, should, with no change in the nature of his work, receive a sudden increase in salary to $8,000 a year, except upon an understanding that it was merely for record purposes and not to be paid. This conclusion was strengthened by the fact that the $26,041.64 accumulated for over five years with no effort on Smith's part to col-

District Court disallowed the Litton claim either as a secured or unsecured claim and directed the trustee to recover for the benefit of the estate the property or its value which Litton purchased at the execution sale on June 14, 1934. On appeal the Circuit Court of Appeals reversed that judgment holding that the decision in the state court was *res judicata* in the bankruptcy proceedings.

We think that the Circuit Court of Appeals was in error in reversing the judgment of the District Court.

In the first place, *res judicata* did not prevent the District Court from examining into the Litton judgment and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face. He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other

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lect it and by the fact that shortly before bankruptcy he assigned the claim to Litton for a nominal consideration. As to the $7,427.25 alleged to be owed Litton the court likewise concluded that it had been entered on the books for income tax purposes and was not a "bona fide obligation" of the company. Furthermore, a substantial part of these claims was barred by the statute of limitations. On the most tolerant assumption that could be made, according to the court, the salaries credited to Litton and Smith were merely contingent or conditional obligations not provable since they were intended to be paid only whenever the profits of the company permitted. Hence they were not fixed liabilities absolutely owing. See § 63 (a) (1).

creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz., that it was void *ab initio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there.[6] Hence, the failure on the part of Litton to establish that the state judgment was *res judicata* plus his submission of his judgment to the bankruptcy court for allowance (as a preferred claim to the extent that it was secured by the alleged lien and as a common claim as respects the deficiency) plainly left the bankruptcy court with full authority to follow the course it took and to determine the validity of Litton's alleged secured claim and the priority which should be accorded it in the distribution of the bankrupt estate. In the second place, even though we assume that the alleged salary claim on which the Litton judgment was based was not fictitious but actually existed, we are of the opinion that the District Court properly disallowed or subordinated it.

Courts of bankruptcy are constituted by §§ 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter

[6] It should be noted that there is authority for the conclusion that the trustee is not necessarily precluded from questioning a judgment in the bankruptcy proceedings merely because he attacked it in a state court proceeding, where the state court did not pass upon the validity of the underlying claim. *In re James A. Brady Foundry Co.*, 3 F. 2d 437; Gilbert's Collier on Bankruptcy (4th ed.) § 1247.

section are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Consequently this Court has held that for many purposes "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240. By virtue of § 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence. *Larson* v. *First State Bank,* 21 F. 2d 936, 938. Among the granted powers are the allowance and disallowance of claims; [7] the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; [8] the rejection in whole or in part "according to the equities of the case" of claims previously allowed; [9] and the entering of such judgments "as may be necessary for the enforcement of the provisions" of the Act.[10] In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205, 217.

The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates.[11] They

[7] § 2 (2). The sections are cited as they were at the time of the bankruptcy in this case. But the amendments made by the Chandler Act (52 Stat. 840), approved June 22, 1938, are not material so far as the issues here involved are concerned.

[8] § 2 (7).

[9] § 57 (k).

[10] § 2 (15).

[11] Thus the bankruptcy court has been held to have jurisdiction over a supplemental and ancillary bill to enjoin a creditor, after adjudication and discharge of the bankrupt, from prosecuting his claim in a state court. *Local Loan Co.* v. *Hunt, supra.* As a court in equity it has been held to have the power to protect the bankrupt estate against a fraudulent assessment, *Cross* v. *Georgia Iron & Coal Co.,* 250 F.

have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. By reason of the express provisions of § 2 these equitable powers are to be exercised on the allowance of claims, a conclusion which is fortified by § 57 (k).[12] For certainly if, as provided in the latter section, a claim which has been allowed may be later "rejected in whole or in part, according to the equities of the case," disallowance or subordination in light of equitable considerations may originally be made.

Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser* v. *Gray,* 236 U. S. 70. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned, *Boynton* v. *Ball,* 121 U. S. 457, so the court may look behind the judgment to determine the essential nature of the liability

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438; to compel execution of a deed to make the bankrupt's equitable title a complete legal title, *Dearborn Electric Light & Power Co.* v. *Jones,* 299 F. 432; to recover assets of the estate which have been used to pay dividends under a composition order later reversed, *In re Lily-knit Silk Underwear Co.,* 73 F. 2d 52. And even though the act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims to be proved thereafter in order to prevent a fraud or an injustice. *Williams* v. *Rice,* 30 F. 2d 814; *In re Pierson,* 174 F. 160; *Larson* v. *First State Bank, supra; Burton Coal Co.* v. *Franklin Coal Co.,* 67 F. 2d 796.

[12] Section 57 (k) provides: "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

for purposes of proof and allowance. *Wetmore* v. *Markoe,* 196 U. S. 68. It may ascertain the validity of liens, marshal them, and control their enforcement and liquidation. *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734. And the bankruptcy trustee may collaterally attack a judgment offered as a claim against the estate for the purpose of showing that it was obtained by collusion of the parties or is founded upon no real debt.[13]

That equitable power also exists in passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation. The mere fact that an officer, director, or stockholder has a claim against his bankrupt corporation or that he has reduced that claim to judgment does not mean that the bankruptcy court must accord it *pari passu* treatment with the claims of other creditors. Its disallowance or subordination may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 492. Their powers are powers in trust. See *Jackson* v. *Ludeling,* 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Co.,* 254 U. S. 590, 599. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an

[13] *Chandler* v. *Thompson,* 120 F. 940; *In re Thompson,* 276 F. 313; *In re Continental Engine Co.,* 234 F. 58. This is of course in absence of a plea of *res judicata.*

arm's length bargain.[14] If it does not, equity will set it aside. While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action,[15] it is, in the event of bankruptcy of the corporation, enforceable by the trustee.[16] For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation[17]—creditors as well as stockholders.

As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity. Hence these rules governing the fiduciary responsibilities of directors and stockholders come into play on allowance of their claims in bankruptcy. In the exercise of its equita-

[14] This Court said in *Twin-Lick Oil Co.* v. *Marbury, supra,* p. 590: "So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."

[15] *Converse* v. *United Shoe Machinery Co.,* 209 Mass. 539; 95 N. E. 929. *Davenport* v. *Dows,* 18 Wall. 626. It is also clear that breach of that fiduciary duty may also give rise to direct actions by stockholders in their own right. *Strong* v. *Repide,* 213 U. S. 419. Cf. *Green* v. *Victor Talking Machine Co.,* 24 F. 2d 378.

[16] § 70 (a) (6); *Manning* v. *Campbell,* 264 Mass. 386; 162 N. E. 770; *Stephan* v. *Merchants Collateral Corp.,* 256 N. Y. 418; 176 N. E. 824; *Dean* v. *Shingle,* 198 Cal. 652; 246 P. 1049.

[17] See *Wyman* v. *Bowman,* 127 F. 257, 274; *Burnes* v. *Burnes,* 137 F. 781; *Texas Auto Co.* v. *Arbetter,* 1 S. W. 2d 334, 339; *McCandless* v. *Furlaud,* 296 U. S. 140; *Jackson* v. *Ludeling, supra,* pp. 624 *et seq.*

ble jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.[18] And its duty so to do is especially clear when the claim seeking allowance accrues to the benefit of an officer, director, or stockholder. That is clearly the power and duty of the bankruptcy courts under the reorganization sections. In *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, this Court held that the claim of Standard against its subsidiary (admittedly a claim due and owing) should be allowed to participate in the reorganization plan of the subsidiary only in subordination to the preferred stock of the subsidiary. This was based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors. Similar results have properly been reached in ordinary bankruptcy proceedings. Thus, salary claims of officers, directors, and stockholders in the bankruptcy of "one-man" or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be

[18] Thus in *National Cash Register Co.* v. *Dallen*, 76 F. 2d 867, the bankrupt, prior to bankruptcy, turned in to petitioner an old cash register as a credit on account of the purchase of a new one. Pending delivery of the new machine, petitioner loaned the bankrupt another one and after the bankruptcy adjudication sought to reclaim the loaned machine. The court affirmed an order of the District Court allowing the reclamation on condition that petitioner first deliver to the bankrupt the old machine or pay the amount of its agreed value. The court said, p. 868, "We do not think it necessary to determine whether the contract for the purchase of the new cash register amounted to a bailment lease or a conditional sale. Bankruptcy courts may apply rules regulating equitable actions."

fair or equitable to other creditors.[19] And that result may be reached even though the salary claim has been reduced to judgment.[20] It is reached where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being or where the history of the corporation shows dominancy and exploitation on the part of the claimant.[21] It is also reached where on the facts the bankrupt has been used merely as a corporate pocket of the dominant stockholder, who, with disregard of the substance or form of corporate management, has treated its affairs as his own.[22] And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other credi-

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[19] *In re Burntside Lodge, Inc.*, 7 F. Supp. 785. In that case the court said, p. 787:

"The relations of a stockholder to a corporation and to the public require good faith and fair dealing in every transaction between the stockholder and the corporation which may injuriously affect the rights of creditors and the general public, and a careful examination will be made into all such transactions in the interests of creditors.

. . . . . .

"If the business had not been incorporated and the Cooks had conducted the enterprise personally, they would not have been allowed compensation for services in the event of bankruptcy, and there is no cogent reason why they should be paid when the same service is rendered as an officer and manager of a corporation of their own creation and to serve their own interests. To allow claims under such circumstances in effect would permit bankrupts to collect on claims against their own bankrupt estate. It would give effect to form rather than to substance, to the letter of the law rather than the spirit and purpose of it."

[20] *In re Wenatchee-Stratford Orchard Co.*, 205 F. 964.

[21] *In re McCarthy Portable Elevator Co.*, 196 F. 247, aff'd 201 F. 923.

[22] *In re Chas. K. Horton, Inc.*, 22 F. Supp. 905; *In re Kentucky Wagon Mfg. Co.*, 71 F. 2d 802; *Forbush Co.* v. *Bartley*, 78 F. 2d 805; *Clere Clothing Co.* v. *Union Trust & Savings Bank*, 224 F. 363.

tors and thus treated in effect as capital contributions by the stockholder not only in the foregoing types of situations but also where the paid-in capital is purely nominal, the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan.[23]

Though disallowance of such claims will be ordered where they are fictitious or a sham,[24] these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment.[25] At times equity has ordered disallowance or subordination by disregarding the corporate entity.[26] That is to say, it has treated the debtor-corporation simply as a part of the stockholder's own enterprise, consistently with the course of conduct of the stockholder. But in that situation as well as in the others to which we have referred, a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant;

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[23] *Albert Richards Co.* v. *Mayfair, Inc.*, 287 Mass. 280; 191 N. E. 430. Cf. *Erickson* v. *Minnesota & Ontario Power Co.*, 134 Minn. 209; 158 N. W. 979; *Oriental Investment Co.* v. *Barclay*, 64 S. W. 80 (Tex. Civ. App.); *Joseph R. Foard Co.* v. *State*, 219 F. 827.

[24] *New York Trust Co.* v. *Island Oil & Transport Corp.*, 34 F. 2d 655; *In re H. Hicks & Son, Inc.*, 82 F. 2d 277.

[25] See comment in 45 Yale L. Journ. 1471.

[26] *In re Otsego Waxed Paper Co.*, 14 F. Supp. 15. The court said, p. 16, "The applicable principle is that, where a corporation is so organized and controlled as to make it a mere instrumentality or adjunct of another, and the subsidiary becomes bankrupt, the parent corporation cannot have its claim paid until all other claims are first satisfied." See also *Hunter* v. *Baker Motor Vehicle Co.*, 225 F. 1006; *Henry* v. *Dolley*, 99 F. 2d 94.

The same result has been reached in equity receiverships. *Central Vermont Ry. Co.* v. *Southern New England R. Corp.*, 1 F. Supp. 1004, aff'd 68 F. 2d 460; *S. G. V. Co.* v. *S. G. V. Co.*, 264 Pa. 265; 107 A. 721.

A fortiori that result is reached where there is a fraudulent purpose. *E. E. Gray Corp.* v. *Meehan*, 54 F. 2d 223.

a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors. He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters.[27] He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

On such a test the action of the District Court in disallowing or subordinating Litton's claim was clearly correct. Litton allowed his salary claims to lie dormant for years and sought to enforce them only when his debtor corporation was in financial difficulty. Then he used them so that the rights of another creditor were impaired. Litton as an insider utilized his strategic position for his own preferment to the damage of Pepper. Litton as the dominant influence over Dixie Splint Coal Company used his power not to deal fairly with the

[27] See *Alexander* v. *Theleman,* 69 F. 2d 610, 613.

creditors of that company but to manipulate its affairs in such a manner that when one of its creditors came to collect her just debt the bulk of the assets had disappeared into another Litton company. Litton, though a fiduciary, was enabled by astute legal manoeuvring to acquire most of the assets of the bankrupt not for cash or other consideration of value to creditors but for bookkeeping entries representing at best merely Litton's appraisal of the worth of Litton's services over the years.

This alone would be a sufficient basis for the exercise by the District Court of its equitable powers in disallowing the Litton claim. But when there is added the existence of a "planned and fraudulent scheme," as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart.

The fact that Litton perfected his lien more than four months preceding bankruptcy is no obstacle to equitable relief. In the first place, that lien was but a step in a general fraudulent plan which must be viewed in its entirety. The subsequent sale cannot be taken as an isolated step unconnected with the long antecedent events, all designed to defeat creditors. *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 232–233. In the second place, Litton is seeking approval by the bankruptcy court of his claim. The four months' provision of the bankruptcy act is certainly not a statutory limitation on equitable defenses arising out of a breach of fiduciary duties by him who seeks allowance of a claim.

In view of these considerations we do not have occasion to determine the legitimacy of the "one-man" corporation as a bulwark against the claims of creditors.[28]

Accordingly the judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

PEARSON, STATE TREASURER OF THE STATE OF OREGON, *v.* McGRAW ET AL., EXECUTORS.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 69. Argued November 15, 16, 1939.—Decided December 4, 1939.

A resident of Oregon, owning bonds in Illinois, held for him by a trust company acting as custodian and financial agent, and having also a checking account with the company, directed the company to raise a specified sum of money by sale of bonds in its hands and by use of his cash balance, and to apply that sum to the purchase of an equal amount in Federal Reserve notes. When this had been done, and the trust company had held the notes for a few days, he executed in Oregon an instrument by which, in contemplation of death, he made a transfer of the notes to the trust company, as trustee for designated beneficiaries, reserving to himself no interest and no power of revocation. Thereafter, the trust company held the notes under the trust agreement for several days, and then used them from time to time to purchase bonds for the account of the trust. Its original engagement as custodian and agent antedated the settlor's domicile in Oregon, and none

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[28] On this point the District Court said: "An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same. In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors."

of the securities handled by the company were ever physically present in that State. *Held,* that the sale of the bonds, the purchase of the notes, and their transfer to the trustee constituted an integrated and indivisible transaction effecting a transfer of intangibles in contemplation of death; and that, whatever the nature of the Federal Reserve notes—whether tangible or intangible property—a tax upon this transfer by the State of Oregon would not contravene the due process clause of the Fourteenth Amendment. *Curry* v. *McCanless,* 307 U. S. 357. P. 317.
161 Ore. 1; 86 P. 2d 424; 87 P. 2d 766, reversed.

CERTIORARI, *post,* p. 531, to review a judgment which reversed in part an order of the Circuit Court of Oregon in probate, determining an inheritance tax.

Messrs. Willis S. Moore, Assistant Attorney General of Oregon, and *Dean H. Dickinson,* with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for petitioner.

Mr. Fletcher Rockwood, with whom *Mr. Charles E. McCulloch* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Hayes, respondents' decedent, died testate in 1936 and was at the time of his death a resident of and domiciled in Oregon. In earlier years when he had resided in the middle west he placed in possession of an Illinois trust company various stocks, bonds and other intangibles, which trust company acted as his agent in collecting principal and income on those securities and in the investment of his funds. When decedent established a domicile in Oregon in 1933, he continued that arrangement with the Illinois trust company, with the result that those securities were always physically present in Illinois, never in Oregon. August 8, 1935, about six months before decedent's death, he directed the Illinois trust company to sell and liquidate sufficient of his bonds held under that

agency arrangement in Illinois to procure a sum which, together with cash balances in his checking account with the trust company, would equal $450,000 and to purchase therewith, as his agent, federal reserve notes of the face amount of $450,000. Between August 8, 1935 and August 12, 1935, the Illinois trust company complied with decedent's directions [1] and prior to August 15, 1935, it purchased $450,000 of federal reserve notes and held them in Illinois as agent for decedent for a few days.

On August 15, 1935, decedent executed in Oregon a trust agreement under which the Illinois trust company was designated as trustee and by which decedent transferred to it as trustee the federal reserve notes. That trust was for the benefit of certain designated relatives and was irrevocable. Under it decedent retained no interest or power whatsoever. The trust company held those federal reserve notes under the trust agreement for about five days. Then from time to time after August 19, 1935, the Illinois trust company used the federal reserve notes, pursuant to the terms of the trust agreement, to purchase bonds and other personal property for the account of the trust.[2]

[1] On the sale of bonds in the open market the trust company realized for decedent's account $176,062.01. On August 12, 1935, decedent borrowed from the trust company on a demand note $183,937.99. On that date decedent had a balance in his checking account with the trust company in excess of $90,000. With the funds so obtained the trust company purchased the $450,000 of federal reserve notes mentioned. Between August 12, 1935, and August 29, 1935, the trust company, on directions of decedent, sold in the open market additional bonds held by it in the agency account and as proceeds of those sales were received by it, it paid off the demand note. That note was entirely paid on August 29, 1935.

[2] None of the property thus acquired by the trustee was ever owned by decedent; the trustee did not purchase or acquire any of the bonds or other assets which at any time constituted a part of the property held by the trustee as agent for decedent under the earlier arrangement.

Admittedly, Oregon had jurisdiction to tax but for the alleged prohibition in the Fourteenth Amendment, for the statute in question imposed a tax on intangibles as well as tangibles which passed by deed or gift made in contemplation of the death of the grantor.[3] But the Supreme Court of Oregon held that that constitutional prohibition was present since neither the securities or cash used to purchase the federal reserve notes nor the notes themselves were ever in Oregon but always in Illinois. Though admitting that intangibles would have been taxable by Oregon under such circumstances, the court in reliance on *Blodgett* v. *Silberman,* 277 U. S. 1, concluded that the federal reserve notes were tangibles. And since decedent had retained them in Illinois for a few days prior to August 15, 1935, without any intention of bringing them to Oregon, they had acquired a so-called business situs in Illinois which constitutionally prevented Oregon from exacting a tax for their transfer.[4] And this conclusion was reached though admittedly the transfer of the notes under the agreement of August 15, 1935, was made in contemplation of death. We granted certiorari

[3] "All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest . . . by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, . . . to any person or persons, . . . in trust or otherwise, . . . shall be and is subject to tax at the rate hereinafter specified in section 10–603, to be paid to the treasurer of the state for the use of the state; . . ." (§ 10–601, O. C. 1930.)

[4] 86 P. 2d 424, 87 P. 2d 766. It seems clear that the Oregon Supreme Court reached this result by reliance on the Fourteenth Amendment and the decisions of this Court thereunder. We do not have, therefore, a case where the state court was merely construing its statute nor a case where it is not clear whether or not it was doing more than that. Cf. *State Tax Commission* v. *Van Cott,* 306 U. S. 511.

because of the importance of the constitutional question involved and of an alleged probable conflict with the principles underlying such decisions as *Curry* v. *McCanless,* 307 U. S. 357.

We disagree with the conclusion of the Supreme Court of Oregon. Oregon having jurisdiction to tax by reason of the statute was not deprived of it by the Federal Constitution.

On the facts of this case we believe that the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death. And we reach this result though each step in the series was real and though none was camouflaged or concealed. For basically the sale of intangibles, the acquisition of federal reserve notes, and their transfer under the agreement of August 15, 1935, were interdependent. Cf. *Groman* v. *Commissioner of Internal Revenue,* 302 U. S. 82; *Helvering* v. *Bashford,* 302 U. S. 454, 458. From decedent's point of view, completion of the series of steps was necessary for consummation of his program to utilize $450,000 of his estate to provide for certain designated members of his family.[5] Any step short of the final transfer would not have done it. The mere sale of the intangibles and the acquisition of the federal reserve notes had no functional or business significance apart from the August 15, 1935 transfer. That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition. Taken as isolated transactions,

[5] This is in accord with the treatment by the Supreme Court of Oregon of "Dr. Hayes' plan," a "plan" which it felt compelled to divide into separate steps by reason of the principles of decisions of this Court dealing with business situs under the Fourteenth Amendment. Cf. *Patterson* v. *Alabama,* 294 U. S. 600.

they have meaning and significance only in relation to the third step, a conclusion made especially evident by the close sequence of events. Hence, it is no answer to say that because the first two steps were not irrevocable but could be recalled, the third step was not a necessary one in the series. For that is as immaterial as is the revocability of any donor's plan to make a gift in contemplation of death at any moment prior to its consummation. Admittedly decedent had such a purpose on the transfer of the notes. To hold that such purpose was not present on the sale of the intangibles would be to isolate one part of the total transaction and to give it significance and meaning utterly inconsistent with the fact that the intangibles were sold for the purpose of acquiring the notes which, in turn, were to be placed under an irrevocable trust. Therefore we need not consider the nature of federal reserve notes, for in that posture of the case their taxability as such and in isolation from the whole transaction is not in issue.

Hence to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance. Cf. *Minnesota Tea Co.* v. *Helvering,* 302 U. S. 609; *Shotwell* v. *Moore,* 129 U. S. 590. Questions of due process are not to be treated "narrowly or pedantically, in slavery to forms or phrases." *Burnet* v. *Wells,* 289 U. S. 670, 677–78.

Accordingly, the transfer was taxable on the authority of *Curry* v. *McCanless, supra,* and related cases. For constitutionally the property was "within the jurisdiction of the state" of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner.

The judgment of the Supreme Court of Oregon is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment below should be affirmed.

MR. JUSTICE STONE:

I concur in the judgment of reversal on the ground that nothing in the Constitution prevents taxation by Oregon of a gift by its citizen of federal reserve notes located elsewhere.

While I do not question that in the circumstances of this case a state could, if so advised, constitutionally tax its citizen for action taken for no other purpose than the evasion of its taxing statutes, no such question is, I think, presented by the record. Discussion of it seems at most to be academic and not to relieve us of the duty of deciding the only federal question which could by any possibility be said to be raised by the record, namely, whether the Constitution precludes taxation of the gift of the banknotes merely because of the physical fact that they are located without the state.

In arriving at the conclusion that the gift of federal reserve notes located outside the state was not taxable, the Supreme Court of Oregon necessarily construed the Oregon statute, which imposes a tax on gifts of "all property within the jurisdiction of the state . . . whether tangible or intangible." The court has said that the banknotes were not within the jurisdiction of the state because their situs was elsewhere, and that the acts of decedent in avoiding the tax by the acquisition of property having an extra-territorial situs were not reached for taxation by state law. If the court did anything more than rule

that the statute, by its own terms, did not extend to the taxation of the gift of the notes because they were located outside the state, it held that the Fourteenth Amendment because of that physical fact withholds, from the state, jurisdiction over the property which the taxing statute asserts.

Petitioner asks us to determine whether that holding is correct. He is entitled to have an answer. We do not rightly avoid giving the answer by saying that, by some statute other than that under review, the state could constitutionally tax its citizen for his action in avoiding the tax, by making the gift in a form of property which is by hypothesis beyond the taxing power. If the state has by its statute undertaken to lay a tax on gifts of banknotes outside the state without more—and we are without jurisdiction if it has not—no purpose is served by saying to the state that it could have reached the same result by another route, which, under its laws, does not appear to be open to it.

As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes as chattels were treated in *Frick* v. *Pennsylvania,* 268 U. S. 473, and as no reason has been advanced, even in *Blodgett* v. *Silberman,* 277 U. S. 1, 18, for a different view, cf. *Baldwin* v. *Missouri,* 281 U. S. 586, 591, the judgment should, I think, be reversed upon that ground rather than upon a theory of permissible legislation, of which apparently Oregon's tax laws do not avail.

MR. JUSTICE FRANKFURTER agrees with my views as to Oregon's power to tax these federal reserve notes, but is of opinion that the record sustains the ground taken in the Court's opinion.

WEISS ET AL. *v.* UNITED STATES.

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

No. 42. Argued November 13, 14, 1939.—Decided December 11, 1939.

1. The provision of § 605 of the Communications Act of 1934, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person," applies to intrastate as well as to interstate and foreign communications (over wires used for both kinds), and bars admission in trials in the federal courts of evidence obtained by interception of such intrastate telephone communications. P. 329.
2. As Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications. P. 327.
3. The broad and inclusive language of the second clause of § 605, quoted *supra,* is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence. P. 329.
4. *Held:* Evidence of intercepted intrastate telephone communications which had been recorded by stenograph and phonograph was inadmissible in a trial in the federal court; and it was prejudicial error for the court to admit such evidence either by permitting the parties to the telephone conversation, who had turned state's evidence, to read the stenographic transcript, or by allowing the prosecutor to put the stenographic transcripts and phonograph records in evidence upon identification by the parties to the conversation. The divulgence of the communications under the circumstances here was not "authorized by the sender" within the meaning of § 605. Pp. 329, 331.

103 F. 2d 348, reversed.

CERTIORARI, 307 U. S. 621, to review the affirmance of convictions and sentences of the petitioners upon indictments for using the mails to defraud and for conspiracy.

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Mr. Theodore Kiendl for Dr. Maximilian Goldstein; *Mr. Lloyd Paul Stryker* for Joseph J. Weiss; and *Mr. Jacob W. Friedman* for Martin Gross,—petitioners.

Assistant Attorney General Rogge, with whom *Solicitor General Jackson* and *Messrs. Benjamin M. Parker, George F. Kneip, Louis B. Schwartz, Fred E. Strine,* and *W. Marvin Smith* were on the brief, for the United States.

The Communications Act shows on its face that it was intended to apply only to interstate and foreign communications.

Nor can it be assumed that Congress thought it necessary to forbid the divulging of intrastate communications in order to protect the secrecy of interstate and foreign communications, for there is no difficulty in dealing with each type of communications separately. Although it might be said that interception of interstate messages could not easily be prohibited without also forbidding interception of intrastate messages passing over the same lines, it is clear both from the language used and the legislative history that § 605 does not prohibit interception *per se* but only interception and divulging.

Petitioners urge that even if § 605 does not or can not forbid the interception and divulging of intrastate messages, nevertheless the policy against wire-tapping should be given effect by construing the section as laying down a rule of evidence. But there is no basis for such a view either in the statute or in *Nardone* v. *United States,* 302 U. S. 379. That decision merely gives effect to an express statutory prohibition against certain disclosures. It is evident from the opinion that this Court regarded the statute as operating on the federal officers who were testifying, not on the trial court in the admission of evidence.

The *Nardone* decision should be limited to its facts and not extended to intrastate communications. Ninety-

eight per cent. of all telephone communication is intrastate, and serious practical and constitutional difficulties will arise if the *Nardone* decision is extended to this wide new field. The immunity granted by the Act, as construed in that decision, is broader than the constitutional guarantee of the Fourth Amendment, since not even reasonable "searches" are permissible. Also, under the general language of § 605, a defendant might have such evidence excluded even when obtained by private persons unconnected with the Government (cf. *Burdeau* v. *McDowell,* 256 U. S. 465) or where the evidence was secured by intercepting some other person's messages (cf. *Hale* v. *Henkel,* 201 U. S. 43; *Agnello* v. *United States,* 269 U. S. 20, 35). If constitutional, the section thus construed would forbid evidence of intercepted intrastate communications by state officers in state prosecutions, although a state constitution or statute may specifically make such evidence admissible. Section 605 should be construed to avoid doubts as to its constitutional validity.

The clause prohibits divulging only by persons "not authorized by the sender." The witnesses who testified to the telephone messages in the trial court were parties to the conversation. It should be sufficient that one participant in a telephone conversation authorizes divulgence of the message.

Interception of telephone communications by federal law enforcement officers does not violate the Fourth or Fifth Amendments. *Olmstead* v. *United States,* 277 U. S. 438, is controlling and should not be overruled.

There was no violation of New York state law in the present case. *People* v. *Hebberd,* 96 Misc. 617, 620–621. Even if the state law were violated, the evidence was properly admitted under the common law rule that evidence, although procured illegally, is, nevertheless, admissible.

Since the telephone conversations were introduced through the testimony of parties thereto, strictly speaking there exists in the present case no question of "wire-tapping."

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioners were indicted, with five others, in the District Court for the Southern District of New York for using the mails to defraud and for conspiracy so to use them.[1] The alleged scheme was to cheat insurance companies by inducing them to pay false claims for disability, health, and accident benefits to three of the defendants, Nelson, Berger, and Spitz. These three pleaded guilty and testified for the Government. Three defendants who were physicians,—Messman, Goldstein, and Krupp—were alleged to have assisted by furnishing policy holders false medical certificates and instructing them how to simulate illness. Messman pleaded guilty and testified for the Government. The other two stood trial. Two lawyers, Joseph J. Weiss and Alfred L. Weiss, and an investigator, Gross, were charged with having furthered the claims knowing them to be false. Alfred L. Weiss was granted a severance; Joseph J. Weiss and Gross stood trial. Each of the petitioners was convicted and sentenced. The judgments were affirmed by the Circuit Court of Appeals.[2]

The conspiracy and scheme charged covered a period extending from January 15, 1934, to July 30, 1937, the date of the indictment. The principal issue of fact was whether the petitioners participated in making false claims with guilty knowledge. Over objection and ex-

[1] Under U. S. C. Tit. 18, §§ 338 and 88.

[2] 103 F. 2d 348.

ception, the trial judge admitted evidence of seventy-six intercepted telephone communications.

For months prior to the finding of the indictment telephone messages over the wires leading into the offices of Weiss and Messman in New York City, were intercepted. The wires were tapped by a policeman acting under instructions of a United States Post Office Inspector. The intercepted messages were taken stenographically and were also simultaneously recorded on phonograph discs by employes of a detective agency acting under the same instructions. Each night the records and stenographic transcripts of communications intercepted during the day were delivered to the United States Attorney or his representative. Interstate calls were made from Weiss' office and the tapped wires were the conduits of both interstate and intrastate communications. Every call, whether interstate or intrastate, to or from Weiss' office, was intercepted and recorded.

It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonographic records and had then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise. In the preparation for trial one of the defendants, who was to testify for the prosecution, held a typed copy of the stenographic transcript of a telephone conversation in which he had participated while a phonographic record of the conversation was played to him. He corrected the typed manuscript to make it conform to the words emitted from the phonograph. He then marked the phonographic record and the script for identification.

The Government's procedure at the trial in proving the communications was to call as a witness one of the defendants who had pleaded guilty, and to hand him a transcript

he had marked for identification. After he had testified that, on a given date, he held a telephone conversation with one of the other defendants, he was asked whether he could repeat the conversation verbatim. Upon his stating that he could not do so without the use of the typed transcript he was permitted to read it to the jury. Subsequently the Government offered the identified phonograph records and typewritten transcripts in evidence and they were admitted. Certain of the records were played to the jury while each juryman held a copy of the typewritten transcript of the conversation. All of the communications in question are conceded to have been intrastate save one which, however, was not shown to have been interstate.

The petitioners' objections to the admission of this evidence were that it would violate § 605 of the Federal Communications Act of 1934; [3] would violate the Fourth and Fifth Amendments of the Federal Constitution, and would be in the teeth of § 1423, subdivision 6, of the Penal Law of the State of New York,[4] making wire tapping a crime.

Because of conflict of decision in the Circuit Courts of Appeal [5] we granted certiorari, limited to the "question whether the trial court properly received in evidence intercepted telephone communications." [6]

In *Nardone* v. *United States,* 302 U. S. 379, it was decided that § 605 of the Federal Communications Act prohibited the reception in a federal court of evidence of interstate communications obtained by federal agents by tapping telephone wires. The petitioners assert, and the

[3] c. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, § 605.

[4] Thompson's Laws of New York, 1939, Part I, p. 1909.

[5] *Valli* v. *United States,* 94 F. 2d 687; *Diamond* v. *United States,* 94 F. 2d 1012, and unreported opinion on petition for rehearing; *Sablowsky* v. *United States,* 101 F. 2d 183.

[6] 307 U. S. 621.

respondent denies, that the section bars evidence of intrastate communications similarly obtained. The Government further claims that, even if the section would otherwise bar the evidence, it does not have that effect in this case, because interception and divulgence of the messages put in evidence were "authorized by the sender" within the meaning of the section.

The section consists of four clauses separated by semicolons. The pertinent one is the second: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;". Plainly the interdiction thus pronounced is not limited to interstate and foreign communications. And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions,[7] there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.

The petitioners and the Government alike refer to the context of the critical clause, and the legislative history of the Communications Act, the former to demonstrate that all communications are protected from interception and divulgence, the latter to prove that the language of the Act must be more narrowly interpreted to cover only interstate and foreign communications.

In support of the petitioners' view it is pointed out that each clause of § 605 is complete in itself; that in the first and third clauses, which deal with divulgence of messages by persons engaged in receiving or transmitting them, the communications are specified as "any interstate or foreign communication," whereas, in the second and fourth

[7] *Shreveport Case,* 234 U. S. 342, 351, 352; *United States* v. *Louisiana,* 290 U. S. 70, 75; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 38.

clauses, which deal with interception and divulgence of communications, the phrases used are "any communication" and "such intercepted communication." It is argued that the difference in phraseology must have significance; and, in support of the assertion that the variety of expression was not due to inadvertence, the petitioners call attention to the fact that § 605 was taken over from § 27 of the Radio Act of 1927,[8] which, referring to radio messages, used uniformly, in each clause, the term "communication" or "message" and nowhere qualified the designation by the use of the phrase "in interstate or foreign commerce."

The petitioners further urge that there is good reason for the distinction in the phrasing of the clauses in § 605 since persons employed by communication companies can distinguish between interstate and intrastate messages which they handle, whereas, inasmuch as messages of both sorts pass indiscriminately over the same wires, the intercepter cannot make a similar distinction and the only practicable way to protect interstate messages from interception and divulgence is to prohibit the interception of all messages.

The Government argues that a reading of the whole section makes it plain that to give the second clause the scope contended for by the petitioners will lead to incongruities and inconsistencies in the operation of the section. We find none such as are sufficient to countervail what appears to be the plain meaning of the second clause.

The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio. We are asked to hold that if Congress

[8] Act of Feb. 23, 1927, 44 Stat. 1162, 1172.

had intended to make so drastic a change as to regulate intrastate as well as interstate communication, both the legislative history of the Act and its phraseology would so indicate, whereas there is nothing in either to emphasize any such extension of authority. We think, however, that the legislative history does not serve to explain the difference in the wording of the various clauses of § 605. In making the alterations in the phraseology of the similar section of the earlier act the Congress must have had some purpose. We cannot conclude that the change in the wording of two of the four clauses of the section was inadvertent.

The Government further contends that the Act, viewed as a whole, indicates an intent to regulate only interstate and foreign communication. The title and §§ 1 and 2, with a single exception which serves to emphasize the distinction, expressly so declare. But we think these considerations are not controlling in the construction of § 605. The Commission's regulatory powers and administrative functions have to do only with interstate and foreign communications. But § 605 delegates no function and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in § 501.[9] We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.

We come, then, to the Government's second proposition,—that disclosure of the intercepted communications was "authorized by the sender" within the meaning of the clause. It is true that one or both of the parties to each of the admitted communications attested in the manner we have indicated to the intercepted conversations. This

[9] 48 Stat. 1100, 47 U. S. C. § 501.

is said to amount to a consent to the divulgence of the subject matter and to satisfy the statute in that respect. We think the position is untenable. The Act contemplates voluntary consent and not enforced agreement to publication. The participants were ignorant of the interception of the messages and did not consent thereto. The contents of the stenographic transcripts and phonographic records were, prior to the trial, made available to Government agents and United States attorneys. This divulgence was not consented to by either of the parties to any of the telephone conversations. In the absence of such divulgence the Government would have been without the evidence embodied in the messages.

It is said, however, that, when some of the defendants pleaded guilty, elected to take the stand and to testify to the contents of the messages, they gave the authorization contemplated by the statute. We have already adverted to the method by which this supposed authorization was obtained. Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence. Messman's license to practice medicine has not been revoked; he was not required to plead to the indictment; he was paid a salary by the Government, first of $65.00 per week and later of $100.00 per week, amounting, in the total, to $3,237.12. Nelson's sentence was suspended. He was paid a salary of $50.00 per week. Berger's sentence was suspended. Spitz's sentence was suspended.

Statement of these facts is convincing that the so-called authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprized of the knowledge of their communications by the Government's representatives, and in the hope of leniency, was not that intended or described by the stat-

ute and emphasis the offensive use which may be made of intercepted messages, whether interstate or intrastate. It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony.

We hold that § 605 rendered the communications inadmissible, and that it was prejudicial error for the trial court to admit them either by permitting the defendants who turned state's evidence to read the transcripts or allowing the prosecutor to put the transcripts and phonographic records into evidence upon identification by the parties to the conversations.

We have no occasion to consider or decide the questions raised by the other objections of the petitioners to the admission of the evidence.

The judgments are reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

FORD MOTOR CO. *v.* BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

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

No. 17. Argued October 16, 17, 1939.—Decided December 11, 1939.

A state corporate franchise tax on the privilege of doing local business, measured by a charge upon such proportion of the outstanding capital stock, surplus, and undivided profits of the corporation, plus its long term obligations, as the gross receipts from its local business bear to the gross receipts of its entire business, *held* constitutional. P. 334.

The gross receipts from the local business for the year in question were approximately $34,000,000; the total gross receipts about $888,000,000; the ratio of local to total receipts, 3.85 per cent; the total taxable capital $600,000,000; the value of local assets about $3,000,000, while the value of the capital allocated to the

taxing State as a base for taxation by the statutory formula would exceed $23,000,000.
100 F. 2d 515, affirmed.

CERTIORARI, 306 U. S. 628, to review the affirmance by the court below of a judgment sustaining a state tax.

Mr. Gaius G. Gannon, with whom *Mr. Palmer Hutcheson* was on the brief, for petitioner.

Mr. Glenn R. Lewis, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *W. F. Moore,* First Assistant Attorney General, were on the brief, for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

The question for determination in this proceeding is the validity, as applied to this petitioner, of a statute of the State of Texas levying an annual franchise tax on all corporations chartered or authorized to do business in Texas, measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits of the corporation, plus its long term obligations, as the gross receipts of its Texas business bear to the total gross receipts from its entire business.

The Court of Appeals [1] affirmed the judgment of the District Court, upholding the validity of the tax. On account of an alleged probable conflict with the principles underlying certain decisions of this Court certiorari was granted.[2] The applicable provisions of the statute appear below.[3]

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[1] *Ford Motor Co.* v. *Clark,* 100 F. 2d 515.

[2] 306 U. S. 628.

[3] "Article 7084. Amount of Tax.—(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, . . . each year, pay

By Article 7057b of the Revised Civil Statutes of Texas any corporation which may be required to pay any franchise or other privilege tax may pay it under written protest and bring suit within a limited time thereafter in any court of competent jurisdiction in Travis County, Texas, against the public official charged with the duty of collecting such tax, the State Treasurer and the Attorney General, for its recovery. This suit was instituted in the District Court of the United States, Western District, Austin Division, against the state officials authorized to be made defendants. Defendants joined in a demurrer on the ground that no cause of action was set out in the petition.

Petitioner owns and operates a large manufactory of motor vehicles in Michigan and assembly plants in Texas. No parts for the automobiles produced by petitioner are manufactured at any point within Texas. The manufactured parts are shipped to petitioner's assembly plants in Texas and are there assembled. The assembled vehicles are sold in intrastate commerce to various dealers who in turn sell the vehicles to the public. A relatively small number of completed vehicles are shipped into Texas and later sold in intrastate commerce along with large quantities of motor parts and accessories. Without undertaking to be precise, the gross receipts from business done in Texas for the year in question amounted to approximately $34,000,000. Petitioner's total gross re-

. . . a franchise tax . . ., based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars ($1,000.00) or fractional part thereof; One Dollar ($1.00) to One Million Dollars ($1,000,000.00), sixty cents (60¢) . . ."

ceipts were about $888,000,000. The ratio of Texas receipts to total receipts was 3.85+ per cent. Petitioner's total taxable capital was $600,000,000+. The value of all assets located in Texas was somewhat over $3,000,000, while the value of the capital allocated to Texas as a base for taxation by the statutory formula would be in excess of $23,000,000.

For the taxable year beginning May 1, 1936, a franchise tax was tendered Texas in the sum of $1,224, computed on the actual net book value of all of petitioner's assets in Texas. On demand and under protest an additional franchise tax and penalty was paid in the sum of $7,529, based on the allocation to Texas of capital as calculated by the statutory formula. This suit was brought to recover the alleged unlawful exaction.

This exaction, petitioner pleads, is calculated from a formula that results in the levy of a tax on assets used in petitioner's interstate business in violation of Article I, § 8, of the Constitution. It is further alleged that the tax operates to deprive petitioner of its property without due process of law in violation of the Fourteenth Amendment because it must pay a tax on property neither located nor used within the State of Texas and on activities beyond the borders of Texas.

The statute calls the excise a franchise tax. It is obviously payment for the privilege of carrying on business in Texas.[4] There is no question but that the State has the power to make a charge against domestic or foreign corporations for the opportunity to transact this intrastate business.[5] The exploitation by foreign corporations

[4] *Investment Securities Co.* v. *Meharg,* 115 Texas 441; 282 S. W. 802; *United North & South Development Co.* v. *Heath,* 78 S. W. 2d 650 (Tex. Civ. App.).

[5] *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, 21; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Matson Nav. Co.* v. *State Board,* 297 U. S. 441; *Western Live Stock* v. *Bureau,* 303 U. S. 250; *Coverdale* v. *Pipe Line Co.,* 303 U. S. 604, 608.

of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated.

The motor vehicles for the marketing of which the privilege is used are concededly sold in intrastate commerce. The tax here levied is not for the privilege of engaging in any transaction across state lines or activity carried on in another state. It is much like that upheld in *Bass, Ratcliff & Gretton* v. *Tax Commission.*[6] In that case a tax was laid for the privilege of doing business in New York determined, for corporations which did not transact all their business within that state, by a percentage of that part of the net income which is calculated by the proportion which the aggregate of specified classes of property within the state bears to all the property of the corporation.[7]

In *National Leather Co.* v. *Massachusetts*[8] this Court upheld a tax for the privilege of doing business in a state by a corporation of an amount "equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth." This excess was defined as "such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets, both real and personal, employed in any business within the commonwealth . . . bears to the value of the total assets of the corporation." The National Leather Company, a Maine corporation, owned the stock of two

[6] 266 U. S. 271.

[7] Cf. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120.

[8] 277 U. S. 413.

other Maine corporations. Their plants were in Massachusetts. On the assumption that the situs of the stock followed the domicile of the owner, the taxpayer challenged the inclusion of the Maine stock in the basis for the local tax. This Court held that Massachusetts was free to use the stock for the calculation of the local tax. Similar methods of determining privilege taxes were left to the states in *International Shoe Co.* v. *Shartel*[9] and *New York* v. *Latrobe*.[10] The Constitution recognizes the dual interests of the national and state governments and permits taxes for local privileges upon the intrastate activities of the farflung enterprises which gain large benefits from the nationwide market, protected by the commerce clause. We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula.

In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located.[11] The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. This was recognized by this Court in *Atlantic &*

[9] 279 U. S. 429.

[10] 279 U. S. 421.

[11] *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, 29; cf. *Kansas City, F. S. & M. Ry. Co.* v. *Botkin*, 240 U. S. 227, 235.

Pacific Tea Co. v. *Grosjean* [12] where an occupation or license tax on chain stores was graduated "on the number of stores or mercantile establishments" included under the same management "whether operated in this State or not." We said: "The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization." [13] This same rule applies here. *James* v. *Dravo Contracting Co.*[14] contains nothing contrary to this view. The statute under consideration there levied a privilege tax "equal to two per cent. of the gross income of the business." In so far as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute.

Affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment complained of should be reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

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[12] 301 U. S. 412, 424–425.
[13] 301 U. S. 425.
[14] 302 U. S. 134, 139.

NARDONE ET AL. *v.* UNITED STATES.

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

No. 240. Argued November 14, 1939.—Decided December 11, 1939.

1. In a prosecution in a federal court, evidence procured by tapping wires in violation of the Communications Act of 1934 is inadmissible. This applies not only to the intercepted conversations themselves but also, by implication, to evidence procured through the use of knowledge gained from such conversations. P. 339.
2. The burden is on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. P. 341.
3. Once that is established, the trial judge must give opportunity to the accused to prove that a substantial portion of the case against him was the result of the illicit wire-tapping. *Id.*
4. Claims that this taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. P. 342.

106 F. 2d 41, reversed.

CERTIORARI, *post*, p. 539, to review the affirmance of convictions in the District Court under an indictment for frauds on revenue.

Mr. David V. Cahill for Frank Carmine Nardone; *Mr. Jesse Climenko,* with whom *Mr. J. Bertram Wegman* was on the brief, for Nathan W. Hoffman; and *Mr. Louis Halle* for Robert Gottfried,—petitioners.

Assistant Attorney General Rogge, with whom *Solicitor General Jackson* and *Messrs. William W. Barron, George F. Kneip, Louis B. Schwartz,* and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We are called upon for the second time to review affirmance by the Circuit Court of Appeals for the Second Circuit of petitioners' convictions under an indictment for frauds on the revenue. In *Nardone* v. *United States,* 302 U. S. 379, this Court reversed the convictions on the first trial because they were procured by evidence secured in violation of § 605 of the Communications Act of 1934 (c. 652, 48 Stat. 1064, 1103; 47 U. S. C., § 605). For details of the facts reference is made to that case. Suffice it here to say that this evidence consisted of intercepted telephone messages, constituting "a vital part of the prosecution's proof."

Conviction followed a new trial, and "the main question" on the appeal below is the only question open here—namely, "whether the [trial] judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information" which *Nardone* v. *United States, supra,* found to have vitiated the original conviction. Though candidly doubtful of the result it reached, the Circuit Court of Appeals limited the scope of § 605 to the precise circumstances before this Court in the first *Nardone* case, and ruled that "Congress had not also made incompetent testimony which had become accessible by the use of unlawful 'taps', for to divulge that information was not to divulge an intercepted telephone talk." 106 F. 2d 41.

The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no § 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversations, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in

the administration of federal criminal justice, and we therefore brought the case here for disposition.

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone* v. *United States, supra.* That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty." 302 U. S. 379, 383. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." What was said in a different context in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, is pertinent here: "The essence of a pro-

vision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." See *Gouled* v. *United States,* 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.

Here, as in the *Silverthorne* case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U. S. 385, 392.

In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtain-

ing testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. So to read a Congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

We have dealt with this case on the basic issue tendered by the Circuit Court of Appeals and have not indulged in a finicking appraisal of the record, either as to the issue of the time limit of the proposed inquiry into the use to which the Government had put its illicit practices, or as to the existence of independent sources for the Government's proof. Since the Circuit Court of Appeals did

not question its timeliness, we shall not. And the hostility of the trial court to the whole scope of the inquiry reflected his own accord with the rule of law by which the Circuit Court of Appeals sustained him, and which we find erroneous.

The judgment must be reversed and remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the Circuit Court of Appeals reached the proper conclusion upon reasons there adequately stated and its judgment should be affirmed.

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

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, KANSAS, *v.* UNITED STATES.

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

No. 14. Argued October 16, 1939.—Decided December 18, 1939.

An Indian allotment was by treaty stipulation and provisions of a trust patent, issued under the General Allotment Act, exempt from taxation so long as the United States should hold it in trust. Over the Indian's objection, the Secretary of the Interior issued to the Indian a patent in fee simple, which later, after long and unexcused delay, he canceled, by authority of an Act of Congress. In the meantime the fee patent had been registered in the county, and the county authorities, in reliance upon it, had collected taxes upon the land. Thereafter, the United States in an action on behalf of the Indian recovered a judgment against the county for the amount of the tax payments with interest. *Held*:

1. The question whether interest should have been allowed is not determined by a law of the State precluding recovery of interest from a county upon taxes illegally collected. P. 349.

2. Congress not having specifically defined the relief to be granted for loss suffered through denial of the tax exemption, remedial details are left to judicial implications; and, since the origin of the right to be enforced is the treaty, whatever rule may be fashioned as to interest is ultimately attributable to the Constitution, treaties and statutes of the United States. P. 349.

3. In determining the question of interest here presented, the Court is guided by considerations of equity and of public convenience; and, conformably to those considerations, the state law of interest can be respected without impinging upon the exemption commanded by the treaty. Pp. 350, 352.

4. It is a general principle that, in the absence of explicit congressional policy cutting across state interests, beneficiaries of federal rights are not to have a preferred position over other aggrieved taxpayers in their relation with the States or their political subdivisions. P. 352.

5. In governmental actions based upon quasi-contractual obligations interest (in the absence of statutory direction) is not recovered according to a rigid theory of compensation for money withheld, but is given or denied in response to considerations of fairness and equity. P. 352.

6. In the circumstances of this case, whatever may be the duty of the county to repay the taxes which there was every practical justification for collecting at the time, the county can not in fairness be called upon to pay interest for the use of the money. P. 353.

100 F. 2d 929, reversed in part.

CERTIORARI, 306 U. S. 629, to review the affirmance of a recovery of county taxes and interest.

Mr. O. B. Eidson, with whom *Mr. Thomas M. Lillard* was on the brief, for petitioner.

A county as a governmental agency is not liable for interest in the absence of a positive statute so requiring or an express agreement to pay. *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *North American Transp. & T. Co.,* 253 U. S. 330–336; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299–304; *Glacier County* v. *United States,* 99 F. 2d 733; *United States* v.

Lewis County, 95 F. 2d 236; *United States* v. *Nez Perce County,* 95 F. 2d 232, 238; *Jackson County* v. *Kaul,* 77 Kan. 715–717; *Salt House* v. *McPherson Co.,* 115 Kan. 668; *School District* v. *County Commissioners,* 127 Kan. 292; *Kittridge* v. *Boyde,* 137 Kan. 241–243.

The Government may not, under the facts of this case, demand interest on behalf of an Indian allottee as damages. *United States* v. *Nez Perce County, supra; Glacier County* v. *United States, supra; United States* v. *Board of County Commissioners,* 6 F. Supp. 401; *United States* v. *Board of County Commissioners,* 13 F. Supp. 641.

If there was any mistake in issuing the patent, or if there was any laches in attempting to secure a refund of the taxes, it was on the part of the Government and the government officials. The county officials were fully warranted in thinking that the land was subject to taxation from the time the patent was issued in 1918 up until the time the Government, acting under the long subsequent Act of Congress, cancelled it. The sole basis upon which the authorities hold that such taxes must be refunded to the Indian allottee is that they were collected during the time of the existence of a patent to the allottee which had been issued without his or her request. The county was fully warranted in assuming that the Government, the trustee of the rights of the Indian allottee, had taken all essential steps prior to the time of the issuance of the patent. For the Government now to come back on the county long years after the taxes had been collected, and speaking on behalf of the allottee, attempt to collect interest on payments of taxes which had been assessed in good faith by the county in reliance upon a fee simple patent issued by the Government to the allottee, is to place an unwarrantable burden on the county.

There being no statute providing for the recovery of interest, the decisions of the Kansas court that interest is not recoverable against the county should be followed.

Billings v. *United States,* 232 U. S. 261, 287; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 386; *Procter & Gamble Distributing Co.* v. *Sherman,* 2 F. 2d 165; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78.

Even under the federal court rule as to liability for interest, there is no liability in the present case. *Billings* v. *United States,* 232 U. S. 261, 286.

Public officers are presumed to do their duty, and there is a further presumption that all necessary preliminary steps to the issuance of a patent have been taken. *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397; *Bouldin* v. *Massie,* 7 Wheat. 122; *United States* v. *Peterson,* 34 F. 2d 245; *United States* v. *Porter Fuel Co.,* 247 F. 769. It was therefore proper for any one to assume that the patent had been regularly issued.

Mr. Raymond T. Nagle, with whom *Solicitor General Jackson* and *Assistant Attorney General Littell* were on the brief, for the United States.

The exemption is a federal right and its scope is determined by federal law. *Carpenter* v. *Shaw,* 280 U. S. 363, 367; *United States* v. *Rickert,* 188 U. S. 432.

The exemption should be construed broadly in favor of the allottee. *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116; *Carpenter* v. *Shaw, supra.* The Indian is entitled to an outright exemption from enforced contributions for the maintenance of local governments. *Choate* v. *Trapp,* 224 U. S. 665; cf. *United States* v. *Osage County,* 251 U. S. 128, 133. This clearly precludes the existence of any right in terms to demand from the allottee the uncompensated use of her money or property for the support of the county. *Carpenter* v. *Shaw, supra; Ward* v. *Love County,* 253 U. S. 17. The claim of the allottee for interest is merely an assertion of the right to be made whole for the enforced use of her money in violation of the exemption.

Full restitution requires the payment of interest. *Billings* v. *United States,* 232 U. S. 261, 284–288. The doctrine that interest does not run against the sovereign has no bearing upon the scope of the exemption from local taxes conferred by Congress upon the allottee. This Court has, without discussion, affirmed or reinstated judgments which allowed interest against a county on taxes wrongfully collected from Indian allottees. *Ward* v. *Love County, supra; McCurdy* v. *United States,* 264 U. S. 484.

Federal courts may apply established federal principles where interest is claimed. *Concordia Ins. Co.* v. *School Dist.,* 282 U. S. 545, 551. The state law, if contrary, must yield. The power of Congress over the Indians in Kansas is plenary. *The Kansas Indians,* 5 Wall. 737, 755–756; *Sage* v. *Hampe,* 235 U. S. 99, 106. Cf. *United States* v. *Rickert,* 188 U. S. 432; *Bunch* v. *Cole,* 263 U. S. 250; *Carpenter* v. *Shaw, supra.* The conflict need not be direct or immediate; a possible interference with the policy of the federal law may render the state doctrine inapplicable. *Sage* v. *Hampe, supra;* cf. *Tullock* v. *Mulvane,* 184 U. S. 497. A suit by the United States on behalf of its Indian wards can not be defeated by either substantive or procedural rules of state law. *Carpenter* v. *Shaw, supra; Davis* v. *Wechsler,* 263 U. S. 22, 24. Neither fiscal arrangements nor local doctrines of estoppel bind the United States suing on behalf of its ward. *Cramer* v. *United States,* 261 U. S. 219, 234; *Ward* v. *Love County, supra.* There can be no reliance upon immunity to suit. *United States* v. *Minnesota,* 270 U. S. 181; *Chicot County* v. *Sherwood,* 148 U. S. 529.

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review an affirmance by the Circuit Court of Appeals for the Tenth Circuit of a ruling by

the District Court for the District of Kansas allowing interest in a suit for the recovery of taxes by the United States on behalf of an Indian under circumstances presently to be stated. 100 F. 2d 929. We granted *certiorari* because of conflicting views between the Ninth and the Tenth Circuits. See *United States* v. *Nez Perce County, Idaho,* 95 F. 2d 232.[1]

M-Ko-Quah-Wah is a full-blooded Pottawatomie Indian. In her behalf the United States asserts whatever rights she may have flowing from the Treaty of November 15, 1861, between the United States and the Pottawatomie nation of Indians, 12 Stat. 1191, and the legislation in aid of it. This Treaty made lands held by the United States in trust for the Pottawatomie Indians "exempt from levy, taxation, or sale . . .," "until otherwise provided by law. . . ." The land which gave rise to this controversy, situated in Jackson County, Kansas, was patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. Two ten-year extensions were made by Executive Order, one, in 1918 and the other in 1928; and by the Act of June 18, 1934, the existing trust periods were indefinitely extended by Congress. 48 Stat. 984.

In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding trust patent and in its place issued a fee simple patent. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its regular property taxes. It continued to do so as long as

[1] This case has since been followed by the same court in *United States* v. *Lewis County, Idaho,* 95 F. 2d 236, and *Glacier County, Mont.,* v. *United States,* 99 F. 2d 733.

this fee simple patent was left undisturbed by the United States. In 1927 Congress authorized the Secretary of the Interior to cancel fee simple patents theretofore issued over the objection of allottees. In 1935 the patent for the land in controversy was cancelled, and in the next year proceedings were begun by the United States as guardian of M-Ko-Quah-Wah to recover the taxes which Jackson County had collected, amounting to $1,966.13, with interest from the respective dates of payment. The District Court allowed interest at 6%, and a verdict for principal and interest, amounting to $3,277.49, was returned by the jury. A judgment upon this verdict was affirmed by the Circuit Court of Appeals. Jackson County does not here contest its liability for the principal, but challenges the Government's right to interest prior to judgment.

The issue is uncontrolled by any formal expression of the will of Congress. The United States urges that we must be indifferent to the law of the state pertaining to the recovery of taxes improperly levied on land within it. Jackson County, on the other hand, urges that the law of Kansas controls. It is settled doctrine there that a taxpayer may not recover from a county interest upon taxes wrongfully collected. *Jackson County* v. *Kaul,* 77 Kan. 715; 96 P. 45.

We deem neither the juristic theory urged by the Government nor that of Jackson County entirely appropriate for the solution of our problem. The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within Congressional control. But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption. It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately

attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas. Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. And so the concrete problem is to determine the materials out of which the judicial rule regarding interest as an incident to the main remedy should be formulated. In ordinary suits where the Government seeks, as between itself and a private litigant, to enforce a money claim ultimately derived from a federal law, thus implying a wish of Congress to collect what it deemed fairly owing according to the traditional notions of Anglo-American law, this Court has chosen that rule as to interest which comports best with general notions of equity. *United States* v. *Sanborn,* 135 U. S. 271, 281; *Billings* v. *United States,* 232 U. S. 261. Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for judicial law-making.

But the present case introduces an important factor not present in former decisions. The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory.

Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skilful its legal manipulations. *United States* v. *Rickert,* 188 U. S. 432. Cf. *Bunch* v. *Cole,* 263 U. S. 250. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. *United States* v. *Osage County,* 251 U. S. 128; *Ward* v. *Love County,* 253 U. S. 17. Nor may the right to recover taxes

illegally collected from Indians be unduly circumscribed by state law. *Carpenter* v. *Shaw,* 280 U. S. 363. Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. *United States* v. *Minnesota,* 270 U. S. 181. Cf. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.

But the recovery of interest in inter-governmental litigation has no such roots in history. Indeed, liability for interest is of relatively recent origin and the rationale of its recognition or denial is not always clear. That it is not a congenital rule in our law is indicated by its denial in *United States* v. *North Carolina,* 136 U. S. 211, on grounds of "public convenience." Since Congress has, in the legislation implementing the Indians' tax immunity, remained silent as to recovery of interest, we need not presume that it has impliedly fixed liability for interest in a suit like the present.

Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone* v. *White,* 301 U. S. 532, 534, Congress has left us free to take into account appropriate considerations of "public convenience." Cf. *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. See, e. g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were,

as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown* v. *United States,* 263 U. S. 78; *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate.

Assuming, however, that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States* v. *Sanborn,* 135 U. S. 271, 281; *Billings* v. *United States,* 232 U. S. 261.

Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not

call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

Such is this Court's doctrine regarding the imposition of interest in cases where this Court has fashioned its own doctrine. If it be said that the default of the United States should not be charged against its Indian wards, a choice has to be made between equally innocent victims of official neglect from 1918 until 1936 in the administration of the Indian law. The loss of interest to the United States because of the conduct of its officials in the *Sanborn* and *Billings* cases, *supra,* had to be borne by the innocent public. We think as to interest here, the loss should remain where it has fallen. If thereby Indians are out of pocket, they should not be made whole by putting Jackson County unfairly out of pocket. The appeal for relief must be made elsewhere.

The judgment below must accordingly be modified, and the case is remanded for further proceedings in accordance with this opinion.

Judgment modified.

MR. JUSTICE MCREYNOLDS concurs in the result.

Opinion of MR. JUSTICE BLACK.

Congress has traditionally treated the Indian wards of the Nation with particular solicitude,[1] but has also gradually evolved a policy looking to their eventual absorption into the general body of citizenry.[2] This policy has

[1] *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564–6, 568; *United States* v. *Pelican,* 232 U. S. 442, 450.

[2] *Chippewa Indians* v. *United States,* 307 U. S. 1, 4; see *Stuart* v. *United States,* 18 Wall. 84, 87; *Matter of Heff,* 197 U. S. 488, 497–503; *Lane* v. *Mickadiet,* 241 U. S. 201, 210; *Dickson* v. *Luck Land Co.,* 242 U. S. 371, 375; *McCurdy* v. *United States,* 246 U. S. 263, 269.

progressively subjected Indians to the laws under which all other citizens must live in the Indians' States of residence, if not in conflict with specific protective measures of Congress.[3] Here, in the exercise of its plenary authority, Congress by treaty exempted the lands of the Pottawatomies from taxation. It could have by stipulation granted the additional right to recover interest on any taxes collected in violation of the exemption; but it did not. The failure of Congress to stipulate that a State—as here—must pay interest to an Indian when the State law permits interest to no one,[4] is entirely consistent with the congressional policy of steadily extending the operation of the States' laws over their resident Indians. Congress—with exclusive plenary power to legislate concerning the Indians—has not provided for recovery of interest from Kansas, and the courts have no constitutional power to create the right.

That Congress contented itself with the creation of the right to be free from taxation—as distinguished from a right to interest in a suit for refund—is emphasized by the conclusion which would be inescapable were this a suit against the United States for violation of the exemption here conceded to be binding on it.[5] Without more,[6] Congress would then—even on the basis of this concession—be deemed to have refused to create the separate right to recover interest.[7]

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[3] See *Matter of Heff, supra; La Motte* v. *United States,* 254 U. S. 570, 579, 580; *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488, 498; *Larkin* v. *Paugh,* 276 U. S. 431, 438–9; *United States* v. *McGowan,* 302 U. S. 535, 539.

[4] *Jackson County* v. *Kaul,* 77 Kan. 717; 96 P. 45.

[5] The Government bases its concession on *Choate* v. *Trapp,* 224 U. S. 665. But see *The Cherokee Tobacco,* 11 Wall. 616; *Ward* v. *Race Horse,* 163 U. S. 504, 511; *Lone Wolf* v. *Hitchcock, supra,* 566.

[6] Cf. 26 U. S. C. 1671 (a).

[7] *Angarica* v. *Bayard,* 127 U. S. 251, 260; *United States* v. *North American Co.,* 253 U. S. 330, 336; *Smythe* v. *United States,* 302 U. S. 329, 353. Cf. *United States* v. *North Carolina,* 136 U. S. 211.

Because the laws of Kansas deny interest on tax refunds, I concur in the modification of the judgment below.[8]

MR. JUSTICE DOUGLAS concurs in this opinion.

GRIFFITHS *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 49. Argued December 5, 1939.—Decided December 18, 1939.

A taxpayer cannot escape or postpone the income tax on the profit derived from a sale of his stock by interposing as vendor in the transaction a corporation formed for the purpose and wholly controlled by himself, which, in form, receives from him a conveyance of the shares, transfers them to the purchaser, receives the purchaser's money and agrees to pay it over to the taxpayer in annual instalments. P. 357.

103 F. 2d 110, affirmed.

CERTIORARI, *post,* p. 531, to review a decision which reversed an order of the Board of Tax Appeals, 37 B. T. A. 314, overruling a deficiency income tax assessment.

Mr. Herman A. Fischer, with whom *Mr. Delbert A. Clithero* was on the brief, for petitioner.

Mr. Arnold Raum, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Joseph M. Jones* were on the brief, for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case is here to review a decision of the Circuit Court of Appeals for the Seventh Circuit, 103 F. 2d 110,

[8] Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

reversing an order of the Board of Tax Appeals, 37 B. T. A. 314, which had overruled a deficiency assessment by the Commissioner of Internal Revenue in petitioner's income tax return for 1933. We granted *certiorari, post,* p. 531, because of an alleged conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *Smith* v. *Higgins,* 102 F. 2d 456; *post,* p. 473.

The facts are undisputed, and, for purposes of our decision, may be thus abridged: In 1926 Griffiths, the petitioner, paid one Lay $100,000 for some stock. The investment was unprofitable, and the upshot of a complicated series of transactions was allowance to Griffiths by the Commissioner of a deductible loss of $92,500 for the year 1931 resulting from a sale of the stock by Griffiths to a family corporation. Thereafter, in 1932, Griffiths got wind of the fact that Lay had defrauded him in the 1926 sale. Negotiations were begun for a settlement of Griffiths' claim against Lay, and by January 1933, Griffiths' lawyer had devised an arrangement for such a settlement. The gist of the arrangement was this: Griffiths was to re-acquire the shares, convey them to a corporation newly created for the purpose of furthering the scheme and wholly controlled by Griffiths, which in turn was to transfer the stock back to Lay for $100,000 to be paid by him, and that sum was to be paid over by the corporation to Griffiths in annual installments for forty years, with interest on the deferred payments.[1] The

[1] Of the total sum paid, $15,000 was to be applied by the corporation in payment of a personal indebtedness owed by Griffiths. This sum, of course, was clearly income to petitioner. The remainder was to be paid in installments by the corporation to Griffiths. Petitioner contends that these installments alone are taxable to him as they are paid, under the provisions of § 44 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

essentials of this scheme were carried out. Its purpose—to disguise by intervening elaborations what in fact was a rescission of the original purchase by Griffiths for $100,000—was made more manifest by these facts: Griffiths personally re-acquired and transferred the shares to Lay without revealing the existence of the new corporation, gave Lay a personal release of all claims against him, and personally received from Lay the $100,000 which he then turned over to the corporation.

On these findings the Commissioner ruled that Griffiths, having been allowed a deduction for loss attributable to the stock purchased from Lay and having now recouped that loss through settlement of his claim against Lay, was subject to tax for the amount of the settlement in 1933. We think the Commissioner was right, and that the Circuit Court of Appeals properly reversed the Board of Tax Appeals.

The facts leave little scope for legal explication. Griffiths had a claim for fraud against Lay which, when satisfied, wiped out the loss for which he had received an earlier deduction. Had satisfaction of the claim come to him without any conduit, it would have indisputably been his income. The claim having been recognized by Lay and cast into a form realizable by Griffiths, a lawyer's ingenuity devised a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale from Griffiths to Lay and the passage of money from Lay to Griffiths. That was the crux of the business to Griffiths, and that is the crux of the business to us.

We cannot too often reiterate that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers,* 281 U. S. 376, 378. And it makes no difference that such

"command" may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency. Cf. *Gregory* v. *Helvering*, 293 U. S. 465. "A given result at the end of a straight path," this Court said in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613, "is not made a different result because reached by following a devious path." Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed, particularly in the provisions of a tax law like those governing installment sales in § 44 of the Revenue Act of 1932. Taxes cannot be escaped "by anticipatory arrangements and contracts however skilfully devised . . . by which the fruits are attributed to a different tree from that on which they grew." *Lucas* v. *Earl*, 281 U. S. 111, 115. What Lay gave, Griffiths in reality got, and on that he must be taxed.

The judgment is

Affirmed.

BUCKSTAFF BATH HOUSE CO. *v.* McKINLEY, COMMISSIONER OF THE DEPARTMENT OF LABOR OF ARKANSAS, ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 201. Submitted December 4, 1939.—Decided December 18, 1939.

An Arkansas corporation, organized for profit and having its only place of business within the Government Reservation known as Hot Springs National Park, maintained and operated, under a long term lease from the Secretary of the Interior, a bath house, which it erected and equipped. The operation and use of the bath house facilities were subject to regulations promulgated by the Department of the Interior. The corporation had more than eight persons in its employ. *Held:*

1. The corporation was not an "instrumentality of the United States" within the meaning of the federal Social Security Act;

and was not, under § 907, exempt from the tax imposed by that Act. P. 362.

2. The corporation was subject to the tax imposed by the Arkansas Unemployment Compensation Law—a law reciprocal to, and integrated with, the federal Social Security Act. P. 363.

3. That Arkansas was authorized by Congress to impose the tax is implied from the fact that the corporation is subject to the federal tax and from the design of the federal Act to provide a coöperative system of state and federal taxation for social security, in which the States were in effect invited to tax the same classes of employers as are taxed under the federal Act. P. 364.

In the absence of any declaration to the contrary, it is a fair presumption *semble* that the purpose of Congress was to have the state law closely coterminous with its own.

4. The authority of Arkansas to impose the tax in question is merely an extension of the power to tax as personal property all structures and other property in private ownership on the Reservation, conferred by the Act of March 3, 1891. Pp. 364–365.

198 Ark. 91; 127 S. W. 2d 802, affirmed.

CERTIORARI, *post*, p. 508, to review the affirmance by the State Supreme Court of a decree of the lower state court which sustained a demurrer to and dismissed a bill to enjoin the collection of a tax imposed under the Arkansas Unemployment Compensation Law.

Mr. Terrell Marshall submitted for petitioner.

Mr. W. L. Pope submitted for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 901 of the Social Security Act (49 Stat. 620) levies an excise tax, equal to specified percentages of total wages paid, on "every employer" of eight or more persons with respect to their "employment." By § 902 the taxpayer may credit against this tax the amount of contributions paid by him into an unemployment fund under a state law, such credit however not to exceed 90 percent of the tax and to be allowed only for contributions made

under the laws of states approved and certified by the Social Security Board in accordance with the standards prescribed in § 903. By § 907 the term "employment" is defined to mean "any service, of whatever nature, performed within the United States by an employee for his employer" except, *inter alia,* service performed "in the employ of the United States Government or of an instrumentality of the United States."

Petitioner is an Arkansas corporation, organized for profit and with its only place of business situated on the United States Government Reservation known as Hot Springs National Park. It operates a bath house, which it erected and equipped, under a long term lease from the Secretary of the Interior. By the terms of that lease the operation and use of the bath house facilities are subject to certain control by the Department of the Interior, which in the main relate to the number of bath tubs which may be used, the charges to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein.

Respondents are officials of the State of Arkansas charged with the duty of enforcement of the Arkansas Unemployment Compensation Law,[1] an act reciprocal to, and integrated with, the Social Security Act.[2] Pursuant to that act respondents sought to collect from petitioner as an employer the required contributions for the calendar year 1937. Petitioner paid into the Treasury of the United States the tax required by the Social Security Act

[1] Act No. 155, approved February 26, 1937; Pope's Digest, §§ 8549 *et seq.*

[2] The Arkansas Unemployment Compensation Law was certified and approved by the Social Security Board under § 903 on March 9, 1937. See Third Annual Report of the Social Security Board, 1938, p. 175.

for that period. But it refused to pay the state tax and sued in the state court to enjoin its collection on the grounds, *inter alia,* that it is an instrumentality of the United States and that certain acts of Congress and statutes of Arkansas exempt it from such taxation. The Supreme Court of Arkansas affirmed a decree sustaining a demurrer to the bill and dismissing it, on the grounds that the Arkansas statute was applicable to petitioner and that, on construction of the acts in question, petitioner did not have the claimed immunity. We granted certiorari because that decision was asserted to be repugnant to the acts vesting exclusive juridiction over the Hot Springs Reservation in the United States.

Petitioner's contention here, as below, is based primarily on the Act of Congress of March 3, 1891 (26 Stat. 842) whereby the consent of the United States was given "for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation." [3] Petitioner points

[3] The cession act of Arkansas was Act No. 30, approved February 21, 1903. It "ceded and granted" to the United States "exclusive jurisdiction" over the area in question "to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs reservation accorded the State by the Act of Congress approved March 3, 1901, is hereby reserved to the State of Arkansas." This cession was accepted by the Act of Congress of April 20, 1904 (33 Stat. 187). As to Arkansas' asserted right to tax property in the reservation prior to the Act of Congress of March 3, 1891, see *Ex parte Gaines,* 56 Ark. 227.

For earlier Acts of Congress dealing with the rights of the United States to the Hot Springs Reservation see 4 Stat. 505; 20 Stat. 258. The early history of conflicting claims to these hot springs is reviewed

out that the tax imposed by the Social Security Act against which appropriate credits may be made for contributions under state laws is laid, as stated by this Court in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 578, "as a duty, an impost or an excise upon the relation of employment"; and that as held by the Supreme Court of Arkansas the tax in question is "not a tax on personal property; nor is it, in any sense, a property tax." Therefore, petitioner concludes that the United States did not confer on the state of Arkansas the power to impose such a tax but retains its sovereign jurisdiction in that regard since the power of Arkansas to tax was limited to the enumerated property taxes.

We agree with the Supreme Court of Arkansas that the state had jurisdiction to impose the tax in question.

There can be no question but that petitioner is liable for the tax levied by § 901 of the Social Security Act, unless it is exempted by that portion of § 907 which relieves "an instrumentality of the United States" from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner "is engaged in its own behalf, not the government's, in the conduct of a private business for profit." See *Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See *Broad River Power*

in the *Hot Springs Cases,* 92 U. S. 698. See also *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439.

Co. v. *Query,* 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *Federal Compress & Warehouse Co.* v. *McLean, supra.* That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act.

That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a coöperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in *Steward Machine Co.* v. *Davis, supra,* p. 588, that Act was an attempt to find a method by which the states and the federal government could "work together to a common end." Prior thereto many states had "held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors," *id.,* p. 588. The Act was designed therefore to operate in a dual fashion—state laws were to be integrated with the federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the coöperative venture is clear. The fact that it would operate though the states did not come in does not alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue

in this case. For certainly, under the coördinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coördinated and integrated dual system would not materialize.

Hence, it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the federal Act. Thus, the exclusion of federal instrumentalities from the scope of the federal Act, and hence from the complementary state systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation. Had it been desired to exempt the equally well known class, of which petitioner is a member, so as to save it from reciprocal state systems, it would seem that an equally clear exception would have been made.

Whether the same result would follow in case the cession act had absolutely forbidden a state to impose any tax on petitioner we need not decide. For here Arkansas did have a prior express power to tax petitioner's property. The implied authority which we here find to

exist is therefore used not to override an earlier express authority but merely to extend it to a degree. For in final analysis the Arkansas tax does have some relation to the use of petitioner's property. The existence of the implied authority does not therefore do violence to the earlier statutory grant.

Affirmed.

MR. JUSTICE REED concurs on the ground that the Act of Congress of March 3, 1891 (26 Stat. 842) in which the United States consented "for the taxation . . . as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," should be interpreted to give consent to the application of the Arkansas Unemployment Compensation Law. *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 532, 534.

HELIS *v.* WARD, EXECUTRIX, ET AL.

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

No. 68. Argued December 6, 1939.—Decided December 18, 1939.

1. In a suit in equity for specific performance of a contract to purchase an oil lease, the issue was whether a greater sum than had been paid was due, and the decisive question was whether a particular well would produce 3,000 barrels of oil per day. An umpire's report, based on tests made in accordance with the contract, and admitted in evidence without objection, showed that the well would not produce that quantity of oil through a ⅜ inch choke, but would produce in excess of that quantity on open flow. Interpreting the contract to mean that the test was as to the quantity the well would produce through a ⅜ inch choke, the District Court gave judgment for the defendant. The Circuit Court of Appeals, interpreting the contract to mean that the test was what the well would produce on open flow, reversed the District Court and directed entry of judgment for the plaintiff. *Held*, that the failure of the Circuit Court of Appeals to remand the case for a

new trial did not deprive the defendant of his day in court in violation of the Fifth Amendment. *Saunders* v. *Shaw,* 244 U. S. 317, distinguished. P. 369.

2. The defendant is not entitled here to urge that a new trial should be allowed in order that he may attack the competency and accuracy of the umpire's report, when that point was not a ground either of his petition to the Circuit Court of Appeals for rehearing or of his petition here for certiorari. P. 369.
3. Review by certiorari in this Court is confined to the grounds upon which the writ was sought or granted. P. 370.

102 F. 2d 519, affirmed.

CERTIORARI, *post,* p. 537, to review the reversal of a judgment, 20 F. Supp. 514, dismissing a suit upon a contract.

Mr. Eugene D. Saunders for petitioner.

When a litigant objects to the introduction of evidence and the objection is sustained he may rely upon such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

The real issue in this case has never been litigated. The trial judge excluded all evidence except that relating to a particular point or issue, and that point or issue has been declared by the appellate court to be immaterial to the determination of the controversy. See *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 256, 267; *Saunders* v. *Shaw,* 244 U. S. 317; *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518; *United States* v. *Rio Grande Dam & Irrigation Co.,* 184 U. S. 416; *Willing* v. *Binenstock,* 302 U. S. 272; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Fifth Third National Bank* v. *Johnson,* 219 F. 89; *Columbus Gas & Fuel Co.* v. *City of Columbus,* 55 F. 2d

56; *Faulks* v. *Schrider,* 90 F. 2d 370; *Hughes* v. *Reed,* 46 F. 2d 435; *Wilson* v. *Spencer,* 261 F. 357; *Underwood* v. *Commissioner,* 56 F. 2d 67; *Finefrock* v. *Kenova Mine Car Co.,* 22 F. 2d 627; *Hamilton Gas Co.* v. *Watters,* 75 F. 2d 176.

Petitioner believes he has an adequate defense and is confident that a retrial of this cause on the theory announced by the Circuit Court of Appeals will result in judgment being again rendered in his favor.

The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer and the written report of an employee of respondents. Neither of these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading. Both reports would, however, have been relevant because of dealing in part with tests which the trial court ruled to be properly the subject of proof.

If these reports had been offered in evidence and if their contents had been ruled relevant to the issues petitioner would have shown that they were worthless in that the conclusions or opinions expressed therein were founded on errors apparent upon the face of the reports.

Mr. William N. Bonner, with whom *Mr. W. D. Gordon* was on the brief, for respondents.

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit for specific performance of a contract to purchase a mineral lease brought by respondents, as vendors. The contract price was to be determined pursuant to a formula based upon the production of certain designated wells on the property. That price was fixed at $300,000 "if the average daily production of said wells for a period of fifteen days after completion is less than

3,000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells." In case the production, calculated in that manner, was more than 3,000 barrels per day, the purchase price was fixed at $400,000. The test was to be made jointly by a representative of respondents and a representative of petitioner; and "in the event they fail to agree on the proper gauge," it was provided that "Judge Hardin . . . will appoint a reputable engineer to act as umpire."

The parties failed to agree on the proper gauge and Judge Hardin appointed W. L. Massey, a petroleum engineer, to make the test.[1] Massey conducted a test and submitted a written report, which without objection was admitted at the trial. That report stated that although "the well will not make 3,000 barrels per day on such 3/8" choke," it was "capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke." At the trial there was other testimony that the production "through a 3/8-inch choke" was not more than 3,000 barrels a day. The trial court held that the contract meant that the well was to be flowed through a 3/8-inch choke. Accordingly it dismissed the bill, since on that interpretation it was clear that the production was not more than 3,000 barrels a day and since petitioner already had paid $300,000. On appeal, the Circuit Court of Appeals held that the test provided in the contract "was not to measure the production through a 3/8-inch choke, but to calculate on a 3/8-inch choke the amount the well was capable of producing." It then turned to the record and ascertained that Massey, the umpire appointed pur-

[1] Judge Hardin instructed Massey: "You are requested to determine, first, the actual production of three-eighths (3/8) choke; second, by using the three-eighths (3/8) choke you are to calculate the open flow capacity of the well."

suant to the agreement of the parties, had found that by using the 3/8-inch choke as a base and "building up therefrom by using other chokes to determine pressures and conditions" the well was capable of producing much in excess of 3,000 barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, $400,000. It accordingly reversed the judgment directing the District Court to enter judgment for respondents for $100,000, the balance due under the contract, with interest. We granted certiorari, limited to the question whether a new trial should not have been granted, on the assertion that the failure to remand for a new trial deprived petitioner of his day in court in violation of the rule of *Saunders* v. *Shaw,* 244 U. S. 317.

We conclude that the Circuit Court of Appeals committed no error.

The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders* v. *Shaw, supra.* The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract. To be sure, petitioner now asserts that on a new trial he would attack the competency and accuracy of the umpire's report—matters which were immaterial to the issues on the trial in view of the fact that it was not contested that no more than 3,000 barrels of oil a day could be produced through a 3/8-inch choke. But the difficulty with petitioner's position is that he has not pre-

served that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report.[2] Nor was that the ground upon which the petition for certiorari was predicated. For review by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. There was no intimation in the petition for certiorari that a new trial should be granted in order to afford petitioner an opportunity to attack the competency and accuracy of the umpire's report. It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. *Clark* v. *Williard,* 294 U. S. 211, 216; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 498; *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 146. Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the Fifth Amendment. Due process of law is not concerned with mere afterthoughts.

Affirmed.

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[2] In addition to attacking the interpretation of the contract by the Circuit Court of Appeals, petitioner merely asserted, "Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record."

Counsel for Petitioner.

CHICOT COUNTY DRAINAGE DISTRICT *v.* BAXTER STATE BANK ET AL.

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

No. 122. Argued December 7, 1939.—Decided January 2, 1940.

1. Bondholders of a state drainage district, who were parties to a proceeding under the Act of Congress of May 24, 1934, for a re-adjustment of its indebtedness, and who did not then question the constitutionality of that statute, but did not comply with the provisions of the decree for retirement of their bonds within a time limited, are estopped, by the principle of *res judicata*, from raising that question of constitutionality in a subsequent action on their bonds, notwithstanding that, in the meantime, in another case, coming from another district, this Court had declared the Act unconstitutional. Pp. 374–375.
2. The lower federal courts, including the District Court sitting as a court of bankruptcy, though their jurisdiction is limited to that prescribed by Acts of Congress, are nevertheless courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally. P. 376.
3. *Res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceedings, but also as respects any other available matter which might have been presented to that end. P. 378.

103 F. 2d 847, reversed.

CERTIORARI, *post*, p. 532, to review the affirmance of a judgment recovered in the District Court in an action on bonds of a drainage district.

Messrs. E. L. McHaney, Jr. and *S. Lasker Ehrman*, with whom *Mr. Grover T. Owens* was on the brief, for petitioner.

Mr. G. W. Hendricks for respondents, made the following citations: *Ashton* v. *Cameron County Water Improvement Dist.*, 298 U. S. 513; *McDonald* v. *Mabee*, 243 U. S. 90; *Chicago, I. & L. R. Co.* v. *Hackett*, 228 U. S. 559; *Norton* v. *Shelby Co.*, 118 U. S. 425; *Security Savings Bank* v. *Connell*, 200 N. W. 8; *Servonitz* v. *State*, 113 N. W. 277; *Metzger Motor Car Co.* v. *Parrott*, 233 U. S. 36; Black on Judgments, § 216; Freeman on Judgments, (5th ed.) Vol. 1, p. 733; Constitutional Law, 11 Am. Jur. § 148, "Effect of Unconstitutional Statutes"; *Rankin* v. *Schofield*, 81 Ark. 463; *Townsley-Myrick Dry Goods Co.* v. *Fuller*, 58 Ark. 186; *Pitcock* v. *State*, 91 Ark. 534; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

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

Respondents brought this suit in the United States District Court for the Western Division of the Eastern District of Arkansas to recover on fourteen bonds of $1,000 each, which had been issued in 1924 by the petitioner, Chicot County Drainage District, organized under statutes of Arkansas,[1] and had been in default since 1932.

In its answer, petitioner pleaded a decree of the same District Court in a proceeding instituted by petitioner to effect a plan of readjustment of its indebtedness under the Act of May 24, 1934,[2] providing for "Municipal-Debt Readjustments." The decree recited that a plan of readjustment had been accepted by the holders of more than two-thirds of the outstanding indebtedness

[1] Act No. 405, Extra. Sess., General Assembly of Arkansas, approved February 20, 1920, as amended by Act No. 432 of 1921, and General Drainage Law of Arkansas, approved May 27, 1909.

[2] 48 Stat. 798. Originally this provision was limited to two years but it was extended to January 1, 1940, by Act approved April 10, 1936, 49 Stat. 1198.

and was fair and equitable; that to consummate the plan and with the approval of the court petitioner had issued and sold new serial bonds to the Reconstruction Finance Corporation in the amount of $193,500 and that these new bonds were valid obligations; that, also with the approval of the court, the Reconstruction Finance Corporation had purchased outstanding obligations of petitioner to the amount of $705,087.06 which had been delivered in exchange for new bonds and canceled; that certain proceeds had been turned over to the clerk of the court and that the disbursing agent had filed his report showing that the Reconstruction Finance Corporation had purchased all the old bonds of petitioner other than the amount of $57,449.30. The decree provided for the application of the amount paid into court to the remaining old obligations of petitioner, that such obligations might be presented within one year, and that unless so presented they should be forever barred from participating in the plan of readjustment or in the fund paid into court. Except for the provision for such presentation, the decree canceled the old bonds and the holders were enjoined from thereafter asserting any claim thereon.

Petitioner pleaded this decree, which was entered in March, 1936, as *res judicata*. Respondents demurred to the answer. Thereupon the parties stipulated for trial without a jury.

The evidence showed respondents' ownership of the bonds in suit and that respondents had notice of the proceeding for debt readjustment. The record of that proceeding, including the final decree, was introduced. The District Court ruled in favor of respondents and the Circuit Court of Appeals affirmed. 103 F. 2d 847. The decision was placed upon the ground that the decree was void because, subsequent to its entry, this Court in a

proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional. *Ashton* v. *Cameron County District,* 298 U. S. 513. In view of the importance of the question we granted certiorari. October 9, 1939.

The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County,* 118 U. S. 425, 442; *Chicago, I. & L. Ry. Co.* v. *Hackett,* 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[3] Without attempting

[3] See Field, "The Effect of an Unconstitutional Statute"; 42 Yale Law Journal 779; 45 Yale Law Journal 1533; 48 Harvard Law Review 1271; 25 Virginia Law Review 210.

to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of *res judicata* as it now comes before us.

First. Apart from the contention as to the effect of the later decision as to constitutionality, all the elements necessary to constitute the defense of *res judicata* are present. It appears that the proceedings in the District Court to bring about a plan of readjustment were conducted in complete conformity to the statute. The Circuit Court of Appeals observed that no question had been raised as to the regularity of the court's action. The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceeding and were parties, and the evidence was to the same effect, showing compliance with the statute in that respect. As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Case* v. *Beauregard,* 101 U. S. 688, 692; *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, 319, 325; *Grubb* v. *Public Utilities Comm'n,* 281 U. S. 470, 479.

Second. The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

In the early case of *M'Cormick* v. *Sullivant,* 10 Wheat. 192, where it was contended that the decree of the federal district court did not show that the parties to the proceedings were citizens of different States and hence that the suit was *coram non judice* and the decree void, this Court said: "But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior Courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." *Id.,* p. 199. See, also, *Skillern's Executors* v. *May's Executors,* 6 Cranch 267; *Des Moines Navigation Co.* v. *Iowa Homestead Co.,* 123 U. S. 552, 557, 559; *Dowell* v. *Applegate,* 152 U. S. 327, 340; *Evers* v. *Watson,* 156 U. S. 527, 533; *Cutler* v.

Huston, 158 U. S. 423, 430, 431. This rule applies equally to the decrees of the District Court sitting in bankruptcy, that is, purporting to act under a statute of Congress passed in the exercise of the bankruptcy power. The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action. *Stoll* v. *Gottlieb,* 305 U. S. 165, 171, 172.

Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. In the present instance it is suggested that the situation of petitioner, Chicot County Drainage District, is different from that of the municipal district before the court in the *Ashton* case. Petitioner contends that it is not a political subdivision of the State of Arkansas but an agent of the property owners within the District. See *Drainage District No. 7 of Poinsett County* v. *Hutchins,* 184 Ark. 521; 42 S. W. 2d 996.[4] We do not refer to that phase of the case as now determinative but merely as illustrating the sort of question which the District Court might have been called upon to resolve had the validity of the Act of Congress in the present application been raised. As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceed-

[4] See *Drainage District No. 2* v. *Mercantile-Commerce Bank,* 69 F. 2d 138; *In re Drainage District No. 7,* 21 F. Supp. 798.

ing to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. *Stoll* v. *Gottlieb, supra.*[5]

The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, "but also as respects any other available matter which might have been presented to that end." *Grubb* v. *Public Utilities Comm'n, supra; Cromwell* v. *County of Sac, supra.*

The judgment is reversed and the cause is remanded to the District Court with direction to dismiss the complaint.

Reversed.

POSTAL STEAMSHIP CORP. *v.* EL ISLEO.*

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

No. 73. Argued December 12, 1939.—Decided January 2, 1940.

1. Under Rules II and VII of the Board of Supervising Inspectors, when two steamships are on crossing courses, the privileged vessel has no absolute right to keep her course and speed, regardless

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[5] See, also, *Miller* v. *Tyler,* 58 N. Y. 477, 480; *Drinkard* v. *Oden,* 150 Ala. 475, 477, 478; 43 So. 578; *Pulaski Avenue,* 220 Pa. 276, 279, 280; 69 A. 749; *People* v. *Russel,* 283 Ill. 520, 524; 119 N. E. 617; *Beck* v. *State,* 196 Wis. 242, 250; 219 N. W. 197.

*Together with No. 74, *Postal Steamship Corp.* v. *Southern Pacific Co.,* also on writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

of danger involved; her right to maintain her privilege ends when there is danger of collision; and, in the presence of that danger, both vessels must be stopped and backed if necessary, until signals for passing with safety have been made and understood. P. 382.

2. These rules should be construed with Article 27, and are not essentially inconsistent with Articles 19–23, of the Inland Rules established by Act of June 7, 1897, c. 4, § 2, 30 Stat. 103, 33 U. S. C. 157, and are valid. Pp. 385, 388.

101 F. 2d 4, reversed.

CERTIORARI, *post,* p. 532, to review the affirmance of decrees of the District Court, in admiralty, 20 F. Supp. 373, which dismissed a libel brought by the present petitioner and awarded damages to the respondent, in a collision case.

Mr. John C. Crawley, with whom *Mr. Earle Farwell* was on the brief, for petitioner.

Mr. Chauncey I. Clark, with whom *Mr. Burton H. White* was on the brief, for respondent.

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

The steamer Eastern Glade, owned by petitioner, collided with the steamer El Isleo, owned by respondent, in the waters of Baltimore harbor. Each owner filed a libel against the vessel of the other. The District Court found that the Eastern Glade was solely at fault (20 F. Supp. 373) and decrees dismissing petitioner's suit and awarding damages to respondent were affirmed by the Circuit Court of Appeals. 101 F. 2d 4. In the view that there was involved an important question of maritime law which had not been, and should be, settled by this Court, certiorari was granted.

That question is said to arise from rulings of the Circuit Court of Appeals with respect to the validity of

Rules II and VII of the Board of Supervising Inspectors [1] in the light of the applicable provisions of the Act of Congress.[2] See *The Fulton,* 54 F. 2d 467, 468.

The facts are thus stated by the Circuit Court of Appeals:

"The collision occurred in the waters of Baltimore Harbor near the junction of Curtis Bay Channel with Fort McHenry Channel. The latter is about 600 feet wide and runs in a northwesterly direction towards Baltimore; the former, running nearly east and west, comes into Fort McHenry Channel from the west but does not cross it. The night was clear, the tide ebb, and a 15 mile breeze was blowing from the northwest. The steamship Eastern Glade, light, was bound out of Curtis Bay Channel and was intending to turn left into Fort McHenry Channel and proceed to Baltimore. The steamer El Isleo, laden with 1,000 tons of steel ore, also bound for Baltimore, was proceeding up Fort McHenry Channel at full speed—about eight miles through the water, as she was working only one boiler. When the vessels sighted each other they were more than a mile apart, the El Isleo being about four points on the starboard bow of the Eastern Glade. The latter stopped her engines and shortly thereafter sounded a two blast signal to indicate, as her master says, that his course was to the left and up Fort McHenry Channel. El Isleo answered the two blast signal with an alarm followed by one blast to indicate that she would keep her course and speed. Captain Korn of El Isleo testified that the Eastern Glade responded with four blasts followed by one, while her captain says she responded with three blasts to indicate that she was reversing her engines. El Isleo kept on until she reached

[1] "Pilot Rules for Certain Inland Waters," etc., effective, as amended, May 1, 1912.

[2] Inland Rules, Act of June 7, 1897, Arts. 19, 21–23, 27, 30 Stat. 101, 102; 33 U. S. C. 204, 206–208, 212.

a buoy just opposite Curtis Bay Channel, when, believing collision imminent, she put her rudder hard right and swung out of Fort McHenry Channel to her starboard. The Eastern Glade, although her master testified that he intended to hold back in Curtis Bay Channel until El Isleo had passed the junction, came clear across Fort McHenry Channel and brought her stem into contact with the port side of El Isleo about amidships. The place of collision was east of Fort McHenry Channel. The district court did not determine how far to the east, but McDonald testified it was about 200 yards."

After referring to the question whether the vessels were on crossing courses as the district court had held, or whether the situation was one of special circumstances, as petitioner contended, the Court of Appeals continued:

"It is not disputed that El Isleo's course up Fort McHenry Channel was always apparent to the Eastern Glade. But the latter's course was not immediately apparent to El Isleo; when the Eastern Glade should reach the end of Curtis Bay Channel, she might turn left, she might turn right, or she might conceivably, though improbably, cross Fort McHenry Channel, since there was water enough to the East of that channel, although neither pier, port nor anchorage to which she might be bound appears on the chart. When, however, she sounded her two blast signal, she indicated an intention either to cross the bows of El Isleo by proceeding across Fort McHenry Channel, or to turn to the left and proceed up that channel. The former alternative would clearly result in crossing courses; the latter would result in converging courses, since the Eastern Glade's course, if projected, would carry her into the starboard lane of Fort McHenry Channel, unless she violated her duty by going up on the wrong side. Such converging courses involve the very risk that resulted in the collision, and the rights

and duties of the vessels are governed by Articles 19, 22 and 23 of the Inland Rules, 33 U. S. C. A., §§ 204, 207, 208. . . . Accordingly, the district court was right in treating the situation as one of crossing courses."

The Articles of the Inland Rules established by Congress [3] provide:

"Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse."

Applying these statutory provisions, and viewing the situation as one of "crossing courses," the Court of Appeals found that no fault appeared in the navigation of El Isleo, the "privileged vessel." The fault of the Eastern Glade was found to be glaring and alone sufficient to account for the disaster.

Petitioner does not contest the ruling that the Eastern Glade was at fault but insists that El Isleo was also at fault. Petitioner argues that El Isleo violated Rules II and VII of the Supervising Inspectors, purporting to have been adopted under the authority of the statute.[3] These rules are as follows:[4]

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[3] Act of June 7, 1897, c. 4, § 2, 30 Stat. 102; 33 U. S. C. 157.

[4] See Note 1.

"Rule II. Steam vessels are forbidden to use what has become technically known among pilots as 'cross signals,' that is, answering one whistle with two, and answering two whistles with one.

"Rule VII. When two steam vessels are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steam vessel is overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse.

"If from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steam vessels shall be stopped and backed if necessary, until signals for passing with safety are made and understood."

Petitioner says that these rules are not inconsistent with the statute and have the force of law; that they provide in substance "that where the so-called privileged vessel in a crossing situation receives an unacceptable proposal to cross ahead, the privileged vessel may not maintain her course and speed until collision becomes imminent but must at once sound danger signals and stop and back if necessary until a safe passage has been agreed upon." Hence, it is argued, that El Isleo was required to "stop, and reverse if necessary," when the Eastern Glade sounded her two-blast signal, and that the only question here is as to the validity of the Inspectors' requirements.

Respondent contends that the statutory provisions of Articles 19–23 govern; that it was not only the privilege

but the duty of El Isleo to "keep her course and speed"; that it was not the intention of the Supervising Inspectors to modify that affirmative duty; that El Isleo was not bound to agree to the two-blast signal from the Eastern Glade; that the signals had been made and were understood by each vessel and the collision was due to the miscalculation of the master of the Eastern Glade; and that if there were any errors in El Isleo's navigation they were errors *in extremis* for which she is not liable.

The Inspectors' prohibition against "cross signals," found in Rule II, was originally applicable to "vessels approaching each other from opposite directions" [5] but was amended so that its terms apply to crossing situations as well.[6] *The Fulton, supra.* But the Court of Appeals in a number of decisions involving crossing situations has disregarded the Inspectors' rule and has "exonerated a vessel which pressed her statutory privilege by crossing the signal and holding her course and speed." [7] *Id.* It is unnecessary to review the many cases which the present parties cite, as the court itself has summarized its position:

"Our reasoning has been, that, as the statute (Inland Rules) article 21 (33 U. S. C. A., § 206), puts a duty upon the privileged ship to keep her course and speed, no rule can be valid which affects to relieve her of it, and that she may announce her determination to insist by crossing the first signal. The doctrine has been too long and too repeatedly established to allow any question now, but it is plain that the inspectors have never assented to it." *Id.*

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[5] See Rule III, "Pilot Rules for Atlantic and Pacific Coast Inland Waters," edition October 23, 1906.

[6] See Rule II, edition July 1, 1907; edition May 1, 1912.

[7] In *The Fulton,* 54 F. 2d, p. 468, the Circuit Court of Appeals cited to this effect *The John King,* 49 F. 469; *The Cygnus,* 142 F. 85; *The Transfer No. 15,* 145 F. 503; *The John H. Starin,* 162 F. 146; *The Montauk,* 180 F. 697; *The Ashley,* 221 F. 423.

Although the Court of Appeals, after making this statement in *The Fulton,* said that, as the court was then constituted, it could not see any necessary inconsistency between the Inspectors' rule and the statute, the court concluded that "unless the Supreme Court chooses finally to settle the whole matter otherwise," it had no option "in crossing situations" and would "continue to disregard the rule." *The Fulton,* however, presented a "head-on situation," and the Court of Appeals, feeling that it was not committed in such a case, decided that the steamship there in question was "at fault for crossing the signal." *Id.,* p. 469.

In the instant case, the Court of Appeals again referred to the rule as established in the second circuit, "that in a crossing situation the privileged vessel may 'cross' the signal of the burdened vessel and hold her course and speed until it becomes evident that the burdened vessel either cannot or will not keep out of the way." And the court observed that although this rule was criticised in *The Fulton,* it was thought to be "too firmly established to be departed from until the Supreme Court speaks." The court added that it still adhered to that view. 101 F. 2d, p. 6.

We may assume that the Supervising Inspectors had no intention to depart from the statute under which they claimed authority to make their regulations. And Articles 19–23 of the statute are to be read in the light of Article 27 which has the following controlling qualification:

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Moreover, the Inspectors expressly recognize and follow the statute in providing in Rule VII, first paragraph, that "the steam vessel which has the other on her own port

side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse." The second paragraph of Rule VII, providing for the stoppage and backing of both vessels if necessary "until signals for passing with safety are made and understood," was clearly intended to apply to the dangerous situation envisaged in Article 27 of the statute.

The grounds for criticising the rulings of the Court of Appeals of the second circuit in disregarding the Inspectors' requirement cannot be better stated than in the court's own language in *The Fulton.* After referring to its former decisions, by which it felt itself bound, the court observed that "concededly there comes a time when the privileged vessel must yield"; that there is never a "right of way into collision"; that the point at best "is one of degree"; and that if the question were *res integra* the Inspectors' rule would be held valid. The court continued: "The inspectors apparently believe that in the greater number of cases it will conduce to collision to allow a pilot to keep on in the face of a proposal by the approaching vessel that she put herself across his bows. True, the proposer often will not act without consent; but it is certainly possible that prudence forbids speculation as to whether he has still time or disposition to keep out of the way. Again and again cases arise in which the proposal is repeated, the vessels coming nearer all the time; sometimes it is repeated even after it has been crossed by a refusal. No substantial interest is at stake except to escape collision which will certainly be avoided if both stop." Stopping "is more likely to avoid disaster than going on in the teeth of what is at least a proposal, and may be a declaration." So, the court thought that the situation was a proper one "for the exercise of the in-

spectors' function in providing for cases not covered explicitly." The court could not see "any conflict with the statute, unless that be read without regard to its purpose." For Articles 19 and 21 "do not require any signals at all"; and "if one is given proposing a dangerous course," the court thought it "too verbal and rigid an interpretation to say that the privileged vessel is inevitably still bound; at least officials, vested with general authority, are not helpless to meet the situation by a rule." And after noting that Article 27 of the statute authorized a departure "to avoid immediate danger," the court posed the question—"Can it be that though vessels themselves may so depart, the inspectors may not say that a situation likely to be dangerous shall be treated as such?"

We are in accord with the criticism thus effectively expressed by the Court of Appeals of its established rule, and we think that the court should be relieved of its assumed obligation to follow its former decisions holding the Inspectors' requirement invalid. We think that Inspectors' Rule II should be read in connection with their Rule VII and that both should be construed in the light of the statutory provision in Article 27.

The plain purpose of the Inspectors' Rules is to minimize the danger of collision. The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be "stopped and backed if necessary, until signals for passing with safety are made and understood."

In *The Quogue,* 47 F. 2d 873, where the Court of Appeals of the second circuit had before it a "head-on situation," the court condemned a vessel "for crossing signals and insisting upon her rights." That vessel was The Transfer and the right insisted upon was that of port

to port passage. The fault of the other vessel, The Quogue, in undertaking to cross the bow of The Transfer was found to be "most glaring," but The Transfer was also held at fault because her master was not justified in acting on the assumption that The Quogue would not carry out the maneuver indicated by her signals unless he consented. He did not "reverse as promptly as he should," for when the dangerous situation was presented "he was not privileged to continue on his course on the chance that the other vessel would change her announced purpose if he refused to consent." The Court of Appeals aptly said: "It is a hard rule which requires a master when he sees another vessel about to cross his bow with wanton disregard of his rights to stop and allow the arrogant usurper to pursue his wrongful course. But safety is better than pride; and however slight the hope that rules to promote safety will be observed under such circumstances, whatever courts may say, the vessels must be judged according to their legal duties."

The Court of Appeals in *The Fulton* considered these observations in *The Quogue* to be pertinent, and we think that they are pertinent to a dangerous situation arising in connection with crossing courses. We see no sufficient ground for a distinction in upholding and applying the Inspectors' requirements in such cases.

We deal simply with the question presented with respect to the validity of the Inspectors' rules here in question. We hold these rules are not essentially inconsistent with the statute and are valid, both the statutory provisions and the Inspectors' Rules being designed to promote safety in situations fraught with danger. We do not pass, or intimate any opinion, upon the particular facts of the instant case, as it is the appropriate province of the Court of Appeals to deal with these. As the Court of Appeals apparently did not consider the conduct of El Isleo in the light of the Inspectors' requirements, but

thought, under the compulsion of its former decision, that it must disregard those requirements, we think that the cause should be returned to the Court of Appeals to be decided by it, free of that compulsion.

To afford that freedom we reverse the judgments and remand.

Reversed.

HAGGAR COMPANY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 176. Argued December 15, 1939.—Decided January 2, 1940.

1. A literal reading which leads to absurd results will be avoided when the statute can be given a reasonable application consistent with its words and purpose. P. 394.
2. Sections 215 and 216 of the National Industrial Recovery Act impose on domestic corporations an annual capital stock tax and an annual tax on profits in excess of 12½ per cent of the capital stock, both calculated on the basis of the value of the capital stock as declared by the corporation's return for the first year in which the tax is imposed, "which declaration of value can not be amended." For any subsequent year the adjusted declared value shall be the original declared value as changed by certain prescribed capital adjustments. *Held*:

   (1) That the purpose is to allow the taxpayer to fix for itself the amount of the taxable base with the proviso that the amount thus fixed for the first taxable year shall be accepted, with only such changes as the statute provides, for the purpose of computing the capital stock and excess profits taxes in the later years. P. 394.

   (2) The phrase "first return" means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes. P. 395.

   (3) This includes a timely amended return for that year. P. 396.
3. A Treasury Regulation which changes an earlier construction of a statute without serving any governmental convenience or purpose

or embodying results of specialized departmental knowledge or experience, and which contradicts the statutory purposes and the plain meaning of its words, will not be followed. P. 398.

4. An amendment of a statute passed for the purpose of precluding for the future an earlier administrative construction, *held* not an adoption of that construction as the one intended by the original enactment. P. 398.

5. *Semble* that retroactive declarations of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, ought not to be implied more than the legislative intention to give retroactive operation to a new statute. P. 400.

104 F. 2d 24, reversed.

CERTIORARI, *post,* p. 533, to review the affirmance of a decision of the Board of Tax Appeals, 38 B. T. A. 141, approving a deficiency assessment of excess profits tax.

Mr. Thomas M. Wilkins, with whom *Mr. Lloyd E. Elliott* was on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *W. Croft Jennings* were on the brief, for respondent.

By leave of Court, *Mr. Theodore B. Benson* filed a brief (*Mr. John J. Fitzgerald,* for Blake & Kendall Company, of counsel) on behalf of the Philadelphia Brewing Company, as *amicus curiae,* in support of the petitioner.

MR. JUSTICE STONE delivered the opinion of the Court.

Decision in this case turns on the question whether a capital stock tax return filed pursuant to § 215 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, may be amended within the time fixed for filing the return.

Sections 215 and 216 of the National Industrial Recovery Act impose interrelated taxes on domestic corporations, namely an annual capital stock tax and an annual tax on profits in excess of 12½ per cent of the capital stock, calculated on the basis of the value of the capital stock as fixed by the corporation's return for the first year in which the tax is imposed.

Section 215 (a) imposes on domestic corporations an annual tax with respect to carrying on or doing business for any part of the taxable year at the rate of "$1 for each $1,000 of the adjusted declared value of its capital stock." Section 215 (f) provides that "For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. . . . For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value" as changed by certain prescribed capital adjustments occasioned by increases and decreases of capital occurring after "the date as of which the original declared value was declared." Section 216 (a) imposes an annual tax upon so much of the net income of a corporation taxable under § 215 (a) as is in excess of 12½ per cent of the "adjusted declared value of its capital stock . . . as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) . . ."

It will be observed that by § 215 (a) and (f) the declared value of capital stock which is made the basis of computation of both taxes is not required to conform either to the actual or to the nominal capital of the tax-

paying corporation; and that the declared value for the first taxable year, with the addition or subtraction of specified items of subsequent capital gains or losses is made the basis of the computation of both taxes in later years. The taxpayer is thus left free to declare any value of capital stock for its first taxable year which it may elect, but since the declared value for the first year is a controlling factor for the computation of taxes for later years, the statute provides that the declaration once made cannot be amended. Because of the method of computation, increase or decrease in the declared value of capital, and of the corresponding tax, produces, as the case may be, a decrease or an increase in the tax on excess profits.

In August, 1933, petitioner, a Texas corporation, mistakenly believing that it was required to state the par value of its issued capital stock in its tax return, filed a timely return for the year ending June 30, 1933, declaring the value of its entire capital stock to be $120,000 and paid the tax of $120. The date for filing returns for that year having been extended to September 29, 1933, T. D. 4368, 4386, petitioner before that date filed an amended return, declaring the value of its capital stock to be $250,000. On March 15, 1934, petitioner filed its income and excess profits tax return for the calendar year 1933. The Commissioner, having refused to accept the amended capital stock return, gave notice of a deficiency in the excess profits tax calculated upon the basis of the capital stock value of $120,000 as declared in petitioner's original return.

The Board of Tax Appeals determined that petitioner's capital stock and excess profits tax should be computed on the basis of $120,000 capital stock value as originally stated instead of $250,000 stock value declared in its amended return, found a deficiency, and entered its order accordingly. 38 B. T. A. 141. The Circuit Court of

Appeals for the Fifth Circuit affirmed, holding that § 215 (f) by its terms precluded any amendment of the tax return for the first year even though made within the time allowed for filing the return. 104 F. 2d 24. We granted certiorari October 9, 1939, to resolve a conflict of the decision below with that of the Court of Appeals for the Sixth Circuit in *Glenn* v. *Oertel Co.*, 97 F. 2d 495, and that of the Court of Claims in *Philadelphia Brewing Co.* v. *United States*, 27 F. Supp. 583.

The Commissioner founds his argument in support of the decision below upon a literal reading of the introductory sentence of § 215 (f) already quoted, which, he argues, precludes even a timely amendment of the tax return for the first year, and upon the administrative and Congressional interpretation of the statute. He insists that the phrase "first return" in the clause "declared value shall be the value as declared by the corporation in its first return under this section (which declaration of value cannot be amended)," means the first paper filed by the taxpayer as a return, and that these words plainly forbid any amendment of the declared value of the capital stock, even though made within the time allowed for filing the return.

In making these contentions the Commissioner concedes that the amount of the declared value of capital fixed for the first year is a matter of indifference to the Government since the statute leaves the taxpayer free to declare any amount which its fancy may choose and that for any reduction in capital stock effected by the declaration of a low value of the capital stock there is an accompanying increase in excess profits taxes. He concedes that if petitioner had filed but a single return on the date of filing the amended return, stating the value of the capital stock as $250,000 instead of $120,000, the Government would have been concluded by the taxpayer's declaration and that it has long been the practice

of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year. He concedes also, as he logically must, that the argument leads to the conclusion that a mistake in the declaration of value whether of law or of fact, however serious and excusable, cannot be corrected by a timely amendment of the return.

All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose. *Hawaii* v. *Mankichi,* 190 U. S. 197; *United States* v. *Katz,* 271 U. S. 354; *Sorrells* v. *United States,* 287 U. S. 435, 446; *Burnet* v. *Guggenheim,* 288 U. S. 280, 285; *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U. S. 315, 332–3. Here the purpose of the statute is unmistakable. It is to allow the taxpayer to fix for itself the amount of the taxable base for purposes of computation of the capital stock tax, but with the proviso that the amount thus fixed for the first taxable year shall be accepted, with only such changes as the statute prescribes for the purpose of computing the capital stock and excess profits taxes in later years. Congress thus avoided the necessity of prescribing a formula for arriving at the actual value of capital for the purpose of computing excess profits taxes, which had been found productive of much litigation under earlier taxing acts, see Sen. Rep. 52, 69th Cong., 1st Sess., pp. 11–12; cf. *Ray Consolidated Copper Co.* v. *United States,* 268 U. S. 373, 376. At the same time it guarded against loss of revenue to the Government through understatements of capital, by providing for an increase in excess profits tax under § 216 ensuing from such understatements.

It is plain that none of these purposes would have been thwarted and no interest of the Government would have

been harmed had the Commissioner, in conformity to established departmental practice, accepted the petitioner's amended declaration. It is equally plain that by its rejection petitioner has been denied an opportunity to make a declaration of capital stock value which it was the obvious purpose of the statute to give, and that denial is for no other reason than that the declaration appeared in an amended instead of an unamended return. We think that the words of the statute, fairly read in the light of the purpose, disclosed by its own terms, require no such harsh and incongruous result.

Section 215 nowhere mentions amendment of returns or amended returns. It speaks of "declared value" for the first tax year and provides that the "declaration of value" cannot be amended. The "declaration of value" is that of the corporation in its "first return under this section." The "first return" as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as "first" is obviously used to distinguish the return made for the first year from the return "for any subsequent year" in which the "adjusted declared value" is required by the same section to conform to a formula based on the "declared value" for the first year and which, for that reason, "cannot be amended."

"First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year. A timely amended return is as much a "first return" for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. *Glenn* v. *Oertel Co., supra; Philadelphia Brewing Co.* v. *United States, supra;* see also, similarly construing the phrase "first return" under § 114 (b) (4) of the Revenue Act of 1934, 48 Stat. 680,

710; *C. H. Mead Coal Co.* v. *Commissioner,* 106 F. 2d 388, 390; cf. *Pacific National Co.* v. *Welch,* 304 U. S. 191, 194. Thus read the statute gives full effect to its obvious purposes and to the evident meaning of its words. To construe "first return" as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction.

Article 24 of Treasury Regulations 64 (1933 ed.), under § 215 (f) of the National Industrial Recovery Act, in force when the petitioner filed its amended return, did not call for any different construction from that which we have indicated is the correct one. The article made no mention of the "first return." It pointed out merely that the original declared value would be the basis of the tax for the first and later years, and stated "This value once having been declared may not subsequently be changed either by the corporation or by the commissioner." This evidently refers to the parenthetical clause of § 215 (f) "which declaration cannot be amended" which phrase concededly does not preclude an effective declaration of value in a timely amended return.[1]

Sections 215 and 216 of the National Industrial Recovery Act were reënacted as §§ 701 and 702 of the 1934

[1] The Government concedes in its brief that the parenthetical clause "which declaration cannot be amended" continued in the capital stock tax section, § 601, of the 1938 Revenue Act, 52 Stat. 447, 565, does not preclude an effective declaration of value in a timely amended return for the first tax year. If the phrase "first return" in § 215 (f) had that effect, then the parenthetical phrase concededly prohibiting amendments in tax returns of later years would have been superfluous.

Revenue Act, 48 Stat. 680, 769, 770. That act, § 703, amended the National Industrial Recovery Act so as to provide that the capital stock tax and excess profits tax imposed by §§ 215 and 216 of the act last mentioned should not apply respectively to any taxpayer in any year except the years ending June 30, 1933 and June 30, 1934. The amended Regulations 64 (1934 ed.), relating to §§ 701 and 702 of the Revenue Act of 1934, are prefaced with the statement "It must constantly be borne in mind that these regulations relate only to the tax imposed by § 701 of the Revenue Act of 1934. With respect to the tax imposed by § 215 of the National Industrial Recovery Act consult Regulations 64, edition of 1933." This warning was repeated in Regulations 64, 1936 edition, under the corresponding §§ 105 and 106 of the 1935 Revenue Act, 49 Stat. 1014, 1017–1019.

Since the regulations under the Revenue Acts for 1934 and 1935 are thus made inapplicable to the taxpayer's stock return under the National Industrial Recovery Act for the year ending June 30, 1933, they are without force for present purposes except as they are persuasive commentaries on the meaning of the language of § 215 (f) of the National Industrial Recovery Act which was carried forward into later revenue acts. Article 41 (d) of Treasury Regulations 64, published under the 1934 Act, declared that "First return means the first capital stock tax return filed by a corporation for its first taxable year," a definition which was continued in Article 44 of Regulations 64 (1936 ed.), under the corresponding § 105 of the Revenue Act of 1935. Article 44 of the latter regulation for the first time informed taxpayers that an effective declaration of value for the first tax year could not be made in a timely amended return, saying, "A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute."

On the argument the Commissioner admitted that this ruling served no administrative or governmental convenience or purpose apart from compliance with the supposed command of the statute. There is thus a complete absence of those reasons which ordinarily lead courts to give persuasive force to an administrative construction and which justify their acceptance of it in preference to their own. The regulations have not been consistent in their interpretation of the statute and do not embody the results of any specialized departmental knowledge or experience. Cf. *Brewster* v. *Gage,* 280 U. S. 327, 336; *Estate of Sanford* v. *Commissioner, ante,* p. 39. No one, not even the Government, will be prejudiced by its rejection, and as we have said the construction flies in the face of the purposes of the statute and the plain meaning of its words. Judicial obeisance to administrative action cannot be pressed so far.

It is said that Congress, by the change of the language of the capital stock provisions adopted in the 1938 Revenue Act has attributed to the earlier statute the same meaning as that ascribed to it by the administrative construction. It is familiar doctrine that Congress, by reenacting a section of the Revenue Act without change, approves and adopts a consistent administrative construction of it. But here the argument is that by amendment of the statute, which would preclude such a construction in the future, Congress has also declared that the departmental construction was that intended by the earlier Congress which enacted the statute.

Section 601 of the 1938 Act, 52 Stat. 447, 565, in addition to other changes in the capital stock and excess profits tax provisions, prescribed that the "adjusted declared value" should be determined with respect to three year periods, beginning with the year ending June 30, 1938, and denominated the first year of each period

a "declaration year." Section 601 (f) (2) provided that the declared capital stock value for purposes of the tax shall be the value as declared by the corporation "in its return for such declaration year (which declaration of value cannot be amended)." Since, under the new legislation, the return for the declaration year for each three-year period and not that for the first tax year of the taxpayer is controlling, there was no occasion for repeating the phrases "first year" and "first return" which had appeared in the earlier legislation and the new section dropped from the statute the words which had given rise to the earlier administrative construction. This was pointed out by the house committee report recommending the amendment,[2] stating that the change would serve to permit the taxpayer to amend its declaration by timely amendment of the return for the declaration year and adding, "denial of all opportunity for correction appears unduly restrictive."

It must be assumed that Congress was aware through its committees of the change in the regulations which in 1936 had construed the statute as precluding an effective declaration in a timely amended return, and of the litigation then pending in this case and in *Glenn* v. *Oertel Co.*,

[2] "The new section also alleviates the rigid provision of section 105 (f) of the 1935 act that the valuation shall be as declared by the corporation in its 'first' return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word 'first' as it appears the second time in section 105 (f) of the 1935 act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding." H. Rept. 1860, Committee on Ways and Means, 75th Cong., 3rd Sess., p. 62.

supra, in which the departmental construction had been challenged as "unduly restrictive." In the face of the legislative expression of dissatisfaction with the earlier statute as construed, Congressional purpose to declare that such was the intended meaning is not to be inferred merely from the fact that the amendment providing for the future said nothing as to the past. If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction. Cf. *Jordan* v. *Roche,* 228 U. S. 436, 445; *Helvering* v. *New York Trust Co.,* 292 U. S. 455; *Noble* v. *Oklahoma City,* 297 U. S. 481, 492. Retroactive declarations of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, it would seem, ought not to be implied more than the legislative intention to give retroactive operation to a new statute. See *Hassett* v. *Welch,* 303 U. S. 303, 314 and cases cited; cf. *Noble* v. *Oklahoma City, supra.*

Reversed.

AMERICAN FEDERATION OF LABOR ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 70. Argued December 7, 8, 1939.—Decided January 2, 1940.

1. A certification by the National Labor Relations Board, under § 9 (c) of the National Labor Relations Act, that a particular organization of workers is the collective bargaining representative of the employees in a designated unit, is not an order reviewable by the Court of Appeals for the District of Columbia or a Circuit Court of Appeals under § 10 (f) of the Act. P. 403.
2. The Act does not provide for court review of such certifications except as incidental to review of an order restraining an unfair labor practice, under § 10. Pp. 404, 407.

   The question whether an independent suit may be maintained in the District Court to set aside such a certification upon the ground that it is contrary to the statute and inflicts irreparable injury is not involved in this case. P. 412.
3. The due process clause is not infringed by withholding from federal courts jurisdiction which they never possessed. P. 411.

70 App. D. C. 62; 103 F. 2d 933, affirmed.

CERTIORARI, *post,* p. 531, to review a judgment dismissing for want of jurisdiction a petition to review the certification by the National Labor Relations Board of an organization of longshoremen as representative of workers.

Mr. Joseph A. Padway for petitioners.

Mr. Charles Fahy, with whom *Solicitor General Jackson* and *Messrs. Robert B. Watts* and *Laurence A. Knapp* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

The question decisive of this case is whether a certification by the National Labor Relations Board under

§ 9 (c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, §§ 151–166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit, composed of numerous employers of longshore workers at Pacific Coast ports, is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in § 10 (f) of the Act.

Petitioners, International Longshoremen's Association, and its affiliate, Pacific Coast District International Longshoremen's Association No. 38, are labor organizations, both affiliated with the petitioner, American Federation of Labor (A. F. of L.). In January, 1938, the International Longshoremen's & Warehousemen's Union, District No. 1, a labor organization affiliated with the Congress of Industrial Organization (C. I. O.) petitioned the Board for an investigation concerning the representation of longshoremen on the Pacific Coast, and that the Board certify the name of the appropriate representative for collective bargaining as provided in § 9 (c) of the Wagner Act.

The Board directed an investigation with appropriate hearings, and a consolidation of the proceeding for purposes of hearing with two other proceedings already initiated by locals of the Longshoremen's Union. Petitioners were made parties to the consolidated proceedings and participated in the hearings, at the conclusion of which the Board made its findings of fact and of law and certified that the workers who do longshore work in the Pacific Coast ports for the employers which are members of five designated employer associations of Pacific Coast shipowners or of waterfront employers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9 (b) of the Act. It also certified that the C. I. O. affiliate, Longshoremen's Union,

District No. 1, is the exclusive bargaining representative of all the workers in such unit within the meaning of the Act. In the Matter of Shipowners' Association of the Pacific Coast, 7 N. L. R. B. 1002.

The effect of the certification, as petitioner alleges, is the inclusion in a single unit, for bargaining purposes, of all of the longshore employees of the members of the employer associations doing business at the west coast ports of the United States, and to designate the C. I. O. affiliate as their bargaining representative so that in the case of some particular employers, their workers who are not organized or represented by the C. I. O. affiliate have been deprived of opportunity to secure bargaining representatives of their own choice. Although the petitioners who are affiliated with the A. F. of L. assert that they have in fact been selected as bargaining representatives by a majority of the employees of their respective employers, petitioners allege that they have nevertheless been prevented from acting in that capacity by the Board's designation of the C. I. O. affiliate as the exclusive representative of such employees.

The present suit was begun by petition to the Court of Appeals for the District of Columbia in which the petitioners set forth, in addition to the facts already detailed, that they were aggrieved by the "decision and order of certification of the Board" in that the certificate is contrary to fact and to law; that the Wagner Act does not contemplate or authorize "the designation by the Board of an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States." The petition prayed that the "order of certification" be set aside, in so far as it attempts to designate a single exclusive bargaining representative for longshore employees of many employers on the Pacific Coast and denies to a majority of the longshore

employees of a single employer the right to select one of the petitioners as their exclusive bargaining representative.

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by § 10 of the Wagner Act. 103 F. 2d 933. We granted certiorari October 9, 1939, because of the importance of the question presented and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Sixth Circuit, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 105 F. 2d 598.

The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U. S. C., § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10 (f), which gives a right of review to "any person aggrieved by a final order of the Board," determines the nature and scope of the review by the court of appeals.

The single issue which we are now called on to decide is whether the certification by the Board is an "order" which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals for the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and be-

cause it inflicts on petitioners an actionable injury otherwise irreparable.

By the provisions of the Wagner Act the Board is given two principal functions to perform. One, defined by § 9, which as enacted is headed "Representatives and Elections," is the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees. The other, defined by § 10, which as enacted is headed "Prevention of Unfair Labor Practices," is the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in § 8. One of the outlawed practices is the refusal of an employer to bargain with the representative of his employees. § 8 (5).

Certification involves, under § 9 (b), decision by the Board whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," and the ascertainment by the Board under § 9 (c) of the bargaining representative who, under § 9 (a) must be "designated or selected . . . by the majority of the employees in the unit appropriate for such [bargaining] purposes." The Board is authorized by § 9 (c) "whenever a question affecting commerce arises concerning the representation of employees" to investigate "such controversy" and to certify the names of the appropriate bargaining representatives. In conducting the investigation it is required to provide for appropriate hearing upon due notice "and may take a secret ballot of employees, or utilize any other suitable method" of ascertaining such representatives. By § 9 (d) whenever an order of the Board is made pursuant to § 10 (c) directing any person to cease an unfair labor practice and there is a petition for enforcement or review of the order by a court the

Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under § 10 (e) or (f), and the decree of the court enforcing, modifying or setting aside the order of the Board is to be made and entered upon the pleadings, testimony and proceedings set forth in the transcript.

It is to be noted that § 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by § 10 (c). In that event the record in the certification proceeding is included in the record brought up on review of the Board's order restraining an unfair labor practice. It then becomes a part of the record upon which the decree of the reviewing court is to be based.

All other provisions for review of any action of the Board are found in § 10 which as its heading indicates relates to the prevention of unfair labor practices. Nowhere in this section is there mention of investigations or certifications authorized and defined by § 9. Section 10 (a) authorizes the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." Section 10 (b) prescribes the procedure of the Board when any person is charged with engaging in any unfair labor practice, and requires that the person so charged shall be served with a complaint and notice of hearing by the Board with opportunity to file an answer and be heard. Section 10 (c) directs the Board, if it is of opinion, as the result of the proceedings before it, that any person named in the complaint has engaged in an unfair labor practice "to issue" "an order" directing that person to cease the practice and command-

ing appropriate affirmative action. If the Board is of opinion that there has been no unfair labor practice it is directed "to issue" "an order" dismissing the complaint. Section 10 (c) authorizes a petition to the appropriate federal court of appeals by the Board for the enforcement of its order prohibiting an unfair labor practice.

This brings us to the provisions for review of action taken by the Board in § 10 (f) which is controlling in the present proceeding. That subdivision [1] appears as an integral part of § 10. All the other subdivisions relate exclusively to proceedings for the prevention of unfair labor practices. Both they and subdivision (f) are silent as to the proceedings or certifications authorized by § 9. Section 10 (f), providing for review, speaks only of a "final order of the Board." It gives a right to review to persons aggrieved by a final order upon petition to a court of appeals in the circuit "wherein the unfair labor prac-

[1] "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

tice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia." It directs that the order shall be reviewed on the entire record before the Board "including the pleadings and testimony" upon which the order complained of was entered, although no complaint or other pleading is mentioned by § 9 relating to representation proceedings and certificates. Subdivision (f) provides that upon petition for review by an aggrieved person "the court shall proceed in the same manner as in the case of an application by the Board under subdivision (e)," and it is given the same jurisdiction "to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." See, *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 369.

In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reëxamined by courts under particular statutes providing for the review of "orders." See *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130, 135, *et seq.; Federal Power Comm'n* v. *Pacific Power & Light Co.,* 307 U. S. 156. We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the "order" for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10 (f) is emphasized by the clauses of § 9 (d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

Upon the introduction of the bill which was enacted as the Wagner Act, Congress had pointedly brought to its attention the experience under Public Resolution 44 of June 19, 1934, 48 Stat. 1183. That resolution authorized the National Labor Relations Board, predecessor of respondent, "to order and conduct elections" by employees of any employer to determine who were their representatives for bargaining purposes. Section 2 provided that any order of the Board should be reviewed in the same manner as orders of the Federal Trade Commission under the Federal Trade Commission Act. The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from applications to the federal appellate courts for review of orders for elec-

tions.[2] And in considering the provisions of § 9 (d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under § 9 except as incidental to review of an order restraining an unfair labor practice under § 10.[3]

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[2] "WEAKNESSES IN EXISTING LAW. . . . (6) *Obstacles to elections.*— Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals." Sen. Rep. No. 573, Committee on Education and Labor, 74th Cong., 1st Sess., pp. 5, 6.

After referring to the procedure for review under Public Resolution 44, the House Committee declared: "The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. . . . At the present time 10 cases for review of the Board's election orders are pending in the circuit courts of appeals. Only three have been argued and none have been decided." House Rep., No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 6.

[3] "There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." Sen. Rep. 573, Committee on Education and Labor, 74th Cong., 1st Sess., p. 14.

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and

The bill was similarly explained on the Senate floor by the committee chairman who declared: "It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election." 79 Cong. Rec., 7658. The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9 (d).

An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9 (c), with review only when an order is made under § 10 (c) directing the employer to do something "provides an appropriate safeguard and opportunity to be heard," House Rep., p. 23, and that "this provides a complete guarantee against arbitrary action by the Board," Sen. Rep., p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected.[4] But these are arguments to be addressed to

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adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and 10 (c)." House Rep., No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 23.

[4] Congress apparently recognized that representation proceedings under § 9(c) might involve rival unions. The House Committee said: "Section 9 (c) makes provision for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of em-

Congress and not the courts. The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force. *Shannahan* v. *United States,* 303 U. S. 596; see *In re National Labor Relations Board,* 304 U. S. 486, 495.

The Board argues that the provisions of the Wagner Act, particularly § 9 (d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other acts providing for a limited court review in *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177, and in *Utah Fuel Co.* v. *National Bituminous Coal Comm'n,* 306 U. S. 56; cf. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record.

Affirmed.

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ployees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged." H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22.

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL.

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

No. 253. Argued December 8, 1939.—Decided January 2, 1940.

A direction for an election made by the National Labor Relations Board in a representation proceeding under § 9 (c) of the National Labor Relations Act is not reviewable by a Circuit Court of Appeals under § 10 of the Act. *American Federation of Labor* v. *National Labor Relations Board, ante,* p. 401. P. 414.

105 F. 2d 598, reversed.

CERTIORARI, *post,* p. 537, to review a judgment setting aside on appeal an order of the National Labor Relations Board directing an election by employees.

Mr. Charles Fahy, with whom *Solicitor General Jackson* and *Messrs. Robert B. Watts* and *Laurence A. Knapp* were on the brief, for petitioner.

Messrs. John B. Hollister and *Isaac Lobe Straus,* with whom *Mr. Sigmund Levin* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a companion case to *American Federation of Labor* v. *National Labor Relations Board, ante,* p. 401. The decisive question raised by the petition is whether a direction for an election made by the National Labor Relations Board in a representation proceeding under § 9 (c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, §§ 151–166, is reviewable by a circuit court of appeals under § 10 (f) of the Act.

In February, 1938, International Brotherhood of Electrical Workers, Local 876, one of the respondents, and an affiliate of respondent, American Federation of Labor, filed with the regional director of the Board a petition asking an investigation and the certification of a representative, for purposes of collective bargaining, of the employees of Consumers Power Company, pursuant to § 9 (c) of the Act. After a hearing, in which the petitioner, the employer, and the Utility Workers Organizing Committee, an affiliate of the Congress of Industrial Organization, participated, the Board issued a "decision and direction of election." 9 N. L. R. B. 742. At the election in January, 1939, 2,806 of the total 2,977 employees voted. Of these 1,072 voted for I. B. E. W. and 1,164 voted for U. W. O. C.

After further proceedings and a hearing the Board found "that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. W. O. C." and made its "direction" accordingly. 11 N. L. R. B. 848.

Contending that the direction, contrary to law, excludes Union 876 from the ballot on the run-off election, respondents petitioned the Court of Appeals for the Sixth Circuit to review the direction under the provisions of § 10 (f) of the Act. That court set aside the direction as infringing the free choice by employees of their representatives for purposes of collective bargaining assured to them by §§ 1, 7, 9 (a) and (c) of the Wagner Act. We granted certiorari October 9, 1939, so that the case might be considered with *American Federation of Labor* v. *National Labor Relations Board, supra.*

Decision here is controlled by our decision in that case. The direction for an election is but a part of the repre-

sentation proceeding authorized by § 9 (c) and is no more subject to review under § 10 (f) than is a certification which is the final step in such a proceeding and which we have just held Congress has excluded from the review afforded by that subdivision.

Reversed.

LeTULLE *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE.

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

No. 63. Argued December 4, 1939.—Decided January 2, 1940.

1. A transaction whereby one corporation transfers all of its property to another corporation for cash and bonds, of the transferee, retaining no other stake in the enterprise, is not a tax-free "reorganization" within the meaning of § 112 (i) of the Revenue Act of 1928, but is a sale or exchange. P. 419.
2. A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it, even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him. P. 421.

103 F. 2d 20, affirmed.

CERTIORARI, *post,* p. 531, to review the reversal of a judgment against the Collector for taxes unlawfully collected. The plaintiff sued individually and as executor of his wife's will and as her representative in the community property. The actions were consolidated and tried without a jury.

Mr. Homer L. Bruce, with whom *Mr. W. E. Davant* was on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the court.

We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence.

The Gulf Coast Irrigation Company was the owner of irrigation properties. Petitioner was its sole stockholder. He personally owned certain lands and other irrigation properties. November 4, 1931, the Irrigation Company, the Gulf Coast Water Company, and the petitioner, entered into an agreement which recited that the petitioner owned all of the stock of the Irrigation Company; described the company's properties, and stated that, prior to conveyance to be made pursuant to the contract, the Irrigation Company would be the owner of certain other lands and irrigation properties. These other lands and properties were those which the petitioner individually owned. The contract called for a conveyance of all the properties owned, and to be owned, by the Irrigation Company for $50,000 in cash and $750,000 in bonds of the Water Company, payable serially over the period January 1, 1933, to January 1, 1944. The petitioner joined in this agreement as a guarantor of the title of the Irrigation Company and for the purpose of covenanting that he would not personally enter into the irrigation business within a fixed area during a specified period after the execution of the contract. Three days later, at a special meeting of stockholders of the Irrigation Company, the proposed reorganization was approved, the minutes stating that the taxpayer, "desiring also to reorganize his interest in the properties," had consented to be a party to the reorganization. The capital stock of the Irrigation Company was

increased and thereupon the taxpayer subscribed for the new stock and paid for it by conveyance of his individual properties.

The contract between the two corporations was carried out November 18, with the result that the Water Company became owner of all the properties then owned by the Irrigation Company including the property theretofore owned by the petitioner individually. Subsequently all of its assets, including the bonds received from the Water Company, were distributed to the petitioner. The company was then dissolved. The petitioner and his wife filed a tax return as members of a community in which they reported no gain as a result of the receipt of the liquidating dividend from the Irrigation Company. The latter reported no gain for the taxable year in virtue of its receipt of bonds and cash from the Water Company. The Commissioner of Internal Revenue assessed additional taxes against the community, as individual taxpayers, by reason of the receipt of the liquidating dividend, and against the petitioner as transferee of the Irrigation Company's assets in virtue of the gain realized by the company on the sale of its property. The tax was paid and claims for refund were filed. Petitioner's wife having died he brought suit individually and as her executor and representative in the community property against the respondent to recover the amount of the additional taxes so assessed. He alleged that the transaction constituted a tax-exempt reorganization as defined by the Revenue Act.[1] The respondent traversed the allegations of the complaints and the causes were consolidated and tried by the District Court without a jury. The respondent's contention that the transaction amounted merely to a sale of assets by the petitioner and the Irrigation Company and did not fall within the statu-

[1] § 112 (i) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818.

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tory definition of a tax-free reorganization was overruled by the District Court and judgment was entered for the petitioner.

The respondent appealed, asserting error on the part of the District Court in matters not now material and also assigning as error the court's holding that the transaction constituted a nontaxable reorganization.

The Circuit Court of Appeals concluded that, as the Water Company acquired substantially all the properties of the Irrigation Company, there was a merger of the latter within the literal language of the statute, but held that, in the light of the construction this Court has put upon the statute, the transaction would not be a reorganization unless the transferor retained a definite and substantial interest in the affairs of the transferee. It thought this requirement was satisfied by the taking of the bonds of the Water Company, and, therefore, agreed with the District Court that a reorganization had been consummated. It added, however, "We find a reason for reversing the judgment which has not been argued." Adverting to the fact that the transfer of the petitioner's individual properties to the Irrigation Company was for the purpose of including them in the latter's assets to be transferred in the proposed reorganization, the court said the statute did not extend to the reorganization of an individual's business or affairs, and the transaction was a reorganization within the meaning of the Revenue Act as respects the corporation's assets owned on November 4, 1931, but not as respects the petitioner's individual properties included in the sale. It concluded: "Only so much of the consideration as represents the price of the properties and business of the Irrigation Company is entitled to be protected from taxation as arising from a reorganization. It does not appear what the proper apportionment is. The burden was upon LeTulle to show not only that he had been illegally taxed, but how much

of what was collected from him was illegal. The latter he did not do. The evidence does not support the judgment for the full amount paid by him. It is accordingly reversed, that further proceedings may be had consistent herewith." [2]

The petitioner sought certiorari asserting that the Circuit Court of Appeals had departed from the usual and accepted course of judicial proceedings by deciding the cause upon a ground not presented or argued and hence had deprived the petitioner of his day in court. The respondent, though he had contended below that the transaction in question did not amount to a tax-free statutory reorganization, did not file a cross petition asking for a review of that part of the judgment exempting from taxation gain to the Irrigation Company arising from the transfer of its assets owned by it on and prior to November 4, 1931, and the part of the liquidating dividend attributable thereto.

We find it unnecessary to consider petitioner's contention that the Circuit Court of Appeals erred in deciding the case on a ground not raised by the pleadings, not before the trial court, not suggested or argued in the Circuit Court of Appeals, and one as to which the petitioner had never had the opportunity to present his evidence, since we are of opinion that the transaction did not amount to a reorganization and that, therefore, the petitioner cannot complain, as the judgment must be affirmed on the ground that no tax-free reorganization was effected within the meaning of the statute.

Section 112 (i) provides, so far as material:

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other

[2] 103 F. 2d 20.

classes of stock of another corporation, or substantially all the properties of another corporation) . . ."

As the court below properly stated, the section is not to be read literally, as denominating the transfer of all the assets of one company for what amounts to a cash consideration given by the other a reorganization. We have held that where the consideration consists of cash and short term notes the transfer does not amount to a reorganization within the true meaning of the statute, but is a sale upon which gain or loss must be reckoned.[3] We have said that the statute was not satisfied unless the transferor retained a substantial stake in the enterprise and such a stake was thought to be retained where a large proportion of the consideration was in common stock of the transferee,[4] or where the transferor took cash and the entire issue of preferred stock of the transferee corporation.[5] And, where the consideration is represented by a substantial proportion of stock, and the balance in bonds, the total consideration received is exempt from tax under § 112 (b) (4) and 112 (g).[6]

In applying our decision in the *Pinellas* case [3] the courts have generally held that receipt of long term bonds as distinguished from short term notes constitutes the retention of an interest in the purchasing corporation. There has naturally been some difficulty in classifying the securities involved in various cases.[7]

We are of opinion that the term of the obligations is not material. Where the consideration is wholly in the

[3] *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462.

[4] *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378.

[5] *Nelson Co.* v. *Helvering,* 296 U. S. 374.

[6] 45 Stat. 816, 818. See *Helvering* v. *Watts,* 296 U. S. 387.

[7] *Worcester Salt Co.* v. *Commissioner,* 75 F. 2d 251; *Lilienthal* v. *Commissioner,* 80 F. 2d 411, 413; *Burnham* v. *Commissioner,* 86 F. 2d 776; *Commissioner* v. *Kitselman,* 89 F. 2d 458; *Commissioner* v. *Freund,* 98 F. 2d 201; *Commissioner* v. *Tyng,* 106 F. 2d 55; *L. & E. Stirn, Inc.* v. *Commissioner,* 107 F. 2d 390.

transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retains any proprietary interest in the enterprise. On the contrary, he becomes a creditor of the transferee; and we do not think that the fact referred to by the Circuit Court of Appeals, that the bonds were secured solely by the assets transferred and that, upon default, the bondholder would retake only the property sold, changes his status from that of a creditor to one having a proprietary stake, within the purview of the statute.

We conclude that the Circuit Court of Appeals was in error in holding that, as respects any of the property transferred to the Water Company, the transaction was other than a sale or exchange upon which gain or loss must be reckoned in accordance with the provisions of the revenue act dealing with the recognition of gain or loss upon a sale or exchange.

Had the respondent sought and been granted certiorari the petitioner's tax liability would, in the view we have expressed, be substantially increased over the amount found due by the Circuit Court of Appeals. Since the respondent has not drawn into question so much of the judgment as exempts from taxation gain to the irrigation Company arising from transfer of its assets owned by it on and prior to November 4, 1931, and the part of the liquidating dividend attributable thereto, we cannot afford him relief from that portion of the judgment which was adverse to him.

A respondent or an appellee may urge any matter appearing in the record in support of a judgment,[8] but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when

[8] *Langnes* v. *Green,* 282 U. S. 531, 535–537; *Helvering* v. *Gowran,* 302 U. S. 238, 245; *Ticonic Bank* v. *Sprague,* 303 U. S. 406, 410, note 3.

he himself has not sought review of the whole judgment, or of that portion which is adverse to him.[9]

The judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with directions to proceed in accordance with the opinion and mandate of the Circuit Court of Appeals.

Affirmed.

GENERAL AMERICAN TANK CAR CORP. *v.* EL DORADO TERMINAL CO.

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

No. 129. Argued December 12, 13, 1939.—Decided January 2, 1940.

A car company leased, on a monthly rental basis, tank cars to a shipper for the transportation of the latter's products in interstate commerce, the contract providing that tariff car-mileage allowances from railroads for the use of the cars should be collected by the car company and be credited monthly to the rental account of the shipper. The tariffs contained no provision for payment of such allowances directly to the shipper; and, under the carriers' rules, they were paid in this case to the car company. The car company subsequently refused to pay to the shipper any excess of car-mileage allowances over the stipulated rents, on the ground that it would thus be participating in illegal rebating. The shipper thereupon brought suit in assumpsit upon the lease to recover the amount of such excess. *Held:*

1. The suit was within the jurisdiction of the District Court, since the action was an ordinary one in assumpsit on a written contract and the court had jurisdiction of the parties. P. 432.

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[9] *The Stephen Morgan*, 94 U. S. 599; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527; *United States* v. *Blackfeather*, 155 U. S. 180, 186; *Landram* v. *Jordan*, 203 U. S. 56, 62; *Bothwell* v. *United States*, 254 U. S. 231, 233; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191.

2. Upon disclosure of the terms and operation of the lease contract, the court should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Interstate Commerce Commission with respect to the validity under the Interstate Commerce Act of the practice involved. P. 428.

The shipper furnished the cars and was entitled, under § 15 (13) of the Interstate Commerce Act, to a reasonable allowance therefor. No rule or regulation of the carrier may provide for the payment of such allowance to any other person. That the car company acted merely as collecting agent for the shipper does not take the case out of the jurisdiction of the Commission. The inquiry into the lawfulness of the practice under the lease is peculiarly within the competence of the Commission.

3. The cause should not be dismissed but should be held pending the conclusion of an appropriate administrative proceeding, thus saving to the defendant any defenses which it may have. P. 433.

104 F. 2d 903, 916, reversed.

CERTIORARI, *post*, p. 533, to review the reversal of a judgment for the petitioner in a suit brought by the respondent upon a contract of lease.

Mr. Allan P. Matthew, with whom *Mr. John O. Moran* was on the brief, for petitioner.

Mr. W. F. Williamson for respondent.

By leave of Court, *Solicitor General Jackson* and *Messrs. J. Stanley Payne* and *Daniel W. Knowlton* filed a brief on behalf of the Interstate Commerce Commission, as *amicus curiae,* urging reversal.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This was an action in assumpsit brought by the respondent to recover a sum alleged to be due it by the petitioner under the terms of a car leasing agreement. The answer admitted the execution of the agreement

but pleaded that payment of the sum demanded would amount to the making of a rebate, contrary to the provisions of the Elkins Act.[1] The District Court rendered judgment for the petitioner which the Circuit Court of Appeals reversed, holding the respondent entitled to the full amount claimed.[2] We granted certiorari on account of the importance of the question involved and of the

[1] Act of February 19, 1903, c. 708, § 1, 32 Stat. 847, as amended.

"(3). *Receiving rebates; additional penalty and recovery thereof.*— Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be." U. S. C., Tit. 49, § 41 (3).

[2] 104 F. 2d 903, 916.

allegation that the judgment was not in accord with prior decisions of this court.

The petitioner is a corporation, unaffiliated with any railroad, which owns and leases tank cars to railroads and to shippers for use in transportation in interstate commerce. The respondent is a wholly owned subsidiary of El Dorado Oil Works, a manufacturer of coconut oil operating a plant at Berkeley, California, and brought the action as assignee of the latter's rights under the lease.

September 28, 1933, the petitioner and the Oil Works entered into an agreement whereby the former leased to the latter fifty tank cars designated in the contract as "permanent cars," at a rental of $27.50 per car per month. The petitioner agreed to supply the Oil Works with such additional cars as it might need for the shipment of its products, on a rental basis of $30.00 per car per month, these to be ordered from time to time as needed and returned when no longer required.

The contract provided that the petitioner would collect, and credit to the rental account of the Oil Works each month, all mileage earned by the cars while in the Oil Works' service, "according to and subject to all rules of the tariffs of the railroads." The petitioner was to pay the cost of repairs and maintenance but the Oil Works was to be responsible for damage or destruction of the cars while on privately owned tracks.

The leased cars were used by the Oil Works for shipment of its products. Such use was important to the Oil Works since the railroads serving its plant were not prepared to furnish shippers a full supply of the kind of cars needed for carrying the oils in question. The railroad tariffs, though stating rates on the Oil Works' products when shipped in tank cars, disclaimed any obligation to furnish cars of the requisite type.

The carriers maintain tariffs applicable to the allowances to be made to car owners for the use of tank cars, which provide for payment of one and one-half cents per car mile loaded and empty. The tariffs also embody rules which, during part of the period in controversy, stated that mileage payments would be made only to the party whose reporting marks appeared upon the cars and during part of the period that "mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee." The rules precluded payment of the mileage allowance to the Oil Works under the circumstances of this case, since the lease stipulated that all the leased cars should bear the reporting marks of the petitioner.

The petitioner complied with the provisions of the agreement until July 2, 1934, when the Interstate Commerce Commission rendered its decision in Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323, in which it considered the payment of mileage allowances to shippers either directly or through car owners, which payments exceeded the total of the agreed rental for the use of the cars and any additional actual expenses of the shipper in connection with the cars. In that case the Commission held that such payments operated to give the lessee transportation of his products at lower rates than those paid by other shippers who use cars furnished by the carriers and thus amounted to a rebate from the published transportation rates. The petitioner's practice had been to collect the mileage, deduct the rental due, and pay over the balance monthly. After the rendition of the Commission's decision the petitioner collected the mileage from the railroads, credited the Oil Works with the rental due, retained the balance, and refused to pay it over. The ground of its refusal was that to follow the former practice would render it a participant in illegal rebating.

It was disclosed at trial that throughout the period covered by the respondent's claim the mileage allowances had, in every month, exceeded the rentals, leaving a substantial balance which the respondent insisted should be paid to it. During the seven month period from November 1, 1934, to May 31, 1935, this balance amounted to $17,614.13.

The District Court concluded that payment to the shipper of any excess of the mileage allowances over stipulated rents would constitute a rebate prohibited by the Elkins Act and, in that view, held that the respondent could not recover. The Circuit Court of Appeals permitted a recovery on the ground that § 15 (13)[3] of the Interstate Commerce Act authorized the payment of mileage allowances by railroads for the use of private cars furnished by shippers for the transportation of their own commodities; that the practice had been approved by the Commission, and maximum rates fixed by it; that the one and one-half cents per car mile allowance appeared in the carriers' published tariffs dealing with the subject and was, and would remain until action by the Commission, the legal rate payable for the use of such cars; that, while it is open to the Commission to inquire, on its own motion or on complaint, as to any abuses in connection with such tariff mileage allowances, until the Commission does act, the carriers are justified in continuing to pay the scheduled rates; that the shipper in this case is the furnisher or supplier of privately owned cars to the carriers, and the lease agreement constitutes the petitioner a mere agent for the collection and payment of the mileage allowances to the shipper; and that, consequently, the payment, by the petitioner to the shipper, of any excess of the mileage earnings is not a rebate within the terms of the Elkins Act.

[3] U. S. C. Tit. 49, § 15 (13).

The petitioner insists that this conclusion is wrong and that of the District Court correct. The Interstate Commerce Commission, as a friend of the court, has filed a brief in which it contends, first, that the District Court was without jurisdiction to entertain the cause, as the question involved is one primarily for administrative action by the Commission and, secondly, that the payment of the excess credits by the petitioner would result in payment of a prohibited rebate to the shipper.

We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act.

Freight cars are facilities of transportation, as defined by the Act.[4] The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper,[5] and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission.[6] If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or en-

[4] 49 U. S. C. § 1 (3).

[5] 49 U. S. C. § 1 (10) (11); *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121; *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120.

[6] *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434.

gaged in any public service. Therefore its practices lie without the realm of the Commission's competence.

Cars thus leased and used by the carriers are to be distinguished from so-called private cars with which we are here concerned. Shippers, particularly those who require a specialized form of freight car for transportation of their products, may, and do, own cars adapted for the purpose. They may, and do, in lieu of owning such facilities, rent them from the owners. Car companies owning a large number of a special type of freight car, some affiliates or subsidiaries of railroads and others, like the petitioner, wholly independent and financed by private capital, have, for many years, been in the business of leasing cars to shippers. The practice has been well known and well understood. It is entirely lawful and the Commission has so held.[7] But the practice cannot modify the requirements of paragraph (13) of § 15,[8] which governs the payment of allowances for private cars, and invests the Commission with authority to find and declare what allowances are reasonable.

As the Circuit Court of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the carriers

[7] In the Matter of Private Cars, 50 I. C. C. 652.

[8] *Allowance for service or facilities furnished by shipper.*—If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. 49 U. S. C. § 15 (13).

for the use of such cars must be the subject of published schedules,[9] and must be just and reasonable,[10] the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.[11]

From what has been said it results that the shipper in this case was permitted by law to furnish freight cars for the transportation of its products and to be paid a reasonable allowance for performing this portion of the public service which the carrier was bound to render, and that the law requires that the amount and conditions of payment of such allowance shall be set forth in a published tariff. If this is not done, the shipper may complain to the Commission, to the end that a proper allowance be ascertained and made effective by a schedule duly published. In the present case this has not been done. Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it.

As we have stated, the mileage tariffs published by the American Railway Association, which govern the instant case, require that private cars be marked with so-called reporting marks or initials together with a car number. These marks are for the purpose of keeping records of the car's movements and mileage. Appropriate marks to designate privately owned cars are assigned by the Rail-

[9] 49 U. S. C. § 6 (1) (7).

[10] 49 U. S. C. § 15 (13), *supra*, note 9.

[11] Compare *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U. S. 42, 45.

way Association to their owners. The rules appearing in the tariff during a portion of the period in question provided that the mileage for the use of cars of private ownership would be paid to the car owner or to the party who had acquired the car or cars as shown by the permanent reporting marks. The lease agreement provided that the cars should bear the reporting marks of the petitioner. Thus the carrier was bound by its rules to pay the allowance to the petitioner. During a portion of the term in controversy the rules provided that mileage could be paid only to the car owner, not to a lessee. Here again the rules precluded the payment of the allowance by the carrier to the shipper.

The Circuit Court of Appeals has held, and we think correctly, that the shipper—the Oil Works—furnished the cars to the carrier in the present instance. The petitioner did not. The shipper was then entitled, under the plain terms of § 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility. It seems clear that no rule or regulation of the carrier may provide for the payment of such allowance to any other person. And we think the consideration that, in this case, the petitioner acted merely as collecting agent for the shipper, does not take the case out of the Commission's jurisdiction. If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.[12] The inquiry into the lawfulness of the prac-

[12] Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323.

tice is one peculiarly within the competence of the Commission.[13]

As the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.[14]

We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree. The action was an ordinary one in assumpsit on a written contract. The court had jurisdiction of the subject matter and of the parties. But it appeared here, as it did in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, that the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of

[13] *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290, 291.

[14] *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304.

enforcing claims arising out of the failure to comply with the Commission's lawful orders.

When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co., supra,* the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.[15]

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

Reversed.

KALB ET UX. *v.* FEUERSTEIN ET UX.*

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 120. Argued December 15, 1939.—Decided January 2, 1940.

1. The effect of the filing of a petition for a composition or extension of time under § 75 of the Bankruptcy Act upon a state court's jurisdiction of a pending proceeding to foreclose a mortgage on the petitioner's property, is a federal question. P. 438.
2. The filing of a petition by a farmer under § 75 of the Bankruptcy Act for a composition or extension of time to pay his debts, operates *ipso facto* as a stay on the power of a state court, in a pending proceeding to foreclose a mortgage on his property, to proceed with

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[15] Compare *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, 314, where no rights could be saved by retaining the cause; and *St. Louis, B. & M. Ry. Co.* v. *Brownsville District,* 304 U. S. 295, 301, where the District Court was asked to make an order which the Commission alone had authority to make.

* Together with No. 121, *Kalb* v. *Luce et al.*, also on appeal from the Supreme Court of Wisconsin.

foreclosure, to confirm the foreclosure sale, and to dispossess under it. Pp. 438, 440.

3. The action of the state court in this case in proceeding contrariwise, without the consent of the bankruptcy court, was not merely erroneous, but was in excess of its authority, void, and subject to collateral attack. And whether the jurisdiction of the state court to proceed thus was contested in the foreclosure proceeding, or could have been contested, is immaterial. Pp. 438, 440.
4. The language and the broad policy of the federal Act, as well as its legislative history, support this construction; and, as so construed, the Act was within the plenary power of Congress in respect of the subject of bankruptcy. Pp. 439–441.
5. The liability in tort of the state court judge, the sheriff who executed the writ of assistance, and the mortgagees, for such action as was taken against the farmer-debtor without the authority of law, is to be determined according to the state law. P. 443.

231 Wis. 185, 186; 285 N. W. 431, reversed.

APPEALS from affirmances of judgments dismissing the complaints in two cases. For earlier opinions of the state supreme court, see 228 Wis. 519, 525; 279 N. W. 685, 687; also 280 N. W. 725, 726.

Messrs. William Lemke and *Elmer McClain,* with whom *Mr. James J. McManamy* was on the brief, for appellants.

Messrs. J. Arthur Moran and *Arthur T. Thorson* for appellees.

Independent and adequate non-federal grounds support the state court decision.

The judge, who acted in his judicial capacity; the sheriff, who acted in his official capacity; and litigants, who merely sought legal rights, are immune from liability for damages. Citing many cases.

The county court orders are voidable and not void, and not subject to collateral attack. *Bradley* v. *Fisher,* 13 Wall. 335; *Dowell* v. *Applegate,* 152 U. S. 327; Freeman on Judgments, pp. 718–719. Wisconsin decisions are con-

trolling and support this contention. Distinguishing *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502.

The filing of the amended petition under § 75 did not effect an automatic stay of the foreclosure proceedings pending in the county court. That court had jurisdiction to confirm the sale previously made.

The Bankruptcy Act subjects to exclusive federal jurisdiction only the farmer and property not in control of some other court. *In re Price*, 16 F. Supp. 836. Distinguishing *Wright* v. *Vinton Branch*, 300 U. S. 440; *Wright* v. *Union Central Life Ins. Co., supra; Adair* v. *Bank of America Assn.*, 303 U. S. 350. See *Ex parte Baldwin*, 291 U. S. 610; *Straton* v. *New*, 283 U. S. 318.

The cases cited by the appellants in support of their contention that § 75 is self-executing do not apply. Distinguishing *May* v. *Henderson*, 268 U. S. 111; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Acme Harvester Co.* v. *Beekman*, 222 U. S. 300.

The full faith and credit clause requires recognition of the sale and proceedings in the state court.

Mr. Justice Black delivered the opinion of the Court.

Appellants are farmers. Two of appellees, as mortgagees, began foreclosure on appellants' farm [1] March 7, 1933, in the Walworth (Wisconsin) County Court; judgment of foreclosure was entered April 21, 1933; July 20, 1935, the sheriff sold the property under the judgment; September 16, 1935, while appellant Ernest Newton Kalb had duly pending [2] in the bankruptcy court a petition for

[1] In both No. 120 and No. 121, the complaints alleged that appellant Kalb and his wife executed the mortgage. In No. 120 both Kalb and his wife were alleged to be owners of the farm; while in No. 121, appellant Kalb was alleged to be the owner.

[2] October 2, 1934, the petition was filed and approved. June 27, 1935, the petition was dismissed, but September 6, 1935, it was re-

composition and extension of time to pay his debts under § 75 of the Bankruptcy Act (Frazier-Lemke Act),[3] the Walworth County Court granted the mortgagees' motion for confirmation of the sheriff's sale; no stay of the foreclosure or of the subsequent action to enforce it was ever sought or granted in the state or bankruptcy court; December 16, 1935, the mortgagees, who had purchased at the sheriff's sale, obtained a writ of assistance from the state court; and March 12, 1936, the sheriff executed the writ by ejecting appellants and their family from the mortgaged farm.

The questions in both No. 120 and No. 121 are whether the Wisconsin County Court had jurisdiction, while the petition under the Frazier-Lemke Act was pending in the bankruptcy court, to confirm the sheriff's sale and order appellants dispossessed, and, if it did not, whether its action in the absence of direct appeal is subject to collateral attack.

No. 120. After ejection from their farm, appellants brought an action in equity in the Circuit Court of Walworth County, Wisconsin, against the mortgagees who had purchased at the sheriff's sale, for restoration of possession, for cancellation of the sheriff's deed and for removal of the mortgagees from the farm. Demurrer was sustained for failure to state a cause of action and the complaint was dismissed. The Supreme Court of Wisconsin affirmed.[4]

No. 121 is a suit at law in the state court by appellant Ernest Newton Kalb against the mortgagees, the sheriff and the County Court judge who confirmed the foreclosure sale and issued the writ of assistance. Damages are sought for conspiracy to deprive appellant of posses-

instated and the order of dismissal was vacated pursuant to the second Frazier-Lemke Act, 11 U. S. C. 203, § 5.

[3] 11 U. S. C. 203.

[4] 231 Wis. 185; 285 N. W. 431.

sion, for assault and battery, and for false imprisonment. As in No. 120, demurrer was sustained, and the Supreme Court of Wisconsin affirmed.[5]

In its first opinion the Supreme Court of Wisconsin said: "It is the contention of the plaintiff [mortgagor] that this statute is self executing,—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the Bankruptcy Act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling." Addressing itself solely to this federal question of construing the Frazier-Lemke Act, the Wisconsin court decided that the federal Act did not itself as an automatic statutory stay terminate the state court's jurisdiction when the farmer filed his petition in the bankruptcy court. Since there had been no judicial stay, it held that the confirmation of sale and writ of assistance were not in violation of the Act.

Appellees insist, however, that the Wisconsin court on rehearing rested its judgment on an adequate non-federal ground. If that were the fact, we would not, under accepted practice, reach the state court's construction of the federal statute.[6] The statement on rehearing relied

[5] Demurrer to one count against the sheriff for assault and battery was overruled, but the Supreme Court of Wisconsin reversed as to this count. The opinion of the court upholding the demurrer appears in *Kalb* v. *Luce,* 228 Wis. 519; 279 N. W. 685; 280 N. W. 725. Appeal to this Court was dismissed because no final judgment had been entered. 305 U. S. 566. Upon remand the State Circuit Court dismissed, the Supreme Court of Wisconsin affirmed, "for the reasons . . . stated" in its opinion in *Kalb* v. *Luce, supra,* 231 Wis. 186; 285 N. W. 431, and the appeals here are from the judgments of dismissal.

[6] *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54; *Enterprise Irrigation District* v. *Farmers*

on as constituting the non-federal ground was: "We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void."

But if appellants are right in their contention that the federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the state court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a federal question.

It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack.[7] But Congress, because its power over the subject of bankruptcy

Mutual Canal Co., 243 U. S. 157, 164; *Hammond* v. *Johnston*, 142 U. S. 73.

[7] *Chicot County Drainage District* v. *Baxter State Bank*, *ante*, p. 371; *Stoll* v. *Gottlieb*, 305 U. S. 165, 171, 172; *Dowell* v. *Applegate*, 152 U. S. 327, 340.

is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.[8] Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin,[9] a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no state court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack.[10] The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.[11] The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—state and federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone.

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[8] *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 353–4; and compare *Elliott* v. *Lessee of Piersol*, 1 Pet. 328, 340; *Williamson* v. *Berry*, 8 How. 495, 540, 541, 542.

[9] Laws of Wisconsin, 1907, Chap. 234.

[10] *Vallely* v. *Northern Fire Ins. Co.*, *supra*, 355; cf. *Taylor* v. *Sternberg*, 293 U. S. 470, 473.

[11] *Hines* v. *Lowrey*, 305 U. S. 85, 90, 91; *Davis* v. *Wechsler*, 263 U. S. 22, 24.

We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending.[12]

The Act expressly provided:

"(n) The filing of a petition . . . shall immediately subject the farmer and all his property, wherever located, . . . to the exclusive jurisdiction of the court, including . . . the right or the equity of redemption where the period of redemption has not or had not expired, . . . or where the sale has not or had not been confirmed," and "In all cases where, at the time of filing the petition, the period of redemption has or had not expired, . . . or where the sale has not or had not been confirmed, . . . the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section"; and

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings *shall not be instituted,* or if instituted at any time prior to the filing of a petition under this section, *shall not be maintained, in any court or otherwise,* against the farmer or his property, *at any time after the filing* of the petition under this section, and *prior to the confirmation* or other disposition of the composition or extension proposal by the court:

. . . . . .

[12] That a state court before which a proceeding is competently initiated may—by operation of supreme federal law—lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system. See *Moore* v. *Dempsey,* 261 U. S. 86. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458.

"(2) *Proceedings for foreclosure of a mortgage on land,* or for cancellation, rescission, or specific performance of an agreement for sale of land *or for recovery of possession of land;*

. . . . . .

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) *The prohibitions . . . shall apply to all judicial or official proceedings in any court or under the direction of any official,* and *shall apply to all creditors, public or private,* and *to all of the debtor's property, wherever located. All such property shall be* under *the sole jurisdiction and control of the court in bankruptcy,* and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act." [Italics supplied.]

Thus Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history. Clarifying and altering the sweeping provisions for exclusive federal jurisdiction in the original Act,[13] Congress made several important changes in 1935.[14] It was then that subsection (p) was amended so that the prohibitions in subsection (o) of any steps against a farmer-debtor or his property once his petition is filed were made specifically applicable "to all judicial or official proceed-

[13] 47 Stat. 1470, § 75.

[14] 49 Stat. 942, 943.

ings in any court or under the direction of any official, and . . . to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 . . ."

As stated by the Senate Judiciary Committee in reporting these amendments: ". . . subsection (n) brings all of the bankrupt's property, wherever located, under the absolute jurisdiction of the bankruptcy court, where it ought to be. Any farmer who takes advantage of this act ought to be willing to surrender all his property to the jurisdiction of the court, for the purpose of paying his debts, and for the sake of uniformity. . . .

"The amendment to subsection (p) further carries out the amendment to subsection (n), and places the sole jurisdiction of the bankrupt's estate and of his obligations all in the bankruptcy court, without exception."[15]

The Congressional purpose is similarly set out in the House Judiciary Committee's Report: "The amendment to subsection (n) in fact construes, interprets, and clarifies both subsections (n) and (o) of section 75. By reading subsections (n) and (o) as now amended in this bill, it becomes clear that it was the intention of Congress, when it passed section 75, that the farmer-debtor and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefits of the act should extend to the farmer, prior to confirmation of sale, during the period of redemption, and during a moratorium; and that no proceedings after the filing of the petition should be instituted, or if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise."[16]

[15] Senate Report No. 985, 74th Cong., 1st Sess.

[16] House Report No. 1808, 74th Cong., 1st Sess.

Congress set up in the Act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who, as victims of a general economic depression, were without means to engage in formal court litigation. To this end, a referee or Conciliation Commissioner was provided for every county in which fifteen prospective farmer-debtors requested an appointment; and express provision was made that these Commissioners should "upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section." [17] In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that state court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law. Individual responsibility for such unlawful acts must be decided according to the law of the State. We therefore express no opinion as to other contentions based

[17] 47 Stat. 1473 (q).

upon state law and raised by appellees in support of the judgments of the Supreme Court of Wisconsin.

Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court,[18] or whether it could have been contested,[19] are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act.

The judgments in both cases are reversed and the causes are remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.

Reversed.

AVERY *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 124. Argued December 7, 1939.—Decided January 2, 1940.

1. The guarantee by the Fourteenth Amendment of assistance of counsel in a criminal case, is not satisfied by a formal appointment of counsel to defend the accused but includes an opportunity for consultation between them and for preparation of the defense. P. 446.
2. Upon review of a decision of a state court, the question whether an accused has been denied the federal constitutional right to the assistance of counsel, is to be determined by this Court upon an independent examination of the record. P. 447.
3. Upon the record in this case, *held* that denial by the trial court of a motion for a continuance, made by appointed counsel to obtain

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[18] *Stoll* v. *Gottlieb, supra.*

[19] *Chicot County Drainage District* v. *Baxter State Bank, supra.*

more time to prepare the defense, did not, under the circumstances disclosed, deprive the accused of his constitutional right to the assistance of counsel. P. 450.

237 Ala. 616; 188 So. 391, affirmed.

CERTIORARI, *post,* p. 540, to review the affirmance of a conviction of murder.

Messrs. L. S. Moore and *John Foshee,* with whom *Mr. Edward H. Saunders* was on the brief, for petitioner.

Mr. Thomas S. Lawson, Attorney General of Alabama, with whom *Mr. William H. Loeb,* Assistant Attorney General, was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted of murder in the Circuit Court of Bibb County, Alabama; he was sentenced to death and the State Supreme Court affirmed.[1] The sole question presented is whether in violation of the Fourteenth Amendment "petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial," because after competent counsel were duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.[2]

Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction.[3] But counsel were duly appointed for petitioner by the trial court as

[1] 237 Ala. 616; 188 So. 391.

[2] *Post,* p. 540.

[3] *Powell* v. *Alabama,* 287 U. S. 45; see *Brown* v. *Mississippi,* 297 U. S. 278, 286.

required both by Alabama law [4] and the Fourteenth Amendment.

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.[5]

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.[6] The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders,[7] and was not intended to bring to the test of a decision of this Court every ruling

[4] Code of Ala., 1923, § 5567.

[5] *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *Isaacs* v. *United States,* 159 U. S. 487, 489; see *Minder* v. *Georgia,* 183 U. S. 559, 561.

[6] Cf. *Powell* v. *Alabama, supra; Moore* v. *Dempsey,* 261 U. S. 86, 91.

[7] *Leeper* v. *Texas,* 139 U. S. 462, 467–8; *Ughbanks* v. *Armstrong,* 208 U. S. 481, 487; *Minder* v. *Georgia, supra,* 562.

made in the course of a state trial.[8] Consistently with the preservation of constitutional balance between state and federal sovereignty, this Court must respect and is reluctant to interfere with the states' determination of local social policy.[9] But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness[10] demands that we scrupulously review the record.[11]

The record shows—

Petitioner was convicted on an indictment filed in the Bibb County Circuit Court for murder alleged to have occurred in 1932. He was found and arrested in Pittsburgh, Pennsylvania, shortly before March 21, 1938. On that date, Monday, he was arraigned at a regular term of the Court; two practicing attorneys of the local bar were appointed to defend him; pleas of not guilty and not guilty by reason of insanity were entered and the presiding judge set his trial for Wednesday, March 23. The case was not reached Wednesday, but was called Thursday, the 24th, at which time his attorneys filed a motion for continuance, on the ground that they had not had sufficient time and opportunity since their appointment to investigate and prepare his defense. Affidavits of both attorneys accompanied the motion.

One attorney's affidavit alleged that he had not had time to investigate and prepare the defense because he had been actually engaged in another trial from the time of his appointment at 2 P. M., Monday, until 9 P. M.

[8] Cf. *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Walker* v. *Sauvinet*, 92 U. S. 90, 92.

[9] *Green* v. *Frazier*, 253 U. S. 233, 239, 240, 242; *Nebbia* v. *New York*, 291 U. S. 502, 537–8.

[10] Cf. *Lewis* v. *United States*, 146 U. S. 370, 374, 375.

[11] *Norris* v. *Alabama*, 294 U. S. 587, 590; *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

that evening; his presence had been required in the court room on Tuesday, March 22, due to employment in other cases set, but not actually tried; he had been detained in court Wednesday, March 23, waiting for petitioner's case to be called; but after his appointment he had talked with petitioner and "had serious doubts as to his sanity."

The affidavit by the other attorney stated that he too had not had proper time and opportunity to investigate petitioner's case because of his employment in other pending cases, some of which were not disposed of until Tuesday at 4:30 P. M.

No ruling on the motion for continuance appears in the record, but on Thursday, the 24th, the trial proceeded before a jury.

The foster parents of the person whose murder was charged and another witness testified that on the day of the killing, deceased, petitioner's wife from whom he was then separated, had started to a nearby neighbor's house to get a washtub when petitioner approached her with a pistol in his right hand; words ensued; she turned and ran and he shot her twice in the back; she fell and he shot her three more times. Petitioner denied that these witnesses were at the time in a position to see what occurred. Admitting he had come some three miles from his home to see his wife, he insisted that he had no pistol but that when he spoke to her she had a bucket of water and something else; they quarrelled; she then drew a pistol from under her sweater and he "got to tussling with her over the pistol, trying to take it away from her"; "shot her, behind the shoulder, and through the back, tussling with her," and then ran away. There is no suggestion in the record that there were any witnesses to the killing other than those who testified. The plea of insanity apparently was withdrawn.[12]

[12] The opinion of the Supreme Court of Alabama notes: "Counsel first interposed a plea of not guilty, and another of not guilty by reason of insanity. But upon the trial withdrew the latter plea."

The jury returned a verdict of guilty with the death penalty. On the same day, the 24th, petitioner's counsel moved for a new trial, setting up error in the failure to grant the requested continuance. This motion for new trial was continued from time to time until June 30. In the interim, a third attorney had been employed by petitioner's sister, and on June 30, petitioner's three lawyers filed an amendment to the motion for new trial, specifically setting out that the denial of a continuance had deprived petitioner of the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment, by denying him "the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial."

When the motion for new trial was heard the only witnesses were petitioner's three attorneys. The third attorney, employed by petitioner's sister, testified only that he had been employed after the trial and verdict. The two attorneys who had represented petitioner at the trial substantially repeated what they had set out in their original affidavits. In some detail they testified that: they had conferred with petitioner after their appointment on Monday, March 21, but he gave them no helpful information available as a defense or names of any witnesses; between their appointment and the trial they made inquiries of people who lived in the community in which the petitioner had lived prior to the crime with which he was charged and in which the killing occurred and none of those questioned, including a brother of petitioner, could offer information or assistance helpful to the defense; they (the attorneys) had not prior to the trial conferred with local doctors, of whom there were four, as to petitioner's mental condition, had neither summoned any medical experts or other witnesses nor asked for compulsory process guaranteed an accused by the Alabama Constitution, Art. 1, § 6. And in response to inquiries

made by the trial judge they stated that they had not made any request for leave of absence from the court to make further inquiry or investigation.

The motion for new trial was overruled.

Upon appeal, the Alabama Supreme Court gave full consideration to the motion for continuance although no ruling upon it was contained in the record and concluded that the trial court had not abused its discretion in failing to continue the case.[13]

Under the particular circumstances appearing in this record, we do not think petitioner has been denied the benefit of assistance of counsel guaranteed to him by the Fourteenth Amendment. His appointed counsel, as the Supreme Court of Alabama recognized, have performed their "full duty intelligently and well." Not only did they present petitioner's defense in the trial court, but in conjunction with counsel later employed, they carried an appeal to the State Supreme Court, and then brought the matter here for our review. Their appointment and the representation rendered under it were not mere formalities, but petitioner's counsel have—as was their solemn duty—contested every step of the way leading to final disposition of the case. Petitioner has thus been afforded the assistance of zealous and earnest counsel from arraignment to final argument in this Court.

The offense for which petitioner was convicted occurred in a County largely rural. The County seat, where court was held, has a population of less than a thousand.[14] Indictments in the Bibb County Circuit Court, as in most rural Counties throughout the Nation, are most frequently returned and trials had during fixed terms or sessions of

[13] *Avery* v. *Alabama, supra.*

[14] Vol. I, Fifteenth Census of the United States, 1930.

court.[15] And these rural "Court Weeks" traditionally bring grand and petit jurors, witnesses, interested per-

[15] The first Constitution of Alabama (1819), Art. V, § 7, provided for the holding of a circuit court at least twice a year in each county, and this provision continues in the present constitution, Const. of Ala. (1901) Art. VI, § 144. While in recognition of modern social needs (see Pound, Criminal Justice in America, 1930, pp. 152, 88, 150, 163, 164, 178, 183, 189, 190) circuit courts now, by statute, entertain causes at substantially all times (Code, 1923, § 6667) the holding of formal court at specific terms or sessions is emphasized in the requirement that each cause be called at least twice a year and as often as is necessary to secure prompt trials. (*Id.*, § 6668). Cf. Ala. Civ. Code, 1907, c. 62, Art. I, § 3234, specifically providing for holding of circuit court in Bibb County on the first Monday before the last Monday in February and August of each year. In general, the practice in Alabama accords with that in all sections of the country, e. g., see Compiled Laws of Colorado, 1921, § 5656, *et seq.*, fixing specific terms of district courts, and § 5734–5766, fixing specific dates of county court terms; Idaho Code Ann. (1932) 1–706, *et seq.*, requiring at least two terms each year for the district court in each county, to be fixed by court order; Burns Indiana Stat. Ann. (1933) 4–332, *et seq.*, fixing specific terms of circuit courts, 4–407 *et seq.*, and 4–607, fixing specific terms of superior courts; Rev. Stat. of Maine (1930), c. 91, § 21, p. 1264, fixing specific trial terms for superior courts; Mich. Stat. Ann. (Callaghan, 1938) § 27.546, *et seq.*, providing for at least four terms of circuit court in each county organized for judicial purposes, at fixed times subject to change by court order (§ 27.547); Cahill's Consol. Laws of New York (1930), c. 31, § 84, providing that special and trial terms of supreme court be designated by the appellate division (see also § 150) and requiring that at least one special term and two trial terms must be held in each county annually, § 148; Rev. Stat. of Utah (1933), 20–3–6, 20–3–9, requiring at least three terms during each year for the district court at each county seat, at times to be fixed by the respective district judges; Public Laws of Vermont (1933), § 1374, p. 296, fixing stated terms for holding county courts. In Pennsylvania, courts of quarter sessions, "of oyer and terminer and jail delivery shall be holden four times, annually, in every county." 17 Purdon's Penn. Stat., §§ 331, 351, 371.

sons and spectators from every part of the County into the County seat for court.[16] Unlike metropolitan centers, people in these rural Counties know each other, and information concerning witnesses and events is more widespread and more generally known than in large cities. Because this was so, petitioner's attorneys were able to make the inquiries during Court Week at the County seat, to which they testified, and that they apparently withdrew the plea of insanity after this inquiry is significant. That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.

[16] The system of circuit court terms continues today characteristics traceable to the original English Assizes. While financial and administrative matters have been dropped from the business historically committed to justices on Eyre and later to judges of assize from the time of Henry II, our rural County Circuit courts still bear the earmarks of a "general review of the whole administration of the country." I Stephen's, "His. of the Cri. Law of Eng." (London), pp. 101, 106, 111. See, II Enc. of Soc. Sci., 283, 284, IV, 522. And the practice of promptly trying at any term all the then accused finds its historical roots in the commissions of gaol-delivery oyer and terminer of judges on Circuit or "Assize." I Stephen, *supra*, p. 105, *et seq.* These judges were empowered "to try every prisoner in the gaol, committed for any offense whatsoever." They proceeded upon prior indictments "as well as upon indictments taken before themselves." Stubb's "Crown Circuit" (Dublin), 2, 5, 7, 9, 10. "And therefore it hath never been a question, but that the justices of gaol-delivery may take an indictment, try, and give judgment the same day." 2 Hale's "Pleas of the Crown" (1st Amer. ed.), 33. The Sheriff was commanded to see that the prisoners "together with their attachments, indictmenti, and all other muniments any ways concerning those prisoners . . . [be present and that] all they, who will prosecute against those prisoners, be then and there to prosecute against them, as shall be just." Stubbs, *supra*, 4, 5. See 1 Holdsworth's "History of English Law" (1927), pp. 49–51, 264 *et seq.*

Under the circumstances of this case we cannot say that the trial judge, who concluded a fairly conducted trial by carefully safeguarding petitioner's rights in a clear and fair charge, deprived petitioner of his constitutional right to assistance of counsel. The Supreme Court of Alabama having found that petitioner was afforded that right, its judgment is

Affirmed.

NATIONAL LABOR RELATIONS BOARD *v.* FALK CORPORATION.

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

No. 460. Argued December 8, 11, 1939.—Decided January 2, 1940.

In consolidated proceedings against an employer under the National Labor Relations Act, the Board, under § 10 (c), ordered the employer to cease and desist from interference with and domination of a labor union of its employees, to completely disestablish such union, and to post notices of compliance with the Board's order; and, under § 9 (c), directed an election of a representative for collective bargaining on a ballot containing the names of two competing unions but omitting the company union. The Circuit Court of Appeals granted enforcement, providing that the employees should be free at any election to choose the company union to represent them, and that the employer be permitted to add to the posted notices the qualification that the company union would be disestablished and unrecognized until and unless it should be chosen by the employees to represent them. *Held:*

1. The Circuit Court of Appeals was without power thus to modify, and was without jurisdiction under § 9 (d) to review, the Board's direction of an election. Pp. 458–459.

2. The Board's order that the company union be completely disestablished and barred from consideration as an employee representative was supported by the evidence and findings, and was not inconsistent with § 7 of the Act, which guarantees the right of employees to choose their own representative. P. 461.

3. Modification of the Board's order by omitting the requirement that the notices to be posted in the plant contain a statement that the company would "cease and desist" from its unlawful activities; and by inclusion in such notice of assurances to the employees that the company union was eligible for selection as their bargaining representative—was error. P. 462.

4. The order of the Board should be enforced without modification. P. 463.

106 F. 2d 454, reversed.

CERTIORARI, *post*, p. 544, to review a decree modifying an order of the National Labor Relations Board, 6 N. L. R. B. 654, and granting enforcement of the order as modified. See also, 102 F. 2d 383.

Mr. Charles Fahy, with whom *Solicitor General Jackson* and *Messrs. Robert B. Watts, Laurence A. Knapp*, and *Mortimer B. Wolf* were on the brief, for petitioner.

Messrs. A. J. Engelhard and *Leon B. Lamfrom* for the Falk Corporation, and *Mr. Giles F. Clark* for the Independent Union of Falk Employees, respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Upon charges filed by the Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge No. 1528, the Labor Board found that respondent, an employer conceded to be engaged in interstate commerce, had, in violation of the National Labor Relations Act, interfered with its employees' free right to self organization and had fostered and dominated a company union called the Independent Union.[1] Respondent was ordered to cease and desist from such interference and domination; to disestablish the company union completely, and to post notices in its plant of compliance with the Board's

[1] 49 Stat. 449, 452, § 8.

order. At the same time and in a proceeding consolidated [2] with the determination of the alleged unfair labor practices, the Board, also upon petition of Amalgamated, directed an election of a representative for collective bargaining on a ballot to contain the Amalgamated and the Operating Engineers—a participant in the consolidated hearing—but not the Independent.

On petition by the Board for enforcement of its order, the Court of Appeals concluded [3] that "the order of the Board is valid and . . . its petition for enforcement . . . is . . . granted." But, of its own volition, the court provided in its final order "that the . . . employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the . . . Act, the Independent Union to represent them in labor relation dealings with respondent"; and that respondent be permitted to add to the notices in its plant the qualification that the Independent would be disestablished and unrecognized only "until and unless . . . [the] employees freely and of their own choice select the Independent Union as their representative. . . ." [4]

In its petition for certiorari, the Board contended that the court was without jurisdiction to review a direction of election and that, apart from the question of jurisdiction, the court had improperly interfered with the discretion given the Board by the Act. We granted certiorari to review these important questions.[5]

The first of the two consolidated proceedings before the Board was based upon the charge of the Amalgamated, a labor organization, that respondent had engaged in unfair labor practices contrary to § 8 (1), (2), (3) and

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[2] *Id.*, § 9 (c).

[3] 102 F. 2d 383, 390.

[4] 106 F. 2d 454, 456, 457.

[5] *Post*, p. 544.

(5) of the Act. As already noted, the Board found respondent had interfered with its employees' free choice of a bargaining agent in violation of 8 (1), (2) and (3). Because there was no clear showing that the Amalgamated then represented a majority of the employees, the Board did not sustain the charge that respondent's refusal to bargain collectively with Amalgamated amounted to an unfair labor practice under 8 (5).

The second phase of the Labor Board's action was taken pursuant to § 9 (c)[6] of the Act, authorizing the Board to investigate and ascertain representatives of employees for collective bargaining. As expressly permitted by subsection (c), the Board conducted this investigation, itself a distinct proceeding, "in conjunction with a proceeding under section 10" and rendered its "Direction of Election" at the same time the order relative to the unfair labor practices was entered "under section 10." It was this "Direction of Election" that provided for inclusion on the ballot of Amalgamated (C. I. O.) and the Operating Engineers (A. F. L.), but omitted the Independent. The election was not actually to be held until after the Board was "satisfied that the effects of the company's unfair labor practices . . . [had] been dissipated by" compliance with the order to cease and desist and to disestablish the Independent.

When the Board petitioned the Court of Appeals for enforcement of its order against respondent, it filed a transcript of the entire consolidated proceedings held under 9 (c) and 10 (c).

[6] § 9(c), 49 Stat. 453: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Affirming the finding of unfair labor practices and order made by the Board under 10 (c), the court considered its power to act at an end if nothing had been before it "but the terms of an election by the employees about to take place." But the court held, one judge dissenting, that it did have jurisdiction to attach a condition to the Board's order whereby Independent might become a candidate in the proposed election because it was "disposing of a labor dispute case wherein the proceedings . . . [had] gone beyond mere plans by the Board for the calling of an election" and therefore had before it "for final disposition, the matter of the selection of the bargaining agent." Having thus found jurisdiction in itself to make "final disposition . . . of the selection of the bargaining agent," the court thought it necessary so to condition the Board's order as to prevent the elimination "for all time [of] one of the candidates—the Independent Union."

Respondent and the intervening Independent (company) union here contend that the court below did not actually modify the Board's "Direction of Election," but if deemed to have done so, the modification was authorized under either § 9 (d) or § 10 (e).[7] They also support

[7] "Sec. 9.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10.

"(e) The Board shall have power to petition any circuit court of appeals . . . within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person re-

the result below on the ground that, as the court below believed, the Board was without power to keep the company union—if purged from company influence—from the ballot in a future election to select a bargaining agent, because such proscription would impair the guarantee in § 7 of the Act that employees may bargain collectively through representatives of their own free choice.

First. We think it apparent that the conditions attached by the court to the Board's order operated as a modification of the Board's Direction that Independent be omitted from the ballot in the coming election. In conditioning the Board's order, the court acted, as it said, "that the coming election shall be free, uninfluenced by the employer, and unhampered by any election order which eliminates [the Independent] as a contender." In effect, the court's qualification of the Board's order judicially pronounced—in advance of the election—that election methods considered "suitable" by the courts rather than by the Board must be followed. But § 9 of the Act vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent; to this end, the Board "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

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sides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . ."

Nor can authority for such anticipatory judicial control of election methods be found in § 9 (d) which permits a review only in those cases in which the Board makes an order relating to labor practices found to be unfair as a result of a prior certification of a selected bargaining agent.[8] Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not "based in whole or in part upon facts certified" as the result of an election or investigation made by the Board pursuant to § 9 (c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification—has been or can be made, so as to invoke the court's powers under 9 (d).

The fundamental error of the court below lay in its assumption that there was before it "for final disposition, the matter of the selection of the bargaining agent." The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted.[9] There can be no court review under 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.

Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9 (d).

Second. The company and Independent contend, as the court below held, that the Board's order of disestablishment—eliminating the Independent from the coming election even though purged of company influence—violates § 7 [10] of the Act which guarantees the right of

[8] *American Federation of Labor* v. *Labor Board, ante,* pp. 406, 409.

[9] *Labor Board* v. *International Brotherhood, ante,* p. 413.

[10] § 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through rep-

employees to choose their own bargaining representatives. On this premise, they argue that under the power in 10 (e) to modify orders of the Board, it was the duty of the court below to alter the Board's order of disestablishment so as to protect the right of the employees to choose the Independent if purged of company domination prior to the contemplated election.

On the contrary, the Board reached the conclusion that full protection of the employees' right freely to choose bargaining representatives required complete disestablishment effecting elimination of the Independent as a candidate. The findings of the Board, on which it reached this conclusion, in part were:

Shortly after the passage of the National Industrial Recovery Act in 1933,[11] respondent brought into being a company dominated union of its employees called the "Works Council" which functioned under company control until April, 1937. At that time, the A. F. of L. and the C. I. O. were making intensive efforts to organize respondent's employees in the face of respondent's hostility. As the campaign of the outside unions progressed, the company's personnel manager arranged, for April 12, the first of four meetings, held by Representatives of the Works Council during working hours in the company's plant hospital; in the course of these meetings there was a suggestion that the company would advance the date of a proposed wage income to influence the employees' choice of a union, and the necessity for prompt incorporation "because the C. I. O. was working in the plant" was made clear; April 18, a meeting was held off of respondent's property, but no definite form of organiza-

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resentatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

[11] 48 Stat. 195, 198.

tion was decided upon; April 20, after conferring with an attorney whom respondent's president had suggested, three employees incorporated the Independent and notified respondent that it was ready to bargain collectively for some four hundred employees; on April 23, respondent recognized the Independent as the bargaining unit for all its employees upon the statement of the three incorporators, without proof, that they represented a majority of the employees.

In summary, the Board stated that respondent had used the Independent "as a convenient weapon to prevent the exercise of its employees' rights to self-organization and collective bargaining." And the court below, in approving the findings of the Board, held that the testimony showed that the company "earnestly endeavored to prevent the unionizing of its employees and when the inevitable became imminent, it sought to dominate the formation, organization and activities of the" company union. The evidence abundantly supports the concurrent findings of the Board and the court below.[12]

From these findings the Board justifiably drew the inference that this company-created union could not emancipate itself from habitual subservience to its creator, and that in order to insure employees that complete freedom of choice guaranteed by § 7, Independent must be completely disestablished and kept off the ballot.

Congress has intrusted the power to draw such inferences to the Board and not to the courts.[13] In order that 9 (c) might be an effective means of selecting freely chosen representatives for collective bargaining as guaranteed by § 7, the Board acted within its power in dis-

[12] Cf. *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 466.

[13] *Labor Board* v. *Greyhound Lines,* 303 U. S. 261, 271; *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co., ante,* p. 241.

establishing Independent so as to bar it from consideration as an employees' representative.[14]

Third. The court also modified the Board's order by omitting the requirement that the notices to be posted in the plant contain a statement that the company would "cease and desist" from its unlawful activities. As stated in the first opinion of the court below,[15] the purpose of the Board in requiring the company to publish notices assuring its employees that it would "cease and desist" had been "to convey to the employees the knowledge of a guarantee of an unhampered right in the future to determine their own labor affiliations." Knowledge on the part of the men that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent, which the Board found the company had done successfully in the past, was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor. But the notices as permitted by the court's modifying order not only failed to assure the men that the company would cease its unlawful and coercive practices, but—backed with the prestige of a formal court order—told the men that Independent, while in terms disestablished for the time being, was still available for selection by the employees. Thus the modified notices neither renounced

[14] Report of House Comm. on Labor, House Report No. 1147, 74th Cong., 1st Sess., pp. 17–19: "It is of the essence that the rights of employees to self-organization and to join or assist labor organizations should not be reduced to a mockery by the imposition of employer-controlled labor organizations, particularly where such organizations are limited to the employees of the particular employer and have no potential economic strength."

[15] The court first affirmed the findings and order of the Board, 102 F. 2d 383; it wrote a second opinion rejecting the Board's objection to the final decree embodying the disputed conditions to the Board's order, 106 F. 2d 454.

the company's unlawful practices nor promised their abandonment, and left as a candidate the Independent, toward which the unrenounced unlawful activities of the company had been directed. We think the plant notices as modified by the court's order fell far short of conveying "to the employees the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations."

Other contentions of respondent have been considered and found without merit.

The court below committed error in modifying the Board's order. Accordingly, the cause is remanded to the Court of Appeals with instructions to enforce the Board's order without any modification.

Reversed.

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

BONET, TREASURER, *v.* TEXAS COMPANY (P. R.), INC.

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

No. 132. Argued December 11, 1939.—Decided January 2, 1940.

1. To warrant reversal of a decision of the Supreme Court of Puerto Rico on construction of local statutes the error must be manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous. P. 470.
2. The Circuit Court of Appeals erred in overruling the following conclusions of the Supreme Court of Puerto Rico, construing Island statutes, viz.,

   (a) That under § 9 of Act No. 102, 1925, an uninsured employer could have an award of the Workmen's Relief Commission reviewed, including the issue whether or not he was insured. Pp. 465, 471.

(b) That in place of the provision of § 7 of that Act for collection by the Attorney General of awards made against uninsured employers, amendatory legislation had substituted collection by the Treasurer. Pp. 466, 472.

(c) That the Treasurer had power of distraint. Pp. 468, 472.

102 F. 2d 710, reversed; 52 P. R. Dec. 658; 53 *id.* 475, affirmed.

REVIEW by certiorari, *post*, p. 538, of a judgment of the Circuit Court of Appeals which reversed the Supreme Court of Puerto Rico in a suit to enjoin the Treasurer of the Island from enforcing by distraint orders of the Puerto Rico Workmen's Relief Commission.

Mr. William Cattron Rigby, with whom *Messrs. Nathan R. Margold, B. Fernandez Garcia*, and *Enrique Campos del Toro* were on the brief, for petitioner.

Messrs. Lionel P. Marks and *Jerrold H. Ruskin*, with whom *Messrs. Harry T. Klein* and *T. K. Schmuck* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent brought this action in a Puerto Rico court to enjoin the Treasurer of Puerto Rico from enforcing by distraint, orders of the Puerto Rico Workmen's Relief Commission awarding compensation for the death of each of three laborers while in the employ of respondent. The Supreme Court of Puerto Rico interpreted the Workmen's Accident Compensation Act of Puerto Rico [1] as not permitting such collateral attack on orders of the Commission and affirmed a judgment dismissing the bill. 52 P. R. Dec. 658, 53 P. R. Dec. 475. On appeal (43 Stat. 936) the Circuit Court of Appeals vacated that judgment and remanded the cause with directions to issue the in-

[1] Act No. 102, 1925, as amended by Act No. 85, 1928 and Act No. 45, 1935.

junction. 102 F. 2d 710. We granted certiorari because of the asserted violation by the Circuit Court of Appeals of the well established rule that Puerto Rican tribunals must not be overruled on their construction of local statutes in absence of "clear or manifest error." *Bonet* v. *Yabucoa Sugar Co.,* 306 U. S. 505; 307 U. S. 613.

The theory underlying respondent's bill was that it was an insured employer and therefore the awards should have been paid out of the state fund,[2] and that its remedy at law was not adequate. The bill so alleged, and attacked the orders of the Commission adjudging that it was not an insured employer. The cause was submitted, without an answer, on a stipulation which included, *inter alia,* an admission by petitioner of "the ultimate facts of the bill, except the conclusions of fact or of law that it might contain." The Supreme Court of Puerto Rico in effect treated this stipulation as a demurrer and concluded that petitioner had not thereby admitted that respondent was an insured employer. This seems to have been a reasonable construction—certainly not manifest error.

Treating the bill then as one brought by an uninsured employer, the Supreme Court of Puerto Rico construed the Act on two points: (1) the right of respondent to appeal; (2) the power of petitioner to distrain.

Right to Appeal. It held that respondent had an adequate remedy at law under § 9 of the Act which provided that "the employer may appeal from any decision of the Commission when such decision is to the effect that the accident is one for which compensation is granted under this Act." [3] And it indicated that on such appeal the

[2] As to the creation of that fund, see §§ 11, 27 of Act No. 102, 1925.

[3] Act No. 102, 1925, § 9. Thirty days were allowed for perfecting the appeal. *Id.* A comparable provision for review is found in Act No. 85, 1928, § 15, where ten days were allowed; and in Act No. 45, 1935, § 11, where fifteen days are granted.

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question of whether or not respondent was uninsured was among the issues which could have been reviewed.[4] The Commission, however, had directed the awards to the Attorney General on April 24, 1928, for collection under § 7 of the Act, a section providing for collection of awards against uninsured employers.[5] But eight years passed and the Attorney General made no attempt to collect. Respondent contended that it did not appeal under § 9 since it was waiting to defend, on the ground that it was insured, an action by the Attorney General under § 7. And though a new method of collection of such awards was created within a few months after these awards were made,[6] respondent contended that the new law, in pro-

[4] This point seems to have been first decided by the Supreme Court of Puerto Rico on a writ of certiorari brought by respondent to nullify the orders of the Commission here involved. The court held that the writ did not lie since it applied only to review the actions of courts. 40 P. R. R. 456.

[5] Sec. 7 of Act No. 102, 1925, provided in part:

"In the case of an accident to a laborer while working for an employer who in violation of the law is uninsured, the Workmen's Relief Commission shall determine proper compensation, plus expenses incurred by it, and shall report the same to the Attorney General for institution of proper action, in a court of competent jurisdiction, against said employer to recover the aforesaid sum; *Provided, however,* That the commission shall grant the employer as well as the laborer in the case an opportunity to be heard and to defend themselves, and shall conform, as far as possible, to the practices observed by the courts of justice."

[6] Act No. 85, 1928, became effective ninety days after its approval on May 14, 1928. § 58. This Act by § 7 created an Industrial Commission to administer the Act. And by § 25 collection of claims against uninsured employers was provided as follows:

"In case of an accident to a laborer while working for an employer who in violation of the law is uninsured, the Industrial Commission shall determine proper compensation, plus expenses incurred by it, and shall certify its decision to the Treasurer of Porto Rico who shall assess said compensation, plus expenses, on the employer and collect them from him; and both such compensation and such expenses shall

viding that pending litigation was not to be affected,[7] preserved its former opportunity to defend under § 7. To this the Supreme Court of Puerto Rico replied that the purpose of the saving clause in the new act[8] was merely to preserve the rights of workmen to compensation, not to make the new procedure inapplicable to pending cases in contradiction to the well settled rule that procedural statutes are immediately applicable. It also added that in any event the procedure of § 7 had not survived the issuance of the order by the Commission since by the 1935 amendment that procedure was to be "followed in such litigations or claims, until their termination"[9]—the issuance of the orders of the Commission having terminated the case within the meaning of the amendment.

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constitute a lien on all the property of said employer, with the same legal effect and priority as if it were a tax levied on such property; *Provided, however,* That the Commissioner shall grant both the employer and the laborer in the case an opportunity to be heard and to defend themselves, and he shall conform, as far as possible, to the practices observed by the district courts."

This procedure, according to the Supreme Court of Puerto Rico, took the place of that provided by § 7 of the 1925 Act, *supra,* note 5, by reason of § 57, "all laws or parts of laws in conflict herewith are hereby repealed."

On September 14, 1936, the Industrial Commission issued an order requesting the petitioner to levy an attachment on properties of respondent.

[7] Act No. 85, 1928, § 48, provided: "The provisions of this Act shall in no way affect pending litigation relative to workmen's compensation under previous laws."

[8] Act No. 45, 1935, § 34, also provided:

"The provisions of this Act shall in no way affect pending litigations or claims relative to workmen's compensation under previous laws. The procedure followed in such litigations or claims, until their termination, shall be in accordance with the laws in force on the date of the accident, and the workmen shall be entitled to such sum of money as may be prescribed by said laws."

[9] *Supra,* note 8.

The Circuit Court of Appeals disagreed with this construction of the Act. It held that § 9 gave an appeal only to insured employers and that only § 7 provided for review of orders issued against those who were uninsured. It said that when § 9 stated that "the employer may appeal from any decision of the commission when such decision is to the effect that the accident is one for which compensation is granted under this Act," it meant that only insured employers could appeal since the compensation granted by the Act was payment out of the state fund.[10] Hence, in its view, the orders of the Commission here in question were "to the effect" that the accident was not one for which compensation was granted under the Act, since the Commission had adjudged respondent to be uninsured. Consistently with that construction it held that the remedy of an aggrieved uninsured employer was to defend any suit brought under § 7. For in its view, the procedure under § 7 was not abolished by the amendments, the issuance of the orders of the Commission not having terminated the case within the meaning of the saving clause quoted above. Accordingly, it held that unless petitioner were restrained from collecting the awards, respondent would be deprived of its day in court.

Power of Petitioner to Distrain. The Supreme Court of Puerto Rico concluded that petitioner had the power

[10] The Circuit Court of Appeals referred to § 2 of the 1925 Act which provided in part:

"This Act shall apply to every employer who employs any laborer or employee whose wages do not exceed the sum of fifteen hundred (1,500) dollars computed annually; *Provided,* That pursuant to the provisions of this Act, compensation shall be paid to injured laborers who become disabled or who lose their lives through accidents originating from any act or function inherent in their work or employment and occurring during the course of their employment as a consequence thereof or from occupational diseases or death due to such occupation contracted in any work performed by administration under the direction of the Insular Government, payable from the government trust fund."

to distrain by virtue of the amendments to the Act made subsequent to the issuance of the orders of award. By the 1928 amendments [11] summary procedure was authorized for collection of a claim "as if it were a tax levied on such property." § 25. Although that phrase was eliminated by the 1935 amendments, § 15 of the latter made such claims "liens preferred over any other charge or lien for taxes or any other cause" with specified exceptions.[12] The court held that since under both the 1928 and 1935 amendments petitioner had the duty to collect the claims and since under both the claim had the status or legal effect of a tax, the power to distrain survived.

But the Circuit Court of Appeals disagreed with that conclusion. It reasoned that petitioner had no power to collect in that manner since by § 15 of the 1935 amendments the person who was to "determine" the amount of the claim and "certify its decision" [13] to petitioner was the Manager of the State Fund created under that law.[14] That person not being the same as the Workmen's Relief Commission which had issued the orders in question, § 15 was not operative as respects respondent. This reasoning

[11] *Supra*, note 6.

[12] Sec. 15 of Act No. 45, 1935, provided in part:

"In case of an accident to a workman or employee while working for an employer who, in violation of law, is not insured, the Manager of the State Fund shall determine the proper compensation plus the expenses in the case, and shall certify its decision to the Treasurer of Puerto Rico who shall collect from the employer such compensation and expenses, both of which shall constitute a lien on all the property of the employer; *Provided,* That said compensation and expenses are hereby declared to be liens preferred over any other charge or lien for taxes or any other cause, with the exception of the mortgage credits, crop loans, and property taxes on the encumbered property for three years and the current year, burdening the property of the employer when it is attached to secure the said compensation and expenses; . . ."

[13] *Supra*, note 12.

[14] Act No. 45, 1935, § 6.

was interwoven with the conclusion of that court that the new procedure provided by the 1928 and 1935 amendments [15] did not reach back to touch pending cases, a result contrary to the opinion of the Supreme Court of Puerto Rico, as we have noted.

The Supreme Court of Puerto Rico, on the other hand, did not reach the precise point determinative of the power of the Manager of the State Fund to certify an award of the former Workmen's Relief Commission apparently because it was tacitly admitted that that power existed,[16] if the remedy provided by former § 7 had been abolished. But however that may be, it did conclude that the Act as amended, though not clear, was designed to give the petitioner power to distrain and that the procedure followed was authorized by law.

For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. From *Sweeney* v. *Lomme*, 22 Wall. 208, decided in 1874, to *Bonet* v. *Yabucoa Sugar Co., supra,* decided in 1939, repeated admonitions to that effect have been given. That rule is founded on sound policy.[17] As this court

[15] *Supra,* notes 6, 12.

[16] In its motion for reconsideration respondent stated:

"As taxes can be collected by distraint, it is clear that under the law of 1928 the compensations, which were given the same legal priority and effect of taxes, could be collected by distraint. But the Act of 1935 does not give them such legal effect or priority, and only states that the Treasurer shall collect them. That being the case, it shall be taken that he can only collect them by an ordinary action."

[17] In *Diaz* v. *Gonzalez,* 261 U. S. 102, 105–106, another Puerto Rico case, Mr. Justice Holmes observed:

"This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva,* 239 U. S. 293, 299. *Nadal* v. *May,* 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a dif-

recently stated, "Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island." *Bonet* v. *Yabucoa Sugar Co., supra,* p. 510.

We now repeat once more that admonition. And we add that mere lip service to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.

Measured by such a test the judgment of the Supreme Court of Puerto Rico should not have been reversed. In concluding that under § 9 an uninsured employer could have an award of the Commission reviewed, including the issue of whether or not he was insured, the Supreme Court of Puerto Rico did not take a patently absurd position.

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ferent system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."

The most that can be said is that the contrary position is a tenable one. In holding that the amendments substituted collection by the petitioner for collection by the Attorney General even in case of pending claims, that tribunal did not commit manifest error. The conclusion that the latter procedure survived the amendments is merely another possible view. And the decision of that tribunal that the petitioner had the power to distrain[18] cannot be said to be inescapably wrong in view of the legislative design to leave no hiatus in the statutory scheme as a result of cumulative amendments. The contrary conclusion, though it might seem wholly reasonable, would not warrant a reversal.

Intimations that respondent was not accorded due process of law and that the question of whether or not it was insured was a jurisdictional fact open to collateral attack are untenable. According to the Supreme Court of Puerto Rico, respondent had not only an opportunity to be heard before the Commission but also a right of appeal. The fact that the period for review by appeal was very limited and that on respondent's interpretation of the law its right to appeal was uncertain are immaterial. Here, as on other aspects of this case, we cannot say that the conclusion of the Supreme Court of Puerto Rico that under this statute the remedy of respondent at law was adequate is obviously erroneous.

The judgment of the Circuit Court of Appeals is reversed and the judgment of the Supreme Court of Puerto Rico is affirmed.

Reversed.

MR. JUSTICE STONE did not participate in the consideration or disposition of this case.

[18] The Supreme Court of Puerto Rico also held that § 243 of the Code of Civil Procedure, barring execution of a judgment for the payment of money after five years from the date of its entry, does not apply to orders of the Commission covering compensation awards, a construction which does not seem to be manifest error.

HIGGINS, COLLECTOR OF INTERNAL REVENUE, *v.* SMITH.

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

No. 146. Argued December 5, 1939.—Decided January 8, 1940.

1. Under § 23 (e) of the Revenue Act of 1932, authorizing in the computation of income tax deductions for losses sustained during the taxable year, no deductible loss occurs upon a sale by the taxpayer to a corporation wholly owned by him. P. 476.
2. The contention that this conclusion is inconsistent with prior interpretations of the income tax laws and unfair to the taxpayer—examined and rejected. P. 478.
3. From the fact that § 24 (a) (6) of the Revenue Act of 1934 provides explicitly that losses determined by sales to corporations controlled by the taxpayer are not deductible, it does not follow that the law formerly was otherwise. P. 479.
4. Claims of error prejudicial to the taxpayer, arising out of the District Court's rulings on evidence in this case, *held* without merit. P. 480.

102 F. 2d 456, reversed.

CERTIORARI, *post*, p. 536, to review the reversal, on cross-appeals, of a judgment in a suit brought by a taxpayer for refund of a sum paid as income taxes.

Assistant Attorney General Clark, with whom *Solicitor General Jackson* and *Messrs. Sewall Key, Arnold Raum*, and *Joseph M. Jones* were on the brief, for petitioner.

Mr. David Sher for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Certiorari was allowed [1] from the judgment of the Circuit Court of Appeals for the Second Circuit [2] on account of an asserted conflict between the decision below and that

[1] *Post*, p. 536.

[2] 102 F. 2d 456.

of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Griffiths*.[3]

The issue considered here is whether a taxpayer under the circumstances of this case is entitled to deduct a loss arising from the sale of securities to a corporation wholly owned by the taxpayer. The statute involved is § 23 (e) of the Revenue Act of 1932.[4]

The Innisfail Corporation was wholly owned by the taxpayer, Mr. Smith. It was organized in 1926 under the laws of New Jersey. The officers and directors of the corporation were subordinates of the taxpayer. Its transactions were carried on under his direction and were restricted largely to operations in buying securities from or selling them to the taxpayer. While its accounts were kept completely separate from those of the taxpayer, there is no doubt that Innisfail was his corporate self. As dealings by a corporation offered opportunities for income and estate tax savings, Innisfail was created to gain these advantages for its stockholder. One of its first acts was to take over an option belonging to the taxpayer for the acquisition by exchange of a block of Chrysler common stock. Through mutual transactions in buying and selling securities, and receiving dividends, the balance of accounts between Innisfail and the taxpayer resulted, on December 29, 1932, in an indebtedness from him to Innis-

[3] 103 F. 2d 110, affirmed *sub nom. Griffiths* v. *Commissioner, ante,* p. 355.

[4] 47 Stat. 169, 179–80. "Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

. . . . . .

"(e) Losses by Individuals.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

"(1) if incurred in trade or business; or

"(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . ."

fail of nearly $70,000. On that date, as a partial payment on this indebtedness, a number of shares of stock were sold to the corporation by the taxpayer at market. The securities sold had cost the taxpayer more than the price charged to the corporation, and in carrying out the transaction the taxpayer had in mind the tax consequences to himself.

In computing his net taxable income for 1932, the taxpayer deducted as a loss the difference between the cost of these securities and their sale price to his wholly owned corporation. The Commissioner of Internal Revenue ruled against the claim, whereupon respondent paid the tax and brought this suit for refund in the United States District Court for the Southern District of New York. The case was tried before a jury and the verdict was adverse to the taxpayer's claim that the purported sales of these securities to Innisfail marked the realization of loss on their purchase. On appeal the judgment was reversed and the case remanded to the District Court for a new trial. It was the opinion of the Court of Appeals that the facts as detailed above, as a matter of law, established the transfer of the securities to Innisfail as an event determining loss.

Under § 23 (e) deductions are permitted for losses "sustained during the taxable year." The loss is sustained when realized by a completed transaction determining its amount.[5] In this case the jury was instructed to find whether these sales by the taxpayer to Innisfail were actual transfers of property "out of Mr. Smith and into something that existed separate and apart from him" or whether they were to be regarded as simply "a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all." The jury agreed the latter situation existed. There was sufficient evidence

[5] *Burnet* v. *Huff*, 288 U. S. 156, 161.

of the taxpayer's continued domination and control of the securities, through stock ownership in the Innisfail Corporation, to support this verdict, even though ownership in the securities had passed to the corporation in which the taxpayer was the sole stockholder. Indeed this domination and control is so obvious in a wholly owned corporation as to require a peremptory instruction that no loss in the statutory sense could occur upon a sale by a taxpayer to such an entity.

It is clear an actual corporation existed. Numerous transactions were carried on by it over a period of years. It paid taxes, state and national, franchise and income. But the existence of an actual corporation is only one incident necessary to complete an actual sale to it under the revenue act. Title, we shall assume, passed to Innisfail but the taxpayer retained the control. Through the corporate forms he might manipulate as he chose the exercise of shareholder's rights in the various corporations, issuers of the securities, and command the disposition of the securities themselves. There is not enough of substance in such a sale finally to determine a loss.

The Government urges that the principle underlying *Gregory* v. *Helvering* [6] finds expression in the rule calling for a realistic approach to tax situations. As so broad and unchallenged a principle furnishes only a general direction, it is of little value in the solution of tax problems. If, on the other hand, the *Gregory* case is viewed as a precedent for the disregard of a transfer of assets without a business purpose but solely to reduce tax liability, it gives support to the natural conclusion that transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration. There is no illusion about the payment of a tax exaction. Each tax, according to a legislative plan, raises funds to carry

[6] 293 U. S. 465.

on government. The purpose here is to tax earnings and profits less expenses and losses. If one or the other factor in any calculation is unreal, it distorts the liability of the particular taxpayer to the detriment or advantage of the entire tax-paying group.[7]

The taxpayer cites *Burnet* v. *Commonwealth Improvement Company* [8] as a precedent for treating the taxpayer and his solely owned corporation as separate entities. In that case the corporation sold stock to the sole stockholder, the Estate of P. A. B. Widener. The transaction showed a book profit and the corporation sought a ruling that a sale to its sole stockholder could not result in a taxable profit. This Court concluded otherwise and held the identity of corporation and taxpayer distinct for purposes of taxation.[9] In the *Commonwealth Improvement Company* case, the taxpayer, for reasons satisfactory to itself voluntarily had chosen to employ the corporation in its operations. A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.[10]

On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and

[7] Cf. *Stone* v. *White,* 301 U. S. 532, 537.

[8] 287 U. S. 415.

[9] See also *Klein* v. *Board of Supervisors,* 282 U. S. 19; *Dalton* v. *Bowers,* 287 U. S. 404; *Burnet* v. *Clark,* 287 U. S. 410.

[10] Cf. *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 456.

manner of taxation. It is command of income and its benefits which marks the real owner of property.[11]

Such a conclusion, urges the respondent, is inconsistent with the prior interpretations of the income tax laws and consequently unfair to him. He points to the decisions of four courts of appeals which have held losses determined by sales to controlled corporations allowable[12] and further calls attention to the fact that the Board of Tax Appeals has consistently reached the same conclusion.[13] But this judicial and administrative construction has no significance for the respondent. The Bureau of Internal Revenue has insistently urged since February 18, 1930, the date of the Board of Tax Appeals' decision in Jones *v.* Helvering,[14] that a transfer from a taxpayer to a controlled corporation was ineffective to close a transaction for the determination of loss. Every case cited by respondent in the courts of appeals and before the Board of Tax Appeals found the Government supporting that contention. The Board's ruling in the *Jones* case was

[11] *Lucas* v. *Earl,* 281 U. S. 111; *Corliss* v. *Bowers,* 281 U. S. 376; *Griffiths* v. *Commissioner, ante,* p. 355.

[12] *Jones* v. *Helvering,* 63 App. D. C. 204; 71 F. 2d 214 (April 23, 1934, reversing 18 B. T. A. 1225, decided February 18, 1930), cert. denied October 8, 1934, 293 U. S. 583; *Commissioner* v. *Eldridge,* 79 F. 2d 629 (November 4, 1935, affirming 30 B. T. A. 1322, decided July 31, 1934); *Commissioner* v. *McCreery,* 83 F. 2d 817 (May 13, 1936, affirming B. T. A. memorandum opinion of June 19, 1935); *Foster* v. *Commissioner,* 96 F. 2d 130 (April 18, 1938, affirming B. T. A. memorandum opinion of December 23, 1935); *Helvering* v. *Johnson,* 104 F. 2d 140 (June 1, 1939, affirming 37 B. T. A. 155, decided January 21, 1938), affirmed by an equally divided Court, *post,* p. 523.

[13] David Stewart *v.* Commissioner, 17 B. T. A. 604; Corrado & Galiardi, Inc. *v.* Commissioner, 22 B. T. A. 847; Edward Securities Corporation *v.* Commissioner, 30 B. T. A. 918; Ralph Hochstetter *v.* Commissioner, 34 B. T. A. 791; John Thomas Smith *v.* Commissioner, *supra,* 40 B. T. A. 387.

[14] 18 B. T. A. 1225, a rehearing affirmed May 26, 1932, unpublished.

standing unreversed at the time of the transaction here involved, December 29, 1932. It was only after the transactions here involved and after the reversal of the Board in the *Jones* case on April 23, 1934, or this Court's refusal of certiorari on October 8, 1934, that the Board of Tax Appeals and the courts of appeals, over Government protests, ruled in line with the opinion of the Court of Appeals of the District of Columbia in the *Jones* case. If the Bureau's stand in the *Jones* case represented a change in administrative practice, there can be no doubt that the change operated validly at least from 1930 on.[15] After the *Jones* defeat the Government sought relief in Congress and after the judgment in *Commissioner* v. *Griffiths, supra,* certiorari here on a conflict in principle between circuits. Certainly there was no acquiescence by the Government which would justify the taxpayer in relying upon prior interpretations of the law.[16]

Respondent makes the further point that the passage of § 24(a)(6) of the Revenue Act of 1934[17] which explicitly forbids any deduction for losses determined by sales to corporations controlled by the taxpayer is convincing proof that the law was formerly otherwise. This

[15] *Helvering* v. *Wilshire Oil Co., ante,* p. 90.

[16] Cf. *Estate of Sanford* v. *Commissioner, ante,* p. 39.

[17] 48 Stat. 680, 691. "Sec. 24. Items not Deductible.

"(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

. . . . . .

"(6) Loss from sales or exchanges of property, directly or indirectly, (A) between members of a family, or (B) except in the case of distributions in liquidation, between an individual and a corporation in which such individual owns, directly or indirectly, more than 50 per centum in value of the outstanding stock. For the purpose of this paragraph—(C) an individual shall be considered as owning the stock owned, directly or indirectly, by his family; and (D) the family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants."

does not follow. At most it is evidence that a later Congress construed the 1932 Act to recognize separable taxable identities between the taxpayer and his wholly owned corporation. As the new provision goes much farther than the former decisions in disregarding transfers between members of the family it may well have been passed to extend as well as clarify the existing rule. The suggestion is not sufficiently persuasive to give vitality to a futile transfer.

The taxpayer has preserved two objections to the district judge's rulings on the evidence. He claims that evidence as to transactions between the taxpayer and the corporation which took place prior to the sale here involved was remote and highly prejudicial. We think it apparent that this evidence was entirely relevant to the present issue; the history of the taxpayer's relations with the corporation shed considerable light on the actual effect of the sale in question. The second contention is that the district judge charged the jury to give less effect to the book entries of Smith and the corporation than they were entitled to under the applicable book entry statute.[18] The alleged departure from the statute has but dubious support in the record, resting on a single statement of the judge lifted from its context as part of an extended colloquy with counsel. In the circumstances there is no merit in the claim of prejudice to the taxpayer.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

I think the judgment should be affirmed. To reverse it is to disregard a rule respecting the separate entity of corporations having basis in logic and practicality and

[18] 49 Stat. 1561, 28 U. S. C. § 695.

which has long been observed in the administration of the revenue acts.

Since the inception of the system of federal income taxation, capital gains have been taxed and certain capital losses have been allowed as credits against such gains. In order that this system might be practical it has been necessary to select some event as the criterion of realization of gain or loss. The revenue laws have selected the time of the closing of a capital transaction as the occasion for reckoning gain or loss on a capital asset. A typical method of closure is a sale of the asset.

As the sale is voluntarily made by the taxpayer, his determination when he shall sell affects his capital gain or loss. He, therefore, in a sense, controls the question whether, in a given taxable year, he must pay tax on a realized gain or may claim credit for a realized loss. Of course such a sale must be bona fide and title must pass absolutely. In the present instance the sale and transfer were such, and, as the Circuit Court of Appeals held, there was not a scintilla of evidence to the contrary for the jury's consideration. A taxpayer who pretends he has made a sale when in fact he has a secret agreement which leaves him still, for all practical purposes, the owner of the thing sold, is but committing a fraud upon the revenue.

If the sale is bona fide, if title in fact passes irrevocably to another, that other takes as his basis, in reckoning his gain and loss, the price he paid for the asset; and upon his future disposition of it there will be a new reckoning of gain or loss with respect to such disposition. Here, if Innisfail either sold to the respondent or to a third party it would have to reckon gain or loss on the sale. If it distributed the asset in liquidation the respondent would be subject to a tax liability on the receipt of his dividend. The sole question, then, is whether, as matter of law, a bona fide and absolute sale to a wholly owned corporation

can constitute a completed transaction, determining a loss.

The problem as to how a sale to a corporation wholly owned or wholly controlled by an individual taxpayer is to be treated is not a new one. The existence of such corporations and the dealings between them and their stockholder or stockholders have long been understood. Congress was not ignorant of the problem.[1] At the outset Congress might well have adopted the policy that a sale by the stockholder to the corporation, or vice versa, should be disregarded, and the stockholder treated as in effect the owner of the capital asset until its sale to a stranger. On the other hand, it would be a practical policy to recognize the separate entity of the corporation, to treat a transfer at current value for adequate consideration occurring between it and its sole stockholder as closing a transaction for the purpose of reckoning either gain or loss, and then to tax the vendee upon his or its gain or loss upon a subsequent transfer by comparison of the basis on which the asset was acquired and the amount realized on final disposition by the vendee. In fact, the latter course was adopted and was consistently followed until 1934 when Congress dealt with the subject.

This court, speaking by Mr. Justice Holmes, said, in *Klein* v. *Board of Supervisors,* 282 U. S. 19, 24: " . . . But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is

[1] The Revenue Act of 1932, c. 209, 47 Stat. 169, 196, § 112 (b) (5), provided: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; . . ."

a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."

In this view assets received on the liquidation of a one-man corporation constitute taxable income to the sole stockholder.[2] Likewise, losses sustained by a corporation wholly owned by one individual may not be reported and claimed in the individual tax return of the latter.[3] And the sole stockholder and his controlled corporation may not tack successive periods of ownership to make up the two years required for an asset to become, within the meaning of the statute, a capital asset.[4]

This court has found that a taxable gain was realized in a case where a wholly owned corporation sold securities to its sole stockholder.[5] Every element appearing in that case is paralleled here, as a comparison of the facts stated in the opinions in the two cases will demonstrate. This court said, in the earlier case, referring to the corporation: "The fact that it had only one stockholder seems of no legal significance," and held the corporation a separate taxable entity. It is now said, however, that there is no inequity in not applying the same rule to losses as to gains because the taxpayer who exercises the option to conduct a portion of his business through the instrumentality of a wholly owned corporation does so in the full knowledge that, if he does, gains shown on sales by him to the corporation will be taxed whereas losses on such sales will not be allowed as deductions. As hereafter will be shown, this is now true in virtue of the amendment

[2] *France Co.* v. *Commissioner,* 88 F. 2d 917; *Coxe* v. *Handy,* 24 F. Supp. 178; John K. Greenwood, 1 B. T. A. 291.

[3] *Dalton* v. *Bowers,* 287 U. S. 404; *Menihan* v. *Commissioner,* 79 F. 2d 304.

[4] *Webber* v. *Knox,* 97 F. 2d 921.

[5] *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415.

embodied in the Revenue Act of 1934 but it was not true as the law stood before the adoption of that amendment.

In 1921 the Treasury was first called upon to deal with a loss deduction arising out of a sale to a wholly owned corporation. In that year it published Law Opinion 1062.[6] It was held that if the sale was bona fide and passed title absolutely to the controlled corporation, even though the sale was made with the intent of reducing the tax liability of the vendor it fell within the provisions of the revenue act concerning the reckoning of gain or loss upon a closed transaction. So far as I am informed, the Treasury followed this rule in administering the various revenue acts for years after it was issued. The first evidence of a change in its position was the refusal of the Commissioner of Internal Revenue to recognize losses resulting to taxpayers from a bona fide sale of bonds owned by them to a wholly owned corporation at the current market price.[7] The Board of Tax Appeals sustained the Commissioner, but the Court of Appeals of the District of Columbia reversed the Board in *Jones* v. *Helvering,* 71 F. 2d 214. The decision was rendered April 23, 1934. The Commissioner sought certiorari which was denied October 8, 1934.[8] The same result has been reached by three other Circuit Courts of Appeal.[9] The Board of Tax Appeals followed these decisions.[10] In the

[6] 4 C. B. 168, cited with approval in G. C. M. 3008 VII–1 C. B. 235.

[7] Jones v. Commissioner, 18 B. T. A. 1225 (1930).

[8] 293 U. S. 583.

[9] *Commissioner* v. *Eldridge,* 79 F. 2d 629 (C. C. A. 9); *Commissioner* v. *McCreery,* 83 F. 2d 817 (C. C. A. 9); *Helvering* v. *Johnson,* 104 F. 2d 140 (C. C. A. 8); *Foster* v. *Commissioner,* 96 F. 2d 130 (C. C. A. 2); *Smith* v. *Higgins* (the instant case), 102 F. 2d 456 (C. C. A. 2).

[10] David Stewart, 17 B. T. A. 604; Corrado & Galiardi, Inc., 22 B. T. A. 847; Ralph Hochstetter, 34 B. T. A. 791; John Thomas Smith, 40 B. T. A. 387, involving prior years of the taxpayer in this case.

meantime the Circuit Courts of Appeal had decided numerous cases which are, in principle, indistinguishable.[11]

This court having denied certiorari in *Jones* v. *Helvering, supra,* decided *Gregory* v. *Helvering,* 293 U. S. 465, in the following January. It cited the *Jones* case with approval, at p. 469, saying: ". . . The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

So well settled had the judicial interpretation become that the Treasury determined to recommend that Congress amend the statute.[12] The result was the adoption of § 24 (a) (6) of the Revenue Act of 1934.[13] The committee reports disclose that Congress thought it necessary to change the statute in order to render nondeductible a loss claimed on a sale to a wholly owned or a controlled corporation.[14] Subsequent hearings before the Joint Commission on Tax Evasion and Avoidance, 1937, p. 207, indicate the same understanding on the part of the Bureau of Internal Revenue and of Congress that the rule

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[11] *Iowa Bridge Co.* v. *Commissioner,* 39 F. 2d 777; *Taplin* v. *Commissioner,* 41 F. 2d 454; *Commissioner* v. *Van Vorst,* 59 F. 2d 677; *Marston* v. *Commissioner,* 75 F. 2d 936; *St. Louis Union Trust Co.* v. *United States,* 82 F. 2d 61; *Sawtell* v. *Commissioner,* 82 F. 2d 221; *Commissioner* v. *Edward Securities Co.,* 83 F. 2d 1007, affirming 30 B. T. A. 918.

[12] In the Hearings before the Joint Committee on Tax Evasion and Avoidance, 1937, p. 206, it appears that the Solicitor General considered the law so well settled that he refused to apply for certiorari in the *Eldridge* case, *supra,* note 9, although the Treasury recommended such action.

[13] 48 Stat. 680, 691.

[14] See the report of the Committee on Ways and Means of the House of Representatives, H. R. 704, 73d Cong., Second Sess., p. 23; Senate Report 588, 73d Cong., Second Sess., p. 27; see also the hearings before the Committee on Ways and Means, Revenue Revision, 1934, p. 134.

of law in effect prior to the adoption of the amendment in 1934 was changed by that legislation. The amendment lists among items not deductible the following:

"(6) Loss from sales or exchanges of property, directly or indirectly, (A) between members of a family, or (B) except in the case of distributions in liquidation, between an individual and a corporation in which such individual owns, directly or indirectly, more than 50 per centum in value of the outstanding stock. For the purpose of this paragraph—(C) an individual shall be considered as owning the stock owned, directly or indirectly, by his family; and (D) the family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants."

Plainly, prior to 1934, taxpayers were justified in relying, first, upon the Treasury ruling on the subject and, secondly, upon the uniform decisions of the courts in claiming deductions for losses on sales to controlled corporations. After the passage of the amendment they were on notice that this was no longer permissible.

I turn then to the situation here presented. The claims of this taxpayer, as I have said, had been sustained for prior years by the Board of Tax Appeals.[15] The Congress had enacted that subsequent to 1934 the taxpayer could not claim such losses. Notwithstanding the earlier decisions of the respondent's case and those of other taxpayers against the Government's present contention, the Commissioner of Internal Revenue, *after* the adoption of the Act of 1934, namely on March 11, 1935, served a notice of deficiency upon the respondent respecting losses claimed in his return for the year 1932 on sales to Innisfail. Thus the Treasury repudiated the position it had taken in asking that the law be amended to cover cases of this kind; reversed its position in acquiescing in the

[15] *Supra*, note 10.

adjudication of the respondent's tax liability for earlier years and sought, now that it had obtained an amendment of the law operating prospectively, to reach back into sundry unclosed ones,—this one amongst others,—and to attempt to obtain decisions reversing the settled course of decision. I think this court should not lend its aid to the effort.

I am of opinion that where taxpayers have relied upon a long unvarying series of decisions construing and applying a statute, the only appropriate method to change the rights of the taxpayers is to go to Congress for legislation. In my view, the resort to Congress, on the one hand, for amendment, and the appeal to the courts, on the other, for a reversal of construction, which, if successful, will operate unjustly and retroactively upon those who have acted in reliance upon oft-reiterated judicial decisions, are wholly inconsistent.

I am of opinion that the courts should not disappoint the well-founded expectation of citizens that, until Congress speaks to the contrary, they may, with confidence, rely upon the uniform judicial interpretation of a statute. The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions.

MR. JUSTICE MCREYNOLDS joins in this opinion.

DEPUTY, ADMINISTRATRIX, ET AL. *v.* DU PONT.

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

No. 151. Argued December 12, 1939.—Decided January 8, 1940.

1. In calculating net income for taxation a deduction from gross income is allowable only if there is clear statutory provision therefor. P. 493.
2. In determining what are "ordinary and necessary" expenses of a taxpayer's "trade or business," within the meaning of § 23 (a) under the Revenue Act of 1928, resort is had to the popular or received import of those words. P. 493.
3. An ordinary expense is one that is normal, usual or customary; a transaction that gives rise to it must be of common or regular occurrence in the type of business involved. P. 495.
4. The fact that an expense would be an ordinary and common one in the course of one business does not necessarily make it such in connection with another business. P. 495.
5. Carrying charges on short sales of stock made by a stockholder to assist his corporation and preserve his investment in it can not be deducted as ordinary and necessary expenses of his business where it does not appear that he was in the business of trading in securities, or that stockholders, engaged in conserving and enhancing their estates, ordinarily assist their corporations in similar fashion. Pp. 493 *et seq.*
6. In order to aid a plan of his corporation to increase the efficiency of its management by selling some of its stock to executive employees—the corporation not being able legally to sell directly—and to the end that by the plan his beneficial interest in the corporation might be conserved and enhanced, a stockholder made short sales to the executives (the corporation lending them the price) and borrowed the shares requisite to fulfill his contracts; when the borrowing period was up he restored equivalent shares to the lender by borrowing them elsewhere under a contract which in time obliged him to pay to the second lender (a) a sum equal to dividends received by him on the borrowed shares, and (b) a sum equal to the lender's income tax on such payments. Assuming that the activities of the stockholder in conserving and enhancing his estate constitute a "trade" or "business" within the meaning of § 23 (a) of the Revenue Act of 1928, *held*:

(1) That these expenditures were not deductible in computing the stockholder's income because they proximately resulted not from the taxpayer's business but from the business of the corporation, and because they were neither "ordinary" nor "necessary" expenses of his business within the meaning of § 23 (a). Pp. 494 *et seq.*

(2) Such expenditures were not deductible as "interest paid or accrued . . . on indebtedness" under subsection 23 (b) of the Act. P. 497.

7. Although an indebtedness is an obligation, an obligation is not necessarily an "indebtedness" within the meaning of § 23 (b). Interest in its usual import is the amount which one has contracted to pay for the use of borrowed money. In the business world interest on indebtedness means compensation for the use or forbearance of money. It is assumed that Congress has used the words in that sense. P. 497.

103 F. 2d 257, reversed; 22 F. Supp. 589, affirmed.

CERTIORARI, *post*, p. 533, to review the reversal of a judgment of the District Court rendered against the present respondent in his action to recover money collected as income taxes.

Mr. Robert K. McConnaughey, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Newton K. Fox,* and *Richard H. Demuth* were on the brief, for petitioners.

Mr. George Wharton Pepper, with whom *Mr. James S. Y. Ivins* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents the question of whether respondent in computing his taxable net income for the year 1931 may deduct payments of $647,711.56 made by him in that year to the Delaware Realty and Investment Co. (hereinafter called the Delaware Company). The deduction is sought either under § 23 (a) of the Revenue Act of 1928 (45 Stat. 791) as "ordinary and necessary expenses paid

or incurred during the taxable year in carrying on" the "trade or business" of respondent; or under § 23 (b) as "interest paid or accrued within the taxable year on indebtedness." The Commissioner disallowed the deduction and determined a deficiency, which respondent paid and now seeks to recover. It is agreed that if the deduction is allowed, respondent is entitled to judgment for $172,351.64. The judgment of the District Court against respondent, 22 F. Supp. 589, was reversed by the Circuit Court of Appeals, 103 F. 2d 257. We granted certiorari because of the asserted inconsistency of that ruling with *Welch* v. *Helvering,* 290 U. S. 111, which construed the meaning of the words "ordinary and necessary expenses"; and with *Burnet* v. *Clark,* 287 U. S. 410, which limited such deductions to losses directly connected with the taxpayer's business.

Respondent's claim to the deduction arose out of the following transactions, briefly summarized. Respondent was beneficial owner of about 16% of the stock of E. I. du Pont de Nemours and Company (hereinafter called the du Pont Company). In 1919 the du Pont Company constituted a new executive committee composed of nine young men. For business reasons, it thought it desirable that these men have a financial interest in the company. Alleged legal difficulties stood in the way of the du Pont Company selling them the 9,000 shares desired.[1] Accordingly, respondent undertook to sell them 1,000 shares each.

[1] As stated by the District Court, counsel advised that the du Pont Company could issue stock only for money paid, labor performed, or real or personal property acquired; and that if the stock were to be issued for cash, it must first be offered to existing stockholders. According to the findings the du Pont Company did not have 9,000 shares of its stock, other than unissued stock; that stock was not then listed on the New York Stock Exchange; and the over-the-counter market was quite inactive. Nine thousand shares could not have been purchased on this market without substantially raising the price per share.

But since he did not have readily available that amount from his own holdings,[2] he borrowed 9,000 shares of the du Pont Company from Christiana Securities Company,[3] under an agreement whereby he agreed to return the stock loaned in kind within ten years and in the interim to pay to the lender all dividends declared and paid on the shares so loaned.[4] Respondent thereupon sold the shares to the nine executives, the purchase price being furnished by the du Pont Company.[5] In October, 1929 when the ten-year

[2] Respondent had available only seventy-four shares. He had a reversionary interest in two trusts which held 24,000 shares. And he was the owner of 29,125 shares of common stock of Christiana Securities Company out of a total of 75,000 shares issued and outstanding. That company was then the owner of 183,000 shares of common stock of the du Pont Company out of a total of 588,542 shares issued and outstanding.

[3] *Supra,* note 2.

[4] As security respondent gave Christiana Securities Company 3,800 shares of its capital stock. All dividends on that stock were to be paid to respondent.

[5] These sales were made at the price of $320 a share, that being approximately their book value. The du Pont Company loaned to each of the nine executives the necessary funds to purchase his 1,000 shares. They paid respondent $2,880,000 in cash for the 9,000 shares. According to respondent's brief, he turned over this sum through transactions in General Motors stock which ultimately yielded him a great profit. See du Pont *v.* Commissioner, 37 B. T. A. 1198.

By March 1921, the stock of the du Pont Company had declined in value and the bargain made by the executives had become a disadvantageous one. Respondent thereupon offered to turn over 400 shares of the Christiana Securities Company (of a net value of $160,000) to be held by the du Pont Company as additional collateral on the loan made to these executives, respondent to have the right to redeem those 400 shares by payment of $160,000 on maturity of the loan, that payment, if made, to be applied to the loan. If respondent failed to redeem those shares, they were to become the property of the executives on payment of their loans. Meanwhile dividends on the 400 shares up to $8,000 per annum were to go to the executives, the balance to respondent who was, however, to re-

period was about to expire, respondent did not have available the number of shares which he was obligated to return to Christiana Securities Company.[6] Therefore, he arranged for a loan from the Delaware Company of the number of shares necessary to discharge that obligation.[7] Under a contract with that company, respondent agreed to return in kind the number of shares loaned (plus any increase by stock dividend or otherwise) within ten years; to pay to the Delaware Company an amount equivalent to all dividends declared and paid on the borrowed shares until returned; and to reimburse the Delaware Company for all taxes accruing against it by reason of the agreement.

Pursuant to that agreement respondent paid the Delaware Company in 1931, the sum of $567,648, being an amount equivalent to the dividends received by him during that period from the du Pont Company on the borrowed shares; and the sum of $80,063.56, being the amount of the federal income tax imposed upon the lender by reason of the foregoing payments which it had received from respondent. These are the expenditures claimed as a deduction in the present suit.

The District Court concluded, on the basis of respondent's large and diversified investment holdings and his

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turn his portion to the executives if he did not redeem the stock. This offer was accepted by the executives. Respondent when he proposed it, stated that he did so "as a large stockholder, and, perhaps, the one to be most benefited by the recovery in value of the Company's shares." He also stated that he wanted the executives to be "free of worry over the unexpected outcome" of the stock purchase plan.

[6] Due to stock dividends and split-ups respondent was obligated to return to Christiana Securities Company 142,212 shares to replace the 9,000 shares which he had borrowed.

[7] Respondent was not a stockholder of the Delaware Company, although it appears that his brother was one of its executive officers.

wide financial and business interests, that his business was primarily that of conserving and enhancing his estate. The petitioners challenge that conclusion, asserting that respondent's activities in connection with conserving and enhancing his estate did not constitute a "trade or business" within the meaning of § 23 (a) of the Act.

But as we view the case it is unnecessary for us to pass on that contention and to make the delicate dissection of administrative practice which that would entail. For we are of the opinion that the deductions are not permitted either within the rule of *Burnet* v. *Clark,* or *Welch* v. *Helvering, supra,* even though we were to assume that the activities of respondent constituted a business, as found by the District Court.

There is no intimation in the record that the transactions whereby the stock was borrowed were not in good faith or were entered into for any reason except a *bona fide* business purpose. Nor is there any suggestion that the transactions were cast in that form for purposes of tax avoidance. And it is true that as respects the dividends received by respondent and paid over to the Delaware Company, he was little more than a conduit. But allowance of deductions from gross income does not turn on general equitable considerations. It "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440. And when it comes to construction of the statutory provision under which the deduction is sought, the general rule that "popular or received import of words furnishes the general rule for the interpretation of public laws," *Maillard* v. *Lawrence,* 16 How. 251, 261, is applicable.

By those standards the claimed deduction falls for two reasons. In the first place, the payments in question do not meet the test enunciated in *Kornhauser* v. *United*

States, 276 U. S. 145, since they proximately result not from the taxpayer's business but from the business of the du Pont Company. The original transactions had their origin in an effort by that company to increase the efficiency of its management by selling its stock to certain of its key executives. The respondent undertook to furnish the necessary stock only after the company had been advised that it could not legally do so. In that posture of the case these payments are no more deductible than were the payments made by the stockholder in *Burnet* v. *Clark, supra,* as a result of his endorsements of the obligations of his corporation. Those payments were disallowed as deductions from his gross income though they arose out of transactions which were intended to preserve his investment in the corporation. Similar payments were disallowed in *Dalton* v. *Bowers,* 287 U. S. 404. Hence, the fact that the transaction out of which the carrying charges here in question arose might benefit respondent does not bring it within the ambit of his alleged business of conserving and enhancing his estate. The well established decisions of this Court do not permit any such blending of the corporation's business with the business of its stockholders. Accordingly, the payments made under the 1919 agreement would certainly not be deductible. And the fact that a new and different arrangement was made in 1929 with the Delaware Company does not alter the conclusion, for it is the origin of the liability out of which the expense accrues which is material. Otherwise carrying charges on any short sale whether or not related to the business of the taxpayer would be allowable as deductible expenses. That cannot be if the notion of proximate result implicit in the statutory words "expenses paid or incurred . . . in carrying on any trade of business" is to have any vitality.

In the second place, these payments were not "ordinary" ones for the conduct of the kind of business in which, we

assume *arguendo,* respondent was engaged. The District Court held that they were "beyond the norm of general and accepted business practice" and were in fact "so extraordinary as to occur in the lives of ordinary business men not at all" and in the life of the respondent "but once." [8] Certainly there are no norms of conduct to which we have been referred or of which we are cognizant which would bring these payments within the meaning of ordinary expenses for conserving and enhancing an estate. We do not doubt the correctness of the District Court's finding that respondent embarked on this program to the end that his beneficial stock ownership in the du Pont Company might be conserved and enhanced. But that does not make the cost to him an "ordinary" expense within the meaning of the Act. Ordinary has the connotation of normal, usual, or customary. To be sure, an expense may be ordinary though it happen but once in the taxpayer's lifetime. Cf. *Kornhauser* v. *United States, supra.* Yet the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved. *Welch* v. *Helvering, supra,* 114. Hence, the fact that a particular expense would be an ordinary or common one in the course of one business and so deductible under § 23 (a) does not necessarily make it such in connection with another business. Thus, it has been held that one who was an active trader in securities might take as deductions carrying charges on short sales since selling short was common in that business.[9] But the carrying charges on respondent's short sale in this

[8] 22 F. Supp. 589, 597.

[9] *Dart* v. *Commissioner,* 74 F. 2d 845. Cf. *Terbell* v. *Commissioner,* 29 B. T. A. 44, aff'd 71 F. 2d 1017, where such carrying charges were disallowed as deductions. The Board of Tax Appeals said, p. 45, "We have only the stipulated facts and there is no suggestion in those facts that the decedent was engaged in the business of making short sales or in dealing in securities generally."

case cannot be accorded the same privilege under § 23 (a). The record does not show that respondent was in the business of trading in securities. Nor does it show that a stockholder engaged in conserving and enhancing his estate ordinarily makes short sales or similarly assists his corporation in financing stock purchase plans for the benefit of its executives. As stated in *Welch* v. *Helvering, supra,* pp. 113–114: ". . . What is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance." One of the extremely relevant circumstances is the nature and scope of the particular business out of which the expense in question accrued. The fact that an obligation to pay has arisen is not sufficient. It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling.

Review of the many decided cases is of little aid since each turns on its special facts. But the principle is clear. And on application of that principle to these facts, it seems evident that the payments in question cannot be placed in the category of those items of expense which a conservator of an estate, a custodian of a portfolio, a supervisor of a group of investments, a manager of wide financial and business interests, or a substantial stockholder in a corporation engaged in conserving and enhancing his estate would ordinarily incur. We cannot assume that they are embraced within the normal overhead or operating costs of such activities. There is no evidence that stockholders or investors, in furtherance of enhancing and conserving their estates, ordinarily or frequently lend such assistance to employee stock purchase plans of their corporations. And in absence of such evidence there is no basis for an assumption, in experience or common knowledge, that these payments are to be placed in the same category as typically ordinary expenses of such activ-

ities, e. g., rental of safe deposit boxes, cost of investment counsel or of investment services, salaries of secretaries and the like. Rather these payments seem to us to represent most extraordinary expenses for that type of activity. Therefore, the claim for deduction falls, as did the claim of an officer of a corporation who paid its debts to strengthen his own standing and credit. *Welch* v. *Helvering, supra.* And the fact that the payments might have been necessary in the sense that consummation of the transaction with the Delaware Company was beneficial to respondent's estate is of no aid. For Congress has not decreed that all necessary expenses may be deducted. Though plainly necessary they cannot be allowed unless they are also ordinary. *Welch* v. *Helvering, supra.*

We conclude then on this phase of the case that as the District Court, on a correct interpretation of the Act, found that these payments did not proximately result from, and were not ordinary expenses for the conduct of, respondent's alleged business, it was error for the Circuit Court of Appeals to reverse the judgment for petitioners. *McCaughn* v. *Real Estate Land Title & Trust Co.,* 297 U. S. 606.

There remains respondent's contention that these payments are deductible under § 23 (b) as "interest paid or accrued . . . on indebtedness." Clearly respondent owed an obligation to the Delaware Company. But although an indebtedness is an obligation, an obligation is not necessarily an "indebtedness" within the meaning of § 23 (b). Nor are all carrying charges "interest." In *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, this Court had before it the meaning of the word "interest" as used in the comparable provision of the 1921 Act (42 Stat. 227). It said, p. 560, ". . . as respects 'interest,' the usual import of the term is the amount which one has contracted to pay for the use of borrowed money."

It there rejected the contention that it meant "effective interest" within the theory of accounting or that "Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term." p. 561. It refused to assume that the Congress used the term with reference to "some esoteric concept derived from subtle and theoretic analysis." p. 561.

We likewise refuse to make that assumption here. It is not enough, as urged by respondent, that "interest" or "indebtedness" in their original classical context may have permitted this broader meaning.[10] We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world "interest on indebtedness" means compensation for the use or forbearance of money.[11] In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense. In sum, we cannot sacrifice the "plain, obvious and rational meaning" of the statute even for "the exigency of a hard case." See *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370.

Petitioners throughout have referred to these payments by respondent as being capital in nature. Cf. *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381; *Hutton* v. *Commissioner*, 39 F. 2d 459; *Bing* v. *Helvering*, 76 F. 2d 941. What appropriate treatment may be accorded

[10] Respondent refers to the *mutuum* in Roman Law. Ledlie's Sohm's Institutes of Roman Law (2d Ed.), p. 395; Hare, The Law of Contracts, p. 73.

[11] This makes irrelevant other lines of authority cited by respondent where "interest" in a different context has been used to describe damages or compensation for the detention or use of money or of property. See *United States* v. *North Carolina*, 136 U. S. 211, 216; N. Y. General Business Law, § 370, which provides, "The rate of interest upon the loan or forbearance of any money, goods, or things, in action . . . shall be six dollars upon one hundred dollars, for one year, . . ."

these items of cost under other provisions of the Act we do not undertake to say, as that issue is not here.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

What the activities of a taxpayer are is an issue for determination by triers of fact. Whether such activities constitute a "trade or business" as conceived by § 23 (a) of the Revenue Act of 1928 (45 Stat. 791, 799), is open for determination here unfettered by findings and rulings below except for the weight of the intrinsic authority of all lower court opinions. To avail of the deductions allowed by § 23 (a), it is not enough to incur expenses in the active concern over one's own financial interest. " . . . carrying on any trade or business," within the contemplation of § 23 (a), involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do. Expenses for transactions not connected with trade or business, such as an expense for handling personal investments, are not deductible. It is otherwise with losses. § 23 (e) (2). Without elaborating the reasons for this construction and not unmindful of opposing considerations, including appropriate regard for administrative practice, I prefer to make the conclusion explicit instead of making the hypothetical, litigation-breeding assumption that this taxpayer's activities, for which expenses were sought to be deducted, did constitute a "trade or business."

MR. JUSTICE REED joins in these views.

MR. JUSTICE ROBERTS:

I feel constrained to state my views, not because this case raises any important issue of law which should be

settled by this court; but, on the contrary, because I think it presents a question the answer to which depends solely upon the facts disclosed by the record. Decision of the controversy cannot be helpful in the administration of the Revenue Acts or set any important precedent. I think the writ should not have been granted and that it now should be dismissed as improvidently granted. The amount of taxes involved or the insistence of the Government that the court below erred in its application of the law to the facts are not adequate reasons for review. There is no dispute as to principle and no conflict with any case in the application of any principle.

The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reëxamining the correctness of the result. (See Rule 38, par. 5.)

The dominant purpose evidenced by the income tax statutes is to tax net income. The policy is to credit against gross income the expenses of the business which begets earnings. The taxpayer is entitled to deduct that which he reasonably and in good faith expended in the effort to realize a profit. The revenue acts have always characterized deductible expenses as the ordinary and necessary expenses of the business, incurred and paid during the taxable year. The opinion assumes that the expenditure here in question was necessary in the conduct of the taxpayer's business but holds that it was not an

ordinary expense of that business. Obviously what is an ordinary expense of a given business must depend upon the nature and scope of the business, the nature and occasion of the expenditure, and other considerations which will emerge in each specific case. Necessarily the decision of one case will have slight, if any, bearing upon the proper decision of another. If this court is to take under review every dispute in which the Government and a taxpayer differ as to whether a given expenditure is an ordinary or an extraordinary expense of the taxpayer's business we shall be involved in the decision of myriad cases, each turning upon its own facts, without furnishing any light to the taxpayers for their future guidance. I think this is the result of the court's opinion. It is admitted that the fact that the expenditure occurred but once in the taxpayer's experience does not render it extraordinary. It must be admitted that the fact that it is a large transaction does not render it extraordinary. What the opinion does, in the upshot, is to canvass all the circumstances and reach, as I think, a conclusion based solely upon the peculiar facts of this single case. We have repeatedly warned the Bar and the public that this we will not do because we do not sit for any such purpose.

An added reason for refusing to decide the case is the admission that the Treasury and the Board of Tax Appeals in years past have held a similar expense incurred in earlier years an expense of the taxpayer's business. In a matter resting so much in judgment and discretion as the determination of what is ordinary and what extraordinary expenditure in a business the weight of a continued administrative construction is of peculiar importance; and we ought not now depart from the rule long observed that such practice is entitled to high consideration at the hands of the courts and should not be overturned unless clearly wrong and for the most cogent reasons.

Since the case has been taken and considered on the merits I think the judgment below should be affirmed. I need add little to the opinion of Judge Maris of the Circuit Court of Appeals, with which I agree. The taxpayer borrowed stock in order to sell it for cash to others. His contract obligated him either to return the stock or to pay the carrying charges to the lender. What he paid was not technically interest but it was an expense necessary to his obtaining and using the stock. He had several alternatives: to pay the annual carrying charges, or to default, and, in that case, to go into the market to buy the stock and return it to the lender or to pay the lender the value thereof.

What was there extraordinary about this transaction as compared with the borrowing of any commodity other than stock for a business reason and with a business purpose? In the conduct of every business situations arise which must be met. The circumstance that such a situation had not theretofore arisen, or that the transaction was the first of its kind in the respondent's business experience, does not render it extraordinary in the sense in which the statute uses the term. The limitation placed by Congress upon the types of expenditures made deductible was intended to prevent evasion of payment of tax on true net income, which confessedly was not a motive in the present instance. I think that under the guise of enforcing the plain mandate of the statute the court is really reading into the law what is not there and what Congress did not intend to place there.

To suggest, even by indirection, that perchance the taxpayer's expenditure may be treated as a capital expenditure is, in my judgment, to keep the word of promise to the ear and break it to the hope. In my view the carrying charge of the taxpayer's loan was either an ordinary expense of his business or it was nothing of consequence under any provision of the statute.

MR. JUSTICE MCREYNOLDS joins in this opinion.

DECISIONS PER CURIAM, ETC., FROM OCTOBER 2, 1939, THROUGH JANUARY 15, 1940.*

No. 10, original. TEXAS *v.* NEW MEXICO ET AL. October 2, 1939. Final report submitted by *Mr. Charles Warren,* Special Master.

No. 75. BADDOUR, ADMINISTRATRIX, *v.* LONG BEACH. Appeal from the Supreme Court of New York. October 9, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Euclid* v. *Ambler,* 272 U. S. 365, 387–388; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 327–328; *Lewis* v. *Mayor,* 290 U. S. 585; *Jewish Mental Society* v. *Village of Hastings,* 297 U. S. 666; *West Brothers Brick Co.* v. *Alexandria,* 302 U. S. 658. *Miss Winifred Sullivan* for appellant. No appearance for appellee. Reported below: 251 App. Div. 834; 279 N. Y. 167, 794; 297 N. Y. S. 796; 18 N. E. 2d 18; 19 N. E. 2d 90.

No. 143. NEW YORK EX REL. RETSOF MINING CO. *v.* GRAVES ET AL., CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK. Appeal from the Supreme Court of New York. October 9, 1939. *Per Curiam:* Without passing on the question whether the jurisdiction of the Court of Appeals was properly invoked by application for leave to appeal to that court, the motion to dismiss the appeal to this Court is granted and the appeal is dismissed for want of a substantial federal question. *And-*

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*MR. JUSTICE BUTLER took no part in the consideration and decision of any of the cases reported in this volume. See *ante,* p. III.

For decisions on applications for certiorari, see *post,* pp. 530, 549; for rehearing, p. 630. For cases disposed of without consideration by the Court, p. 627.

erson v. *Forty-Two Broadway Co.,* 239 U. S. 69, 72–73; *Denman* v. *Slayton,* 282 U. S. 514, 519–520. *Mr. Henry B. Twombly* for appellant. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Wendell P. Brown,* Assistant Attorney General, for appellees. Reported below: 225 App. Div. 921; 7 N. Y. S. 2d 769.

No. 150. Highway Steel & Manufacturing Co. *v.* Crawford County Circuit Court et al. Appeal from the Supreme Court of Arkansas. October 9, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hess* v. *Pawloski,* 274 U. S. 352; *St. Mary's Petroleum Co.* v. *West Virginia,* 203 U. S. 183, 191–192; *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499. *Messrs. Thomas B. Pryor* and *Thomas B. Pryor, Jr.* for appellant. No appearance for appellees. Reported below: 198 Ark. 134; 127 S. W. 2d 816.

No. 194. Brown *v.* Massachusetts. Appeal from the Superior Court, County of Suffolk, Massachusetts. October 9, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Semler* v. *Oregon Dental Examiners,* 294 U. S. 608. *Mr. Frank L. Simpson* for appellant. No appearance for appellee. Reported below: 20 N. E. 2d 478.

No. 212. Radium Dial Co. *v.* Ryan, Clerk of the Circuit Court of La Salle County. Appeal from the Supreme Court of Illinois. October 9, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Louisville & Nashville R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Holmes* v. *Conway,* 241 U. S. 624, 631–632; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158; *Snyder* v. *Massa-*

chusetts, 291 U. S. 97, 105. *Messrs. Walter Bachrach* and *Arthur Magid* for appellant. *Messrs. Taylor E. Wilhelm* and *Leonard J. Grossman* for appellee. Reported below: 371 Ill. 597; 21 N. E. 2d 749.

No. 296. ILLINOIS EX REL. EITEL ET AL. *v.* TOMAN ET AL.; and

No. 297. ILLINOIS EX REL. SEARS, ROEBUCK & Co. *v.* SAME. Appeals from the Supreme Court of Illinois. October 9, 1939. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *League* v. *Texas,* 184 U. S. 156, 161–162; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 152–153; *Satterlee* v. *Matthewson,* 2 Pet. 378, 413; *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. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration or decision of No. 297. *Mr. Murry Nelson* for appellants. *Mr. Jacob Shamberg* for appellees. Reported below: 371 Ill. 367; 21 N. E. 2d 318.

No. 322. HIBBARD, SPENCER, BARTLETT & Co. *v.* CHICAGO. Appeal from the Appellate Court, First District, 1st Division, of Illinois. October 9, 1939. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112; *Patterson* v. *Colorado,* 205 U. S. 454, 461; *Willoughby* v. *Chicago,* 235 U. S. 45, 50; *O'Neil* v. *Northern Colorado Irrigation Co.,* 242 U. S. 20, 26–27; *Dunbar* v. *City of New York,* 251 U. S. 516, 519; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 118; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450; *American Railway Express Co.* v. *Kentucky,* 273 U. S

269, 273. *Messrs. Frederic Burnham* and *David F. Rosenthal* for appellant. *Messrs. Barnet Hodes, Joseph F. Grossman,* and *J. Herzl Segal* for appellee. Reported below: 299 Ill. App. 614; 19 N. E. 2d 625.

Nos. 173 and 174. TRUSTEES OF PILLSBURY ACADEMY *v.* MINNESOTA. Appeals from the Supreme Court of Minnesota. October 9, 1939. *Per Curiam:* The motions to affirm are granted and the judgments of the Supreme Court of Minnesota are affirmed. *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. JUSTICE BLACK took no part in the consideration or decision of these cases. *Messrs. Herbert T. Park* and *G. A. Youngquist* for appellants. *Messrs. Chester S. Wilson, Alfred W. Bowen,* and *Frank J. Williams* for appellee. Reported below: 204 Minn. 365; 283 N. W. 727.

No. 301. CAROLENE PRODUCTS CO. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL. Appeal from the District Court of the United States for the District of Columbia. October 9, 1939. *Per Curiam:* The motion to affirm is granted and the decree of the District Court of the United States for the District of Columbia is affirmed. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 500; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95–96. *Messrs. George N. Murdock* and *Frank K. Nebeker* for appellant. *Assistant Solicitor General Bell* for appellees. Reported below: 27 F. Supp. 110; 30 *id.* 266.

No. 21. FLORIDA EX REL. VARS *v.* KNOTT, STATE TREASURER & INSURANCE COMMISSIONER. Appeal from the Supreme Court of Florida. October 9, 1939. *Per*

Curiam: The death of William W. Vars, the appellant in this cause, having been suggested by counsel for the said appellant, and counsel for the appellee having indicated that they have no objection, the appeal is dismissed on the ground that the cause of action has abated. *Martin* v. *Baltimore & Ohio R. Co.,* 151 U. S. 673, 691–692, 703; *Kaipu* v. *Pinkham,* 206 U. S. 566; *Beard* v. *Arkansas,* 207 U. S. 601, 602; *Seale* v. *Georgia,* 209 U. S. 554. *Mr. Dean Acheson* for appellant. No appearance for appellee. Reported below: 135 Fla. 206; 184 So. 752.

No. 22. FLORIDA EX REL. HARDWARE MUTUAL CASUALTY CO. ET AL. *v.* KNOTT, STATE TREASURER & INSURANCE COMMISSIONER. Appeal from the Supreme Court of Florida. October 9, 1939. *Per Curiam:* It appearing that the cause has become moot, the motion to vacate and remand is granted and the judgment of the Supreme Court of Florida is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate. *Mr. Dean Acheson* for appellants. No appearance for appellee. Reported below: 136 Fla. 552; 185 So. 927.

No. —, original. EX PARTE RICHARD J. THOMAS;

No. —, original. EX PARTE JOHN S. FARNSWORTH;

No. —, original. EX PARTE J. R. PALMER;

No. —, original. EX PARTE CLYDE H. WALKER ET AL.; and

No. —, original. EX PARTE E. R. LINDSEY. October 9, 1939. The motions for leave to file petitions for writs of habeas corpus denied.

No. —. EX PARTE JOHN F. STRUTHERS; and

No. —. EX PARTE GEORGE GOSSMAN ET AL. October 9, 1939. Application denied.

No. —, original. Ex parte Northern Pacific R. Co., by Schmidt et al. October 9, 1939. Motion for leave to file petition for writ of mandamus denied.

No. —. Northern Pacific R. Co., by Schmidt et al. *v.* United States et al.; and

No. —. Schmidt et al. *v.* United States et al. October 9, 1939. The applications for the allowance of appeals presented to Mr. Justice Reed and referred by him to the Court are denied. Reported below: 102 F. 2d 589.

No. —, original. Oklahoma ex rel. Williamson, Attorney General of Oklahoma, *v.* Woodring, Secretary of War. October 9, 1939. A rule is ordered to issue, returnable within forty days, requiring the defendant to show cause why leave to file the Bill of Complaint should not be granted. The Court directs the attention of the Attorney General of the United States to this case in which the complainant seeks to restrain the enforcement of an act of Congress upon the ground that it is repugnant to the Constitution of the United States.

No. 10, original, October Term 1935. Wyoming *v.* Colorado. October 9, 1939. A rule is ordered to issue, returnable within forty days, requiring the defendant to show cause why leave to file the petition for rule to show cause should not be granted.

No. 201. Buckstaff Bath House Co. *v.* McKinley, Commissioner, et al. Appeal from the Supreme Court of Arkansas. October 9, 1939. The appeal is 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 appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is granted. *Mr. Terrell Marshall* for petitioner. *Mr. W. L. Pope* for respondents. Reported below: 198 Ark. 91; 127 S. W. 2d 802.

No. 239. FISCHER *v.* PAULINE OIL & GAS CO. Appeal from the Supreme Court of Oklahoma. October 9, 1939. The appeal is 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 appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is granted. *Mr. Claude H. Rosenstein* for appellant. *Mr. Charles E. France* for appellee. Reported below: 185 Okla. 108; 90 P. 2d 411.

No. 8. ZIFFRIN, INC. *v.* MARTIN, COMMISSIONER OF REVENUE OF KENTUCKY, ET AL. Appeal from the District Court of the United States for the Eastern District of Kentucky. October 12, 1939. H. Clyde Reeves, Commissioner of Revenue of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, substituted as a party appellee in the place and stead of James W. Martin, formerly Commissioner of Revenue of Kentucky, etc., per stipulation of counsel, on motion of *Mr. Norton L. Goldsmith* for the appellant. Reported below: 24 F. Supp. 924.

Nos. —, —. BESS *v.* WEST VIRGINIA. October 16, 1939. The petitions for the allowance of appeals, referred by the CHIEF JUSTICE to the Court, are denied.

No. —. IN THE MATTER OF THE COMPLAINT OF EDMOND C. FLETCHER. October 16, 1939. Motion of Edmond C. Fletcher for leave to file complaint denied.

No. —, original. EX PARTE JOHN WILSON. October 16, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 10, original. TEXAS *v.* NEW MEXICO ET AL. October 16, 1939. The Special Master having presented his final report stating that the cause has been settled, it is ordered, adjudged, and decreed as follows:

1. The report of the Special Master is received, filed, and confirmed.

2. The bill of complaint is dismissed.

3. The Special Master is directed to return to the proper parties the original copies of the record of the testimony and the exhibits introduced into evidence before him.

4. Costs, including the compensation and expenses of the Special Master, shall be paid one-half by the State of Texas and one-half by the State of New Mexico and the Middle Rio Grande Conservancy District, the State of Texas to be reimbursed by the State of New Mexico and the Middle Rio Grande Conservancy District to the extent of one-half of all sums heretofore disbursed by it on account of expenses of the Special Master.

(Earlier phases of this litigation are reported in 296 U. S. 547; 297 U. S. 693, 698; 298 U. S. 639, 644; 300 U. S. 645; 302 U. S. 658; 304 U. S. 551.)

No. 431. HOEY, DOING BUSINESS AS MIDLAND SERVICE CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of

Illinois. October 23, 1939. *Per Curiam:* The motion for a stay is denied. 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. *Mr. Lloyd C. Whitman* for appellant. *Messrs. Daniel W. Knowlton* and *Edward M. Reidy* for appellees.

No. 406. ALLEN *v.* ILLINOIS. Appeal from the Supreme Court of Illinois; and

No. 448. GENDUSA *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. October 23, 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 also denied. *Mr. Wm. Scott Stewart* for appellant in No. 406. *Mr. M. C. Scharff* for appellant in No. 448. No appearance for appellees. Reported below: No. 406, 368 Ill. 368; 14 N. E. 2d 397; and No. 448, 193 La. 59; 190 So. 332.

No. —, original. EX PARTE LOUIS MARTINI. October 23, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 9, original. ARKANSAS *v.* TENNESSEE. October 23, 1939. The report of the Special Master herein is received and ordered to be filed. It is ordered that exceptions to the said report, if any, be filed on or before November 20, next; that briefs upon such exceptions be filed

on or before December 18; and that reply briefs, if any, be filed on or before January 2. The cause is assigned for hearing on Monday, January 8, next, at the head of the call for that day.

No. 2. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BANDINI PETROLEUM CO.; and

No. 3. SAME *v.* WILSHIRE ANNEX OIL CO. Certiorari, 306 U. S. 628, to the Circuit Court of Appeals for the Ninth Circuit. November 6, 1939. Judgments reversed, per stipulation of counsel to abide the decision in *Helvering, Commissioner of Internal Revenue,* v. *Wilshire Oil Co., ante,* p. 90. *Solicitor General Jackson* for petitioner. *Mr. Joseph D. Brady* for respondents. Reported below: 95 F. 2d 971.

No. 31. TEXAS ELECTRIC RAILWAY CO. *v.* EASTUS, UNITED STATES ATTORNEY, ET AL. Appeal from the District Court of the United States for the Northern District of Texas. Argued October 20, 1939. Decided November 6, 1939. *Per Curiam:* The judgment is affirmed. *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177; *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. J. M. Burford* and *Robert E. Quirk,* with whom *Mr. C. D. Cass* was on the brief, for appellant. *Mr. Robert L. Stern,* with whom *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Daniel W. Knowlton* and *Nelson Thomas* were on the brief, for appellees. Reported below: 25 F. Supp. 825.

No. 43. UNITED STATES *v.* JOHN MCSHAIN, INC. Certiorari, 307 U. S. 619, to the Court of Claims. Argued

October 20, 1939. Decided November 6, 1939. *Per Curiam:* The judgment is reversed, and the cause is remanded to the Court of Claims with instructions to enter judgment in favor of the United States. *Plumley* v. *United States,* 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393. *Mr. Richard H. Demuth,* with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Charles A. Horsky* were on the brief, for the United States. *Mr. Prentice E. Edrington,* with whom *Mr. Herman J. Galloway* was on the brief, for respondent. Reported below: 88 Ct. Cls. 284.

Order amended, *post,* p. 520.

No. 388. GRAYBAR ELECTRIC CO. ET AL. *v.* CURRY, COMMISSIONER OF REVENUE, ET AL. Appeal from the Supreme Court of Alabama. November 6, 1939. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Banker Bros. v. Pennsylvania,* 222 U. S. 210; *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169. *Mr. L. D. Gardner, Jr.* for appellants. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, and *John W. Lapsley,* Assistant Attorney General, for appellees. Reported below: 238 Ala. 116; 189 So. 186.

No. 396. W. T. CARTER & BROS. ET AL. *v.* SHORT ET AL. Appeal from the Supreme Court of Texas. November 6, 1939. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. (1) *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443; (2) Compare *Litchfield* v. *Register,* 9 Wall. 575, 577–578; *Minnesota* v. *Lane,* 247 U. S. 243, 250; *Lane* v. *Darling-*

ton, 249 U. S. 331, 333. *Messrs. John P. Bullington* and *Dillon Anderson* for appellants. *Messrs. H. Grady Chandler* and *Henry H. Brooks* for appellees. Reported below: 133 Texas 202; 126 S. W. 2d 953.

No. 458. CHRISTIE ET AL. *v.* BROUSSARD ET AL. Appeal from the Court of Civil Appeals, 9th Supreme Judicial District, of Texas. November 6, 1939. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. (1) *Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Home for Incurables* v. *City of New York,* 187 U. S. 155, 158; (2) *Roberts* v. *City of New York,* 295 U. S. 264, 278; *Seattle Ry.* v. *Linhoff,* 231 U. S. 568, 570; *Cross Lake Shooting & Fishing Club* v. *Louisiana,* 224 U. S. 632, 638; *Ross* v. *Oregon,* 227 U. S. 150, 162. *Mr. Robert L. Cole* for appellants. *Messrs. E. B. Pickett, Will E. Orgain,* and *E. E. Easterling* for appellees. Reported below: 124 S. W. 2d 929; 127 *id.* 168.

No. 468. ROEDENBECK FARMS, INC., ET AL. *v.* BROUSSARD ET AL. Appeal from the Court of Civil Appeals, 9th Supreme Judicial District, of Texas. November 6, 1939. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented substantial federal question. (1) *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308; *Zadig* v. *Baldwin,* 166 U. S. 485, 488; *Home for Incurables* v. *City of New York,* 187 U. S. 155, 158; (2) *Roberts* v. *City of New York,* 295 U. S. 264, 278; *Seattle Ry.* v. *Linhoff,* 231 U. S. 568, 570; *Cross Lake Shooting & Fishing Club* v. *Louisiana,* 224 U. S. 632, 638; *Ross* v. *Oregon,* 227 U. S. 150, 162. *Mr. John H. Crooker* for appellants. *Messrs. E. B. Pickett, E. E. Easterling,* and *Will E. Orgain* for appellees.

Messrs. William D. Gordon and *E. E. Easterling* for Marrs McLean, appellee. Reported below: 124 S. W. 2d 929; 127 *id.* 168.

No. 394. MINNESOTA EX REL. PEARSON *v.* PROBATE COURT OF RAMSEY COUNTY ET AL. Appeal from the Supreme Court of Minnesota. November 6, 1939. It is ordered that Michael F. Kinkead, present probate judge of Ramsey County, be substituted as a party appellee in the place of Albin S. Pearson, pursuant to stipulation of counsel. Reported below: 205 Minn. 545; 287 N. W. 297.

No. —. PHILADELPHIA-DETROIT LINES, INC. *v.* UNITED STATES, ET AL. November 7, 1939. The application of the appellant for the suspension of the challenged order of the Interstate Commerce Commission pending an appeal herein has been referred by MR. JUSTICE BLACK to the Court and the application is denied.

No. 32. CITY OF ATLANTA *v.* NATIONAL BITUMINOUS COAL COMMISSION ET AL. Appeal from the District Court of the United States for the District of Columbia. November 7, 1939. Harold L. Ickes, Secretary of the Interior, substituted as the party appellee in the place and stead of National Bituminous Coal Commission and Percy Tetlow, Chairman, et al., on motion of *Mr. J. C. Murphy* for the appellant.

No. 400. FIRST NATIONAL BANK OF ALBUQUERQUE *v.* STATE TAX COMMISSION ET AL. Appeal from the Supreme Court of New Mexico. November 13, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Bell's Gap Railroad Co.* v. *Pennsyl-*

vania, 134 U. S. 232, 236–238; *Des Moines Bank* v. *Fairweather,* 263 U. S. 103. The petition for writ of certiorari is denied. *Mr. Quincy D. Adams* for appellant. No appearance for appellees. Reported below: 43 N. M. 307; 92 P. 2d 987.

No. 447. LEONARD, TRADING AS COMMUNITY VARIETY STORE, *v.* MAXWELL, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of North Carolina. November 13, 1939. *Per Curiam:* The motion for leave to file a statement as to jurisdiction is granted. The motion to dismiss is also granted and the appeal is dismissed for want of a substantial federal question. (1) *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 93–95; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509–510; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 578–581. (2) *Smiley* v. *Kansas,* 196 U. S. 447, 457; *Darnell* v. *Indiana,* 226 U. S. 390, 398. *Mr. J. M. Wells, Jr.* for appellant. *Mr. Harry McMullan* for appellee. Reported below: 216 N. C. 89; 3 S. E. 2d 316.

No. 27. FRANKLIN ET AL. *v.* UNITED STATES. Certiorari, 307 U. S. 618, to the Circuit Court of Appeals for the Sixth Circuit. Argued November 7, 1939. Decided November 13, 1939. *Per Curiam:* The judgment is affirmed upon the ground that the District Court had no jurisdiction to entertain the suit. Judicial Code, § 24 (20); 28 U. S. C. § 41 (20). See *Otis Elevator Co.* v. *United States,* 18 F. Supp. 87 (D. C. S. D. N. Y.). *Mr. Sam Costen* submitted for petitioners. *Mr. Warner W. Gardner,* with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Aaron B. Holman* were on the brief, for the United States. Reported below: 101 F. 2d 459.

No. 32. CITY OF ATLANTA *v.* ICKES, SECRETARY OF THE INTERIOR. Appeal from the District Court of the United States for the District of Columbia. Argued November 7, 1939. Decided November 13, 1939. *Per Curiam:* The judgment is affirmed on the ground that the appellant has no standing to maintain the suit. *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 142; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478–479; *Sprunt & Son* v. *United States,* 281 U. S. 249, 255–256; *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240–241. *Mr. J. C. Murphy,* with whom *Messrs. John A. McIntire* and *Charles S. Rhyne* were on the brief, for appellant. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Warner W. Gardner,* and *Abe Fortas* were on a brief for appellee. Reported below: 26 F. Supp. 606.

No. —, original. EX PARTE WILLIAM BAYLEY. November 13, 1939. Motion for leave to file petition for writ of habeas corpus denied.

No. 12, original. MISSOURI *v.* IOWA. November 13, 1939. The counsel for the respective parties to the above-entitled cause having stipulated and agreed that this cause has been fully settled and compromised and that it shall be dismissed and have filed a stipulation to that effect,

It is ordered, adjudged, and decreed that the Bill of Complaint in this cause be, and it hereby is, dismissed, and that the costs, including the compensation of the Special Master, shall be divided equally between the parties. *Messrs. Roy McKittrick,* Attorney General of Missouri, *Frank W. Hayes,* Assistant Attorney General, *M. E. Casey,* and *Mrs. Ruth L. Waltner* for complainant.

Messrs. Fred D. Everett, Attorney General of Iowa, and *Horace E. Pike,* Assistant Attorney General, for defendant.

No. 429 (October Term, 1938). PREBYL *v.* PRUDENTIAL INSURANCE CO. November 13, 1939. Motion for leave to file protest and declaration of rights denied. *Milton Prebyl, pro se.* No appearance for respondent. See 305 U. S. 577, 641, 673.

No. 193. NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP. November 13, 1939. Motion of the National Maritime Union of America for leave to intervene denied.

No. 6. INLAND WATERWAYS CORP. ET AL. *v.* HARDEE, RECEIVER. Certiorari, 306 U. S. 626, to the Court of Appeals for the District of Columbia. November 13, 1939. The motion for substitution is granted and Frederick J. Young, Receiver of the Commercial National Bank of Washington, D. C., is substituted as the party respondent in the place and stead of Cary H. Hardee, resigned.

No. 316. MCNINCH ET AL. *v.* HEITMEYER. Certiorari, *post,* p. 540, to the Court of Appeals for the District of Columbia. November 13, 1939. J. Lawrence Fly, Chairman of the Federal Communications Commission substituted as a party petitioner in the place and stead of Frank R. McNinch, resigned, on motion of *Mr. Solicitor General Jackson* for the petitioners.

No. 486. MADISON AVENUE CORP. *v.* STOKES, COMMISSIONER OF FINANCE & TAXATION OF TENNESSEE.

Appeal from the Supreme Court of Tennessee. November 22, 1939. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 476; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 571–572; *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407, 412–413; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55. *Mr. F. E. Hagler* for appellant. *Mr. W. F. Barry* for appellee.

No. 48. UNITED STATES *v.* STONE, UNITED STATES DISTRICT JUDGE. Certiorari, 307 U. S. 620, to the Circuit Court of Appeals for the Seventh Circuit. Argued November 10, 1939. Decided November 22, 1939. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Assistant Attorney General Arnold,* with whom *Solicitor General Jackson,* and *Messrs. Charles H. Weston* and *John Henry Lewin* were on the brief, for the United States. *Mr. Weymouth Kirkland,* with whom *Messrs. Howard Ellis, John L. McInerney,* and *David Fisher* were on the brief, for respondent. Reported below: 101 F. 2d 870.

No. —. EX PARTE JOHN MULDOON. November 22, 1939. Application denied.

No. 193. NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP. November 22, 1939. Motion of the American Federation of Labor for leave to intervene denied.

No. 490. UNITED STATES *v.* DESROCHERS. November 22, 1939. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is struck

from the docket upon the ground that the petition is not presented by or on behalf of the United States, the party to the record. *Messrs. Horace M. Gray* and *Charles E. Wythe* for petitioner. *Mr. Edgar J. Treacy* for respondent. Reported below: 105 F. 2d 919.

No. 19. OKLAHOMA PACKING CO., FORMERLY WILSON & CO., INC., ET AL. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL. Opinion delivered December 4, 1939, withdrawn and replaced on January 15, 1940. See *post*, p. 530; 309 U. S. 4.

No. 508. MARK *v.* WISCONSIN. Appeal from the Supreme Court of Wisconsin. December 4, 1939. *Per Curiam:* The motion for leave to file the motion to dismiss the appeal is granted. The motion to dismiss is also granted and the appeal is dismissed for want of a substantial federal question. *Hurtado* v. *California,* 110 U. S. 516; *Bolln* v. *Nebraska,* 176 U. S. 83; *Lem Woon* v. *Oregon,* 229 U. S. 586. The motion for leave to proceed further *in forma pauperis* is denied. *Ralph Mark, pro se. Mr. Harold H. Persons,* Assistant Attorney General of Wisconsin, for appellee. Reported below: 228 Wis. 377; 280 N. W. 299.

No. —. PETERS *v.* NANGLE ET AL. December 4, 1939. Application denied.

No. —. PORESKY *v.* ELY ET AL. December 4, 1939. The application presented to the CHIEF JUSTICE and referred by him to the Court is denied.

No. 43. UNITED STATES *v.* JOHN MCSHAIN, INC. December 4, 1939. It is ordered that the order in this

case dated November 6, 1939, *ante,* p. 512, be, and it hereby is, amended to read as follows:

"*Per Curiam:* The judgment is reversed to the extent that it includes the $1,877.93 alleged to be due from the United States in paragraphs XIV through XXIV of the petition to the Court of Claims, and the cause is remanded to the Court of Claims with instructions to enter judgment in favor of the United States with regard to this item. *Plumley* v. *United States,* 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393."

Nos. 15 and 16. BOTELER, TRUSTEE OF RICHMAID CREAMERIES, INC., *v.* INGELS, DIRECTOR OF MOTOR VEHICLES OF CALIFORNIA, ET AL. December 4, 1939. Ordered that the first sentence in the second paragraph on page 3 of the opinion be amended to read:

"*First.* Subdivision 57 (j) prohibits allowance of a tax penalty against the bankrupt estate only if incurred by the bankrupt before bankruptcy by reason of his own delinquency."

It is further ordered that the petition for rehearing be denied.

Opinion reported as amended, *ante,* p. 57.

No. 549. GROSECLOSE *v.* PLUMMER, WARDEN. See *post,* p. 614.

No. 68. HELIS *v.* WARD, EXECUTRIX, ET AL. December 4, 1939. The motion of Agnes E. Lewis and others for leave to intervene is denied. The motion to proceed further *in forma pauperis* is also denied. Reported below: 102 F. 2d 519; 103 *id.* 519.

No. 488. DUGAN *v.* UNITED STATES. See *post,* p. 614.

No. 193. NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP. December 8, 1939. Motion for leave to file brief of the National Maritime Union of America as *amicus curiae* submitted by *Mr. Joseph Kovner* in that behalf and the motion denied.

No. 503. CAVICCHI, DOING BUSINESS AS WADE BUTTON CO., *v.* MOHAWK MANUFACTURING CO., INC. Appeal from the Supreme Court of New York. December 11, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109; *New Marshall Co.* v. *Marshall Engine Co.,* 223 U. S. 473, 478; *Geneva Furniture Co.* v. *Karpen,* 238 U. S. 254, 259. *Mr. Alan N. Mann* for appellant. *Mr. David M. Palley* entered an appearance for appellee. Reported below: 256 App. Div. 1069; 281 N. Y. 53; 12 N. Y. S. 2d 360; 22 N. E. 2d 179, 763.

No. 77. INTERSTATE NATURAL GAS CO. ET AL. *v.* STONE, COMMISSIONER OF FRANCHISE TAX, ET AL. Certiorari, 307 U. S. 620, to the Circuit Court of Appeals for the Fifth Circuit. Argued December 4, 1939. Decided December 11, 1939. *Per Curiam:* The judgment is affirmed. *Southern Gas Corporation* v. *Alabama,* 301 U. S. 148, 153, 156–157. *Mr. Garner W. Green,* with whom *Messrs. Wm. A. Dougherty, Maxwell Bramlette,* and *Marcellus Green* were on the brief, for petitioners. *Messrs. Greek L. Rice,* Attorney General of Mississippi, and *J. A. Lauderdale,* Assistant Attorney General, were on a brief for respondents. Reported below: 103 F. 2d 544.

No. 80. FUR WORKERS UNION No. 21238 *v.* FUR WORKERS UNION, LOCAL No. 72, ET AL. Certiorari, *post,* p. 537, to the Court of Appeals for the District of Colum-

bia. Argued December 6, 1939. Decided December 11, 1939. *Per Curiam:* The judgment is affirmed. *Lauf* v. *E. G. Shinner & Co.,* 303 U. S. 323; *New Negro Alliance* v. *Grocery Co.,* 303 U. S. 552. Cf. *Senn* v. *Tile Layers Union,* 301 U. S. 468. *Mr. Irvin Goldstein* for petitioner. *Messrs. Samuel Levine, Sidney C. Schlesinger,* and *Louis B. Boudin* were on a brief for respondents. Reported below: 70 App. D. C. 122; 105 F. 2d 1.

No. 317. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JOHNSON. Certiorari, *post,* p. 536, to the Circuit Court of Appeals for the Eighth Circuit. Argued December 5, 1939. Decided December 11, 1939. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Assistant Attorney General Clark* and *Mr. Arnold Raum,* with whom *Solicitor General Jackson* and *Messrs. Sewall Key* and *Joseph M. Jones* were on the brief, for petitioner. *Mr. Abraham Lowenhaupt,* with whom *Mr. Stanley S. Waite* was on the brief, for respondent. Reported below: 104 F. 2d 140.

No. 365. LEONA PIATT GRAY *v.* UNION JOINT STOCK LAND BANK OF DETROIT;

No. 366. CARL H. GRAY *v.* SAME; and

No. 367. PIATT *v.* SAME. On petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit. December 11, 1939. *Per Curiam:* Motion for leave to proceed *in forma pauperis,* and petition for writs of certiorari, granted. The judgments of the Circuit Court of Appeals are reversed, and the causes are remanded to the District Court for further proceedings. See *John Hancock Mutual Life Ins. Co.* v. *Bartels, ante,* p. 180. *Mr. William Lemke* for petitioners. *Mr. A. G. Masters* for respondent. Reported below: 105 F. 2d 275.

No. 412. MORRISON *v.* FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, ET AL.; and

No. 413. MORRISON, EXECUTRIX, *v.* SAME. On petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit. December 11, 1939. *Per Curiam:* Motion for leave to proceed *in forma pauperis,* and petition for writs of certiorari, granted. The judgments of the Circuit Court of Appeals are reversed, and the causes are remanded to the District Court for further proceedings. See *John Hancock Mutual Life Ins. Co.* v. *Bartels, ante,* p. 180. *Mr. William Lemke* for petitioner. No appearance for respondents. Reported below: 105 F. 2d 279.

No. 235. POTTER *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. December 11, 1939. *Per Curiam:* The petition for writ of certiorari is granted. As the appeal from the order of the District Court filed December 4, 1937, was duly perfected, the Circuit Court of Appeals had jurisdiction and its order dismissing the appeal was error. The order is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings. *Mr. Elmer McClain* for petitioner. *Messrs. Virgil D. Parish* and *Stanley K. Henshaw* for respondents. Reported below: 102 F. 2d 1010.

No. 237. MILLER *v.* HATFIELD, TRUSTEE, ET AL. December 11, 1939. Motion of the petitioner for leave to proceed *in forma pauperis* as to the printing of the record granted. *Mr. Elmer McClain* for petitioner. *Mr. H. E. Garling* for respondents. Reported below: 101 F. 2d 748.

No. 517. GUY *v.* UNITED STATES. December 13, 1939. Order denying petition for writ of certiorari (*post,* p. 618) ordered withheld pending the filing and determination of a timely petition for rehearing. Reported below: 107 F. 2d 288.

No. 183. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, *v.* CASSELL, SURVIVING EXECUTOR. December 13, 1939. Craig Huston, Administrator d. b. n. c. t. a. of the Estate of George F. Uber, deceased, substituted as the party respondent in the place and stead of Linford B. Cassell, per stipulation of counsel, on motion of *Mr. William R. Spofford* for the respondent.

No. 92. MADDEN, EXECUTOR, *v.* KENTUCKY, BY MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY. December 14, 1939. H. Clyde Reeves, present Commissioner of Revenue of Kentucky, substituted as party appellee in the place and stead of James W. Martin, resigned, as per stipulation of counsel, on motion of *Mr. Leo T. Wolford* in that behalf.

No. 78. UNITED STATES *v.* BALTIMORE & ANNAPOLIS RAILROAD CO. ET AL. Appeal from the Court of Appeals of Maryland. Argued December 11, 1939. Decided December 18, 1939. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hendrick* v. *Maryland,* 235 U. S. 610, 622–623; *Kane* v. *New Jersey,* 242 U. S. 160, 167; *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337; *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 189. *Assistant Attorney General Shea,* with whom *Solicitor General Jackson* and *Messrs. Warner W. Gardner, Paul A. Sweeney,* and *Enoch*

E. Ellison were on the brief, for the United States. *Mr. Edgar Allan Poe* was on a brief for the Baltimore & Annapolis Railroad Co., and *Mr. J. Purdon Wright* was on a brief for O. E. Weller et al., appellees. Reported below: 176 Md. 383; 4 A. 2d 734.

No. —, original. OKLAHOMA EX REL. WILLIAMSON, ATTORNEY GENERAL, *v.* WOODRING, SECRETARY OF WAR. December 18, 1939. The return to the rule to show cause is received and ordered filed. This cause is set for hearing on Monday, January 29, 1940, on the motion for leave to file the bill of complaint and the return to the rule to show cause.

No. —, original. PENNSYLVANIA *v.* NEW JERSEY ET AL. December 18, 1939. A rule is ordered to issue, returnable January 5, 1940, requiring the defendants to show cause why leave to file the bill of complaint should not be granted.

No. 35. RETAIL FOOD CLERKS & MANAGERS UNION, LOCAL NO. 1357, ET AL. *v.* UNION PREMIER FOOD STORES, INC., ET AL. Certiorari, 307 U. S. 619, to the Circuit Court of Appeals for the Third Circuit. Argued December 6, 1939. Decided January 2, 1940. *Per Curiam:* As it appears that the cause has become moot, the judgment of the Circuit Court of Appeals is reversed, without costs to either party in this Court, and the cause is remanded to the District Court with directions to dismiss the complaint. *United States* v. *Hamburg American Co.*, 239 U. S. 466, 477–478; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362–363; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218. *Mr. Joseph A. Padway* for petitioners. *Mr. Harry Shapiro* for respondents. Reported below: 101 F. 2d 475.

No. 564. LACOE *v.* COUNTY OF SAN DIEGO. Appeal from the District Court of Appeal, 4th Appellate District, of California. January 2, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Kidd* v. *Alabama,* 188 U. S. 730; *Darnell* v. *Indiana,* 226 U. S. 390, 398. *Messrs. W. Sumner Holbrook, Jr., Donald V. Hunter,* and *Homer R. Hendricks* for appellant. No appearance for appellee. Reported below: 33 Cal. App. 2d 692; 92 P. 2d 809.

No. 578. QUANAH, ACME & PACIFIC RY. CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Texas. January 2, 1940. *Per Curiam:* The decree is affirmed. *Central R. Co.* v. *United States,* 257 U. S. 247, 257; *Interstate Commerce Commission* 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. *Mr. Robert E. Quirk* for appellant. *Mr. Philip A. Walker* for West Texas Cottonoil Co. et al., appellees. Reported below: 28 F. Supp. 916.

No. 537. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TYNG; and

No. 538. SAME *v.* BUCHSBAUM. On petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. January 2, 1940. *Per Curiam:* The petitions for writs of certiorari are granted. The judgments are reversed and the causes are remanded to the Circuit Court of Appeals for further proceedings. *LeTulle* v. *Scofield, ante,* p. 415. *Solicitor General Jackson* for petitioner. *Mr. Wayne Johnson* for respondent in No. 537. *Messrs. J. R. Sherrod, Homer Hendricks,* and *Robert N. Miller* for respondent in No. 538. Reported below: 106 F. 2d 55.

No. —, original. Ex parte Harmon Metz Waley;
No. —, original. Ex parte E. R. Lindsey;
No. —, original. Ex parte J. R. Palmer. January 2, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Poresky *v.* Ely. January 2, 1940. Motion for a reconsideration of the application herein denied.

No. 598. Philadelphia-Detroit Lines, Inc., *v.* United States et al. Appeal from the District Court of the United States for the Southern District of Florida. January 8, 1940. *Per Curiam:* The judgment is affirmed. *Hoey* v. *United States, ante,* p. 510; *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.,* 295 F. 53, 56, affirmed 269 U. S. 217; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 126. *Messrs. Dan R. Schwartz, Edward S. Brashears, Leo P. Kitchen,* and *Albert F. Beasley* for appellant. No appearance for appellees. 31 F. Supp. 188.

No. —, original. Ex parte George H. Gibson. January 8, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. —. In the matter of Loveland. January 8, 1940. French B. Loveland, a member of the Bar of this Court, having made return in response to the rule to show cause issued on December 4, 1939, and the costs therein mentioned having been paid, the said rule, in view of the explanation submitted in said return, is discharged.

No. 552. Murray, Receiver, et al. *v.* City of New York et al.; and

No. 558. ROBERTS, RECEIVER, *v.* MURRAY, RECEIVER, ET AL. January 8, 1940. The motion to defer consideration of the petitions for writs of certiorari in these cases is granted and consideration is deferred until March 1, 1940. The CHIEF JUSTICE took no part in the consideration and decision of this motion. Reported below: 103 F. 2d 889.

No. 614. PUBLIC SERVICE COMMISSION OF WISCONSIN *v.* WISCONSIN TELEPHONE CO. January 8, 1940. Motion of the Committee on Public Utilities of National Lawyers Guild for leave to file a brief as *amicus curiae* submitted by *Mr. Harry Booth* in that behalf and the motion denied.

No. 242. KEYS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. Certiorari, *post*, p. 535, to the Circuit Court of Appeals for the Second Circuit. Argued January 8, 1940. Decided January 15, 1940. *Per Curiam:* The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed upon the ground that the question of assumption of risk was properly submitted to the jury. *Mr. Simone N. Gazan* for petitioner. *Mr. Ray Rood Allen,* with whom *Mr. Frederic D. McKenney* was on the brief, for respondent. Reported below: 104 F. 2d 663.

No. —, original. EX PARTE EDWARD QUINN; and

No. —, original. EX PARTE WAYNE WAGGONER. January 15, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. PENNSYLVANIA *v.* NEW JERSEY ET AL. January 15, 1940. The return of the individual defendants to the rule to show cause is received and ordered

filed. This cause is set for hearing on Monday, February 26 next, on the motion for leave to file the bill of complaint and the return to the rule to show cause.

No. 562. CONNOR *v.* CALIFORNIA ET AL. Certiorari, *post,* p. 547, to the Supreme Court of California. January 15, 1940. It is ordered that H. Thomas Austern, Esq., of Washington, D. C., a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 19. OKLAHOMA PACKING CO., FORMERLY WILSON & CO., INC., ET AL. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL. January 15, 1940. The decision of the Supreme Court of Oklahoma in *Community Natural Gas Co.* v. *Corporation Commission,* 182 Okla. 137; 76 P. 2d 393, having been brought to the attention of this Court for the first time in the petition of respondents for a rehearing of the disposition made of this cause in the opinion delivered on December 4, 1939, that opinion is hereby withdrawn and replaced by the opinion of this day, 309 U. S. 4. The petition for rehearing is denied.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 2, 1939, THROUGH JANUARY 15, 1940.

No. 204. KOBILKIN *v.* PILLSBURY, DEPUTY COMMISSIONER OF U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL. October 9, 1939. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted. *Mr. George Olshausen* for petitioner. *Solicitor General Jackson* for Warren H. Pillsbury; and *Messrs. Herman Phleger* and *Maurice E. Harrison* for Matson Navigation Co., respondents. Reported below: 103 F. 2d 667.

No. 201. BUCKSTAFF BATH HOUSE CO. *v.* MCKINLEY, COMMISSIONER, ET AL. See *ante*, p. 508.

No. 239. FISCHER *v.* PAULINE OIL & GAS CO. See *ante*, p. 509.

No. 49. GRIFFITHS *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Delbert A. Clithero* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 103 F. 2d 110.

No. 63. LETULLE *v.* SCOFIELD, U. S. COLLECTOR OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Homer L. Bruce* for petitioner. *Assistant Solicitor General Bell, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Robert K. McConnaughey* for respondent. Reported below: 103 F. 2d 20.

No. 69. PEARSON, STATE TREASURER, *v.* MCGRAW ET AL., EXECUTORS. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Oregon granted. *Mr. I. H. Van Winkle,* Attorney General of Oregon, for petitioner. No appearance for respondents. Reported below: 161 Ore. 1; 86 P. 2d 424; 87 P. 2d 766.

No. 70. AMERICAN FEDERATION OF LABOR ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Mr. Joseph A. Padway* for petitioners. *Assistant Solicitor General Bell* and *Messrs. Robert L. Stern, Charles A. Horsky, Charles*

Fahy, and *Mortimer B. Wolf* for respondent. Reported below: 70 App. D. C. 62; 103 F. 2d 933.

No. 73. POSTAL STEAMSHIP CORPORATION *v.* EL ISLEO ET AL.; and

No. 74. SAME *v.* SOUTHERN PACIFIC CO. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. John C. Crawley* and *Earl Farwell* for petitioner. *Messrs. Chauncey I. Clark* and *Burton H. White* for respondents. Reported below: 101 F. 2d 4.

No. 110. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HALLOCK ET AL.;

No. 111. SAME *v.* HALLOCK, EXECUTRIX; and

No. 112. SAME *v.* SQUIRE, SUPERINTENDENT OF BANKS OF OHIO. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. William B. Stewart* for respondents in Nos. 110 and 111. *Mr. W. H. Annat* for respondent in No. 112. Reported below: 102 F. 2d 1.

No. 262. SOUTH CHICAGO COAL & DOCK CO. ET AL. *v.* BASSETT, DEPUTY COMMISSIONER. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Robert J. Folonie* and *Hayes McKinney* for petitioners. *Solicitor General Jackson* and *Messrs. Paul A. Sweeney* and *Aaron B. Holman* for respondent. Reported below: 104 F. 2d 522.

No. 122. CHICOT COUNTY DRAINAGE DISTRICT *v.* BAXTER STATE BANK ET AL. October 9, 1939. Petition for

writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Grover T. Owens, S. Lasker Ehrman,* and *E. L. McHaney, Jr.* for petitioner. *Mr. G. W. Hendricks* for respondents. Reported below: 103 F. 2d 847.

No. 129. GENERAL AMERICAN TANK CAR CORP. *v.* EL DORADO TERMINAL CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Allan P. Matthew* and *John O. Moran* for petitioner. *Mr. W. F. Williamson* for respondent. Reported below: 104 F. 2d 903.

No. 151. DEPUTY ET AL. *v.* DUPONT. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Jackson* for petitioners. *Messrs. George Wharton Pepper* and *James S. Y. Ivins* for respondent. Reported below: 103 F. 2d 257.

No. 152. CHANNAN SINGH *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Marshall B. Woodworth* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 103 F. 2d 303.

No. 176. HAGGAR COMPANY *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Lloyd E. Elliott* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 104 F. 2d 24.

No. 193. NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Assistant Solicitor General Bell* and *Mr. Charles Fahy* for petitioner. *Mr. Gessner T. McCorvey* for respondent. By leave of Court, *Mr. Charlton Ogburn* filed a brief on behalf of the American Federation of Labor, as *amicus curiae,* opposing the petition. Reported below: 103 F. 2d 157.

No. 210. MORGAN, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Brode B. Davis* and *Arthur M. Kracke* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, Joseph M. Jones,* and *Richard H. Demuth* for respondent. Reported below: 103 F. 2d 636.

No. 236. UNITED STATES FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE CO. *v.* NATIONAL SURETY CORP. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Benedict Deinard* for petitioner. *Messrs. R. O. Sullivan* and *Pierce Butler, Jr.* for National Surety Corp., and *Mr. Henry N. Benson* for Patrick J. Malone, respondents. Reported below: 103 F. 2d 450.

No. 237. MILLER *v.* HATFIELD, TRUSTEE, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Elmer McClain* for petitioner. *Mr. H. E. Garling* for respondents. Reported below: 101 F. 2d 748.

No. 242. KEYS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Simone N. Gazan* for petitioner. *Messrs. Ray Rood Allen* and *Frederic D. McKenney* for respondent. Reported below: 104 F. 2d 663.

No. 243. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FITCH. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Assistant Solicitor General Bell* for petitioner. *Mr. John B. Clayton Stiver* for respondent. Reported below: 103 F. 2d 702.

No. 246. DEITRICK, RECEIVER, *v.* GREANEY. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Brenton K. Fisk, George P. Barse,* and *James Louis Robertson* for petitioner. *Mr. Thomas H. Mahony* for respondent. Reported below: 103 F. 2d 83.

No. 265. FEDERAL COMMUNICATIONS COMMISSION *v.* POTTSVILLE BROADCASTING CO. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Assistant Solicitor General Bell* and *Mr. William J. Dempsey* for petitioner. *Messrs. Eliot C. Lovett* and *Charles D. Drayton* for respondent. Reported below: 70 App. D. C. 157; 105 F. 2d 36.

No. 272. NATIONAL LICORICE CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit granted. *Messrs. Edward M. Ladden* for petitioner. *Solicitor General Jackson* and *Messrs. Charles A. Horsky, Charles Fahy, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 104 F. 2d 655.

No. 300. BRUNO *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. M. Michael Edelstein* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Amos W. W. Woodcock* and *George F. Kneip* for the United States. Reported below: 105 F. 2d 921.

No. 310. BERRY, ADMINISTRATRIX, *v.* MIDTOWN SERVICE CORP. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Harold R. Medina* and *Frank L. Tyson* for petitioner. *Messrs. Samuel H. Kaufman* and *Emil Weitzner* for respondents. Reported below: 104 F. 2d 107.

No. 146. HIGGINS, COLLECTOR OF INTERNAL REVENUE, *v.* SMITH. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. David Sher* for respondent. Reported below: 102 F. 2d 456.

No. 317. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JOHNSON. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Stanley S. Waite* and *Abraham Lowenhaupt* for respondent. Reported below: 104 F. 2d 140.

No. 68. HELIS *v.* WARD, EXECUTRIX, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted, limited to the question whether a new trial should not have been granted. *Mr. Eugene D. Saunders* for petitioner. *Messrs. Wm. N. Bonner* and *Wm. D. Gordon* for respondents. Reported below: 102 F. 2d 519; 103 *id.* 519.

No. 56. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* F. & R. LAZARUS & CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* for petitioner. *Messrs. Murray Seasongood* and *Robert P. Goldman* for respondent. Reported below: 101 F. 2d 728.

No. 253. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Assistant Solicitor General Bell* and *Mr. Charles Fahy* for petitioner. *Messrs. John B. Hollister, Isaac Lobe Straus,* and *Sigmund Levin* for respondents. Reported below: 105 F. 2d 598.

No. 80. FUR WORKERS UNION No. 21238 *v.* FUR WORKERS UNION, LOCAL No. 72, ET AL. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Irvin Goldstein* for petitioner. *Mr. Louis B. Boudin* for respondents. Reported below: 70 App. D. C. 122; 105 F. 2d 1.

No. 183. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, *v.* CASSELL, SURVIVING EXECUTOR. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. Harold D. Saylor* for respondent. Reported below: 103 F. 2d 834.

No. 132. BONET, TREASURER, *v.* TEXAS COMPANY (P. R.) INC. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioner. *Mr. Thomas Kirby Schmuck* for respondent. Reported below: 102 F. 2d 710.

No. 196. BHAGAT SINGH *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 104 F. 2d 122.

No. 156. YEARSLEY ET AL. *v.* W. A. ROSS CONSTRUCTION CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Robert Van Pelt* and *Ernest B. Perry* for petitioners. *Mr. Clay C. Rogers* for respondent. Reported below: 103 F. 2d 589.

No. 309. DANFORTH *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit granted. *Mr. J. L. London* for petitioner. *Solicitor General Jackson, Assistant Attorney General Littell,* and *Mr. C. W. Leaphart* for the United States. Reported below: 102 F. 2d 5; 105 *id.* 318.

No. 229. REAL ESTATE - LAND TITLE & TRUST CO. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE ROBERTS and MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. Maurice Bower Saul* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch,* and *Arnold Raum* for the United States. Reported below: 102 F. 2d 582.

No. 230. CARPENTER *v.* WABASH RAILWAY CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted, limited to the question of the right of the petitioner to intervene in order to assert priority. *Messrs. Mark D. Eagleton, Hyman G. Stein,* and *Roberts P. Elam* for petitioner. *Mr. Homer Hall* for Wabash Railway Co. et al.; *Mr. Charles Nagel* for Chase National Bank; and *Mr. Thomas W. White* for Central Hanover Bank & Trust Co., respondents. Reported below: 103 F. 2d 996.

No. 240. NARDONE ET AL. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact.

MR. JUSTICE REED took no part in the consideration and decision of this application. *Mr. David V. Cahill* for Nardone, and *Mr. Louis Halle* for Gottfried, petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 106 F. 2d 41.

No. 124. AVERY *v.* ALABAMA. October 16, 1939. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Supreme Court of Alabama, granted. *Mr. Edward H. Saunders* for petitioner. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondent. Reported below: 237 Ala. 616; 188 So. 391.

No. 346. UNITED STATES *v.* SOCONY-VACUUM OIL CO., INC., ET AL.; and

No. 347. SOCONY-VACUUM OIL CO., INC. ET AL. *v.* UNITED STATES. October 16, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Newman A. Townsend* for petitioner in No. 346. *Messrs. William J. Donovan* and *Ralstone R. Irvine* for the Socony-Vacuum Oil Co. et al. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. John Henry Lewin* and *Charles H. Weston* for respondent in No. 347. Reported below: 105 F. 2d 809.

No. 316. MCNINCH ET AL. *v.* HEITMEYER. October 16, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Messrs. Newman A. Townsend* and *William J. Dempsey* for petitioners. *Mr. Clarence C. Dill* for respondent. Reported below: 70 App. D. C. 162; 105 F. 2d 41.

No. 329. RUSSELL ET AL. *v.* TODD ET AL. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question of the application of the New York statute of limitations. *Messrs. Ralph M. Carson* and *Samuel A. Pleasants* for petitioners. *Mr. George A. Spiegelberg* for respondents. Reported below: 104 F. 2d 169.

No. 342. AMALGAMATED UTILITY WORKERS *v.* CONSOLIDATED EDISON CO., INC., ET AL. October 16, 1939. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is also granted. *Mr. Louis B. Boudin* for petitioner. *Mr. William L. Ransom* for respondents. *Messrs. Isaac Lobe Straus* and *Claude A. Hope* for International Brotherhood of Electrical Workers et al., respondents. Reported below: 106 F. 2d 991.

No. 195. CHAMBERS ET AL. *v.* FLORIDA. October 23, 1939. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Supreme Court of Florida, granted. *Mr. Leon Ransom* for petitioners. *Messrs. George Couper Gibbs,* Attorney General of Florida, and *Tyrus A. Norwood,* Assistant Attorney General, for respondent. Reported below: 136 Fla. 568; 187 So. 156.

No. 354. FEDERAL HOUSING ADMINISTRATION, REGION No. 4, *v.* BURR, DOING BUSINESS AS SECRETARIAL SERVICE BUREAU. October 23, 1939. Petition for writ of certiorari to the Supreme Court of Michigan granted. *Solicitor General Jackson* for petitioner. *Mr. Gus O. Nations*

for respondent. Reported below: 289 Mich. 91; 286 N. W. 169.

No. 370. MONTROSE CEMETERY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Elden McFarland* and *E. J. Quinn* for petitioner. *Solicitor General Jackson* for respondent. Reported below: 105 F. 2d 238.

No. 355. UNITED STATES *v.* MOSCOW FIRE INSURANCE CO. ET AL. October 23, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. The petitioner having applied for a stay pending the final disposition of the cause in this Court, It is hereby ordered that the application for a stay be granted and that the Bank of New York & Trust Company (Bank of New York) be, and it hereby is stayed from making any payment whatsoever pursuant to the judgment of the Supreme Court of the State of New York dated August 22, 1934 until further order of this Court. MR. JUSTICE REED took no part in the consideration and decision of these applications. *Solicitor General Jackson* for the United States. *Messrs. Paul C. Whipp* and *Lounsbury D. Bates* for Lucke; *Mr. Samson Selig* for Sawyer et al:; *Mr. George H. Engelhard* for Jakubovic et al.; *Mr. Hartwell Cabell* for Heckscher & Gottlieb et al.; and *Mr. Borris M. Komar* for Morro et al., respondents. Reported below: 280 N. Y. 286, 848; 20 N. E. 2d 758; 21 N. E. 2d 890.

No. 383. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CLIFFORD. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Jackson* for

petitioner. *Mr. F. H. Stinchfield* for respondent. Reported below: 105 F. 2d 586.

No. 384. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WOOD. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. Ralph S. Rounds* for respondent. Reported below: 104 F. 2d 1013.

No. 386. DICKINSON INDUSTRIAL SITE, INC. *v.* COWAN ET AL. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Walter A. Wade, Benjamin Wham,* and *George W. Ott* for petitioner. *Mr. Samuel E. Hirsch* for respondents. Reported below: 104 F. 2d 771.

No. 419. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* KEHOE. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. Leo W. White, R. M. O'Hara, W. H. Gillespie,* and *Robert T. McCracken* for respondent. Reported below: 105 F. 2d 552.

No. 399. BRYANT ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. J. Gilmer Körner, Jr.* and *David S. Day* for petitioners. *Solicitor General Jackson* for respondent. Reported below: 104 F. 2d 1011.

No. 437. MCCABE *v.* BOSTON TERMINAL CO. November 13, 1939. Petition for writ of certiorari to the Supe-

rior Court in and for the County of Suffolk, Massachusetts, granted. *Mr. Henry Lawlor* for petitioner. *Mr. John L. Hall* for respondent. Reported below: 22 N. E. 2d 33.

No. 459. H. Rouw Co. *v.* Crivella. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William L. Curtis* for petitioner. *Messrs. Harry P. Daily* and *John P. Woods* for respondent. By special leave of Court, *Solicitor General Jackson* and *Mr. Mastin G. White* filed a memorandum on behalf of the United States, as *amicus curiae,* in support of the petition. Reported below: 105 F. 2d 434.

No. 462. Germantown Trust Co., Trustee, *v.* Commissioner of Internal Revenue. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Shippen Lewis* and *Paul F. Myers* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* for respondent. Reported below: 106 F. 2d 139.

No. 460. National Labor Relations Board *v.* Falk Corporation. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioner. *Mr. Leon B. Lamfrom* for respondent. *Mr. Giles F. Clark* for Independent Union of Falk Employees, intervener. Reported below: 102 F. 2d 383; 106 *id.* 454.

No. 479. Helvering, Commissioner of Internal Revenue, *v.* Bruun. November 22, 1939. Petition for

writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. John H. McEvers* for respondent. Reported below: 105 F. 2d 442.

No. 481. THOMPSON, TRUSTEE, *v.* MAGNOLIA PETROLEUM CO. ET AL. See *post*, p. 630.

No. 482. SHELDON ET AL. *v.* METRO-GOLDWYN PICTURES CORP. ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arthur F. Driscoll* for petitioners. *Messrs. John W. Davis* and *Samuel D. Cohen* for respondents. Reported below: 106 F. 2d 45.

No. 473. MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* GULF OIL CORPORATION. December 4, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. William C. Chanler, Paxton Blair, Sol Charles Levine,* and *Jerome R. Hellerstein* for petitioner. *Mr. Matthew S. Gibson* for respondent. By special leave of Court, *Messrs. George deForest Lord* and *Woodson D. Scott* filed a brief on behalf of the Cunard White Star Ltd., as *amicus curiae,* opposing the petition. Reported below: 256 App. Div. 207; 281 N. Y. 647; 9 N. Y. S. 2d 544; 22 N. E. 2d 480.

No. 474. MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* A. H. DUGRENIER, INC. ET AL. December 4, 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. John H. Jackson* and *Haig H. Davidian*

for respondents. Reported below: 255 App. Div. 961; 281 N. Y. 608, 669; 22 N. E. 2d 172, 764.

No. 475. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* BERWIND-WHITE COAL MINING Co. December 4, 1939. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. William C. Chanler, Paxton Blair,* and *Jerome R. Hellerstein* for petitioner. *Messrs. John W. Davis, Montgomery B. Angell,* and *Marvin Lyons* for respondent. Reported below: 255 App. Div. 961; 281 N. Y. 610, 670; 22 N. E. 2d 173, 764.

No. 365. LEONA PIATT GRAY *v.* UNION JOINT STOCK LAND BANK;

No. 366. CARL H. GRAY *v.* SAME; and

No. 367. PIATT *v.* SAME. See *ante,* p. 523.

No. 412. MORRISON *v.* FEDERAL LAND BANK ET AL.; and

No. 413. MORRISON, EXECUTRIX, *v.* SAME. See *ante,* p. 524.

No. 235. POTTER *v.* UNION CENTRAL LIFE INSURANCE Co. See *ante,* p. 524.

No. 499. FEDERAL COMMUNICATIONS COMMISSION *v.* SANDERS BROTHERS RADIO STATION. December 11, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Jackson* and *Mr. William J. Dempsey* for petitioner. *Messrs. Louis G. Caldwell, Reed T. Rollo,* and *Percy H. Russell, Jr.* for respondent. Reported below: 70 App. D. C. 297; 106 F. 2d 321.

No. 500. MINNESOTA *v.* NATIONAL TEA CO. ET AL. December 11, 1939. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. J. A. A. Burnquist,* Attorney General of Minnesota, *Matthias N. Orfield,* and *George W. Markham* for petitioner. *Messrs. Michael J. Doherty, Wilfrid E. Rumble,* and *William Mitchell* for respondents. Reported below: 205 Minn. 443; 286 N. W. 360.

No. 514. THORNHILL *v.* ALABAMA. December 11, 1939. Petition for writ of certiorari to the Court of Appeals of Alabama granted. *Messrs. James J. Mayfield* and *Joseph A. Padway* for petitioner. *Messrs. Thos. S. Lawson,* Attorney General of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondent. Reported below: 28 Ala. App. 527; 189 So. 913, 914.

No. 562. CONNOR *v.* CALIFORNIA ET AL. December 18, 1939. Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari to the Supreme Court of California, granted. *Frank S. Connor, pro se.* No appearance for respondents.

No. 571. COBBLEDICK ET AL. *v.* UNITED STATES;

No. 572. BRAWNER ET AL. *v.* SAME; and

No. 573. PALMUTH ET AL. *v.* SAME. December 18, 1939. The petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit in these cases is granted. *Messrs. Felix T. Smith* and *Chalmers G. Graham* for petitioners. *Solicitor General Jackson* for the United States. Reported below: 107 F. 2d 975.

No. 542. CITY OF YONKERS *v.* DOWNEY, RECEIVER;

Nos. 543 and 544. LOEHR, MAYOR, ET AL. *v.* SAME; and

No. 545. CITY OF YONKERS, TRUSTEE, *v.* SAME. December 18, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. E. J. Dimock* for petitioners in Nos. 543, 544, and 545, and with *Mr. J. Donald Rawlings* for petitioner in No. 542. *Mr. George P. Barse* for respondent. Reported below: 106 F. 2d 69.

No. 537. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* TYNG; and

No. 538. SAME *v.* BUCHSBAUM. See *ante*, p. 527.

No. 569. UNITED STATES *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. January 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Jackson* for the United States. *Mr. Bower Broaddus* for respondents. Reported below: 106 F. 2d 804.

No. 570. UNITED STATES *v.* SHAW, ADMINISTRATOR. January 8, 1940. Petition for writ of certiorari to the Supreme Court of Michigan granted. *Solicitor General Jackson* for the United States. *Messrs. Eugene F. Black* and *Howell Van Auken* for respondent. Reported below: 290 Mich. 311; 287 N. W. 477.

No. 559. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PRICE. January 15, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. David H. Blair, C. R. Wharton,* and *Julius C. Smith* for respondent. Reported below: 106 F. 2d 336.

No. 588. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* BRADFORD DYEING ASSOCIATION (U. S. A.) ET AL. January 15, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Jackson* and *Mr. Charles Fahy* for petitioners. *Messrs. Harry Parsons Cross* and *George Paul Slade* for Bradford Dyeing Assn., and *Mr. William G. Feely* for B. D. A. Employees Federation, respondents. Reported below: 106 F. 2d 119.

No. 563. DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION *v.* COLBURN ET AL. January 15, 1940. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey granted. The Court directs the attention of counsel to the question of the jurisdiction of this Court. *Mr. Edward P. Stout* for petitioner. *Mr. Egbert Rosecrans* for respondents. Reported below: 123 N. J. L. 197; 8 A. 2d 563.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 2, 1939, THROUGH JANUARY 15, 1940.

No. 141. MILLER *v.* UNITED STATES. October 9, 1939. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. Motion for leave to proceed further *in forma pauperis,* and petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, denied. *William Roy Miller, pro se.* No appearance for the United States. Reported below: 104 F. 2d 343.

No. 86. REGER *v.* HUDSPETH, WARDEN. October 9, 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. *Fred Reger, pro se.* No appearance for respondent. Reported below: 103 F. 2d 825.

No. 106. NELSON *v.* UNITED STATES. October 9, 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. Charles I. Evans* for petitioner. No appearance for the United States. Reported below: 102 F. 2d 515.

No. 119. GLOVER *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. October 9, 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. Brantly Harris* for petitioner. No appearance for respondent. Reported below: 103 F. 2d 557.

No. 130. DODGE ET AL. *v.* DODGE ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Felix Hebert* for petitioners. *Mr. George S. Fuller* for respondents. Reported below: 102 F. 2d 703.

No. 139. PELL *v.* T. J. HALL CO. October 9, 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. *James T. Pell, pro se.* No appearance for respondent. Reported below: 102 F. 2d 1017.

No. 145. LACY *v.* TEXAS. October 9, 1939. Petition for writ of certiorari to the Court of Criminal Appeals of Texas, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. W. P. Hamblen* for petitioner. No appearance for respondent. Reported below: 137 Texas Crim. Rep. 362; 128 S. W. 2d 1165.

No. 182. PRICE *v.* ILLINOIS. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Illinois, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Richard E. Westbrooks* for petitioner. No appearance for respondent. Reported below: 371 Ill. 137; 20 N. E. 2d 61.

No. 184. LINDSEY *v.* MCCAULEY, WARDEN. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *E. R. Lindsey, pro se.* No appearance for respondent.

No. 188. JACOBS *v.* NEW YORK. October 9, 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. *Jerome A. Jacobs, pro se.* No appearance for respondent. Reported below: 254 App. Div. 721; 280 N. Y. 562; 4 N. Y. S. 2d 999; 20 N. E. 2d 15.

No. 199. BOYER *v.* CITY OF SALINA ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma pauperis,* denied. *James E. Boyer, pro se.* No appearance for respondents.

No. 200. BOYER *v.* SALINA JOURNAL ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma pauperis,* denied. *James E. Boyer, pro se.* No appearance for respondents.

No. 205. PULLIN *v.* UNITED STATES. October 9, 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. James F. Kemp* for petitioner. No appearance for the United States. Reported below: 104 F. 2d 57.

No. 208. MCGOWEN *v.* UNITED STATES. October 9, 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. *Mr. Josiah Lyman* for petitioner. No appearance for respondent. Reported below: 70 App. D. C. 268; 105 F. 2d 791.

No. 214. IN RE PAYSOFF TINKOFF. October 9, 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. *Paysoff Tinkoff, pro se.* Reported below: 101 F. 2d 341.

No. 215. VAN NEWKIRK *v.* CITIES SERVICE OIL CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Charles Van Newkirk, pro se. Mr. Abbot P. Mills* for respondent. Reported below: 103 F. 2d 899.

No. 216. BUCKNER *v.* HUDSPETH, WARDEN. October 9, 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. *Walker B. Buckner, pro se.* No appearance for respondent. Reported below: 105 F. 2d 396.

No. 224. PFAFF *v.* MCCAULEY, WARDEN. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis*, denied. *Emil Pfaff, pro se.* No appearance for respondent.

No. 227. HOROSKO *v.* SCHOOL DISTRICT OF MOUNT PLEASANT ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Milford J. Meyer* for petitioner. No appearance for respondents. Reported below: 135 Pa. Super. 102; 335 Pa. 369; 4 A. 2d 601; 6 A. 2d 866.

No. 255. REGAN *v.* REMER, SUPERINTENDENT, UNITED STATES PRISON CAMP No. 11, KOOSKIA, IDAHO. October 9, 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. *Daniel C. Regan, pro se.* No appearance for respondent. Reported below: 104 F. 2d 704.

No. 263. GARRISON *v.* JOHNSTON, WARDEN. October 9, 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. *Or-*

ville Chester Garrison, pro se. No appearance for respondent. Reported below: 104 F. 2d 128.

No. 298. FOUCHAUX *v.* BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. F. Carter Johnson, Jr.* for petitioner. No appearance for respondent. Reported below: 193 La. 182; 186 So. 103; 190 So. 373.

No. 303. MEYERS ET AL. *v.* CALIFORNIA. October 9, 1939. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Marian Meyers* and *Harold Laccombe, pro se.* No appearance for respondent. Reported below: 31 Cal. App. 2d. 515; 88 P. 2d 212.

No. 305. YON *v.* FLORIDA. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Florida, and motion for leave to proceed further *in forma pauperis,* denied. *Earl Yon, pro se.* No appearance for respondent. Reported below: 138 Fla. 770; 190 So. 252.

No. 336. HICKS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alexander H. Sands* for petitioner. No appearance for respondents.

No. 340. YUEN ET AL. *v.* CALIFORNIA. October 9, 1939. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. George Olshausen* for petitioners. *Mr. Earl Warren,* Attorney General of California, for respondent. Reported below: 32 Cal. App. 2d 151; 89 P. 2d 438; 90 P. 2d 291.

No. 341. SPEAR *v.* CALIFORNIA. October 9, 1939. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. George Olshausen* for petitioner. *Mr. Earl Warren,* Attorney General of California, for respondent. Reported below: 32 Cal. App. 2d 165; 89 P. 2d 445.

No. 371. FLETCHER *v.* JONES ET AL., TRUSTEES. October 9, 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: 70 App. D. C. 179; 105 F. 2d 58.

No. 294. O'BRIEN *v.* CALMAR STEAMSHIP CORP. October 9, 1939. The motion to proceed on typewritten papers is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is denied. *Mr. Abraham E. Freedman* for petitioner. *Mr. Frank A. Bull* for respondent. Reported below: 104 F. 2d 148.

No. 57. RINN ET AL. *v.* ASBESTOS MANUFACTURING CO. ET AL. October 9, 1939. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. *Mr. Rayford W. Lemley* for petitioners. *Messrs. Eben Lesh* and *U. S. Lesh* for respondents. Reported below: 101 F. 2d 344.

No. 64. TOWN OF WALKERTON *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Indiana denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. *Mr. Henry M. Dowling* for petitioner. *Mr. Russell P. Harker* for respondent. Reported below: 215 Ind. 206; 18 N. E. 2d 799.

No. 190. KOWALESKI, ADMINISTRATOR *v.* PENNSYLVANIA RAILROAD CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. *Mr. E. Burke Finnerty* for petitioner. *Mr. John A. Hartpence* for respondent. Reported below: 103 F. 2d 827.

No. 238. MADDEN, DOING BUSINESS AS KOHL & MADDEN PRINTING INK CO. *v.* MAC SIM BAR PAPER CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writ of certiorari should be granted. *Mr. Harry C. Howard* for petitioner. *Mr. Marvin J. Schaberg* for respondent. Reported below: 103 F. 2d 974.

No. 249. WOODS, COURT TRUSTEE, *v.* INDEMNITY INSURANCE CO.; and

No. 250. SAME *v.* GRANADA APARTMENTS, INC., ET AL. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the petition for writs of certiorari should be granted. *Mr. Weightstill Woods* for petitioner. No appearance for respondents. Reported below: 104 F. 2d 528.

No. 58. FEDERAL TRADE COMMISSION *v.* GOODYEAR TIRE & RUBBER CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE STONE and MR. JUSTICE REED took no part in the consideration and decision of this application. *Solicitor General Jackson* and *Mr. W. T. Kelley* for petitioner. *Mr. Grover Higgins* for respondent. Reported below: 101 F. 2d 620.

No. 88. WINGET KICKERNICK CO. ET AL. *v.* S. S. KRESGE CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE STONE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. Frank A. Whiteley* for petitioners. *Messrs. M. J. Doherty, W. E. Rumble,* and *W. H. Dannat Pell* for respondents. Reported below: 102 F. 2d 740.

Nos. 95 and 96. J. L. PRESCOTT CO. *v.* PROCTER & GAMBLE CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE STONE took no part in the

consideration and decision of this application. *Mr. Harry D. Nims* for petitioner. *Messrs. Marston Allen, Frank F. Dinsmore, Thos. G. Haight,* and *Drury W. Cooper* for respondent. Reported below: 102 F. 2d 773.

No. 98. CORN PRODUCTS REFINING CO. ET AL. *v.* LOFT, INC. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. The CHIEF JUSTICE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Joseph J. Daniels, William G. Davis, Frank H. Hall, Samuel D. Miller, Howard S. Young, Abraham Lowenhaupt, Paul Y. Davis, C. C. LeForgee,* and *James W. Noel,* for petitioners. *Messrs. Everett Sanders, Frank C. Dailey,* and *Edward F. Howrey* for respondent. Reported below: 103 F. 2d 1.

Nos. 158 and 159. MCCORMICK ET AL. *v.* RECONSTRUCTION FINANCE CORP.;

No. 160. WERNER ET AL. *v.* SAME;

No. 161. BELE, TRUSTEE, ET AL. *v.* SAME; and

No. 162. UTILITY & INDUSTRIAL CORP. *v.* SAME. October 9, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of these applications. *Messrs. George T. Buckingham, Edward R. Johnston, Ralph M. Shaw, Frank H. Towner, Samuel M. Rinaker, Michael F. Gallagher, Earl B. Wilkinson, Matthias Concannon, James F. Oates, Jr., Herbert M. Lautmann, Carroll J. Lord, Benjamin V. Becker, Paul R. Conaghan,* and *Harold L. Reeve* for petitioners in No. 158; *Messrs. Samuel M. Rinaker, Michael F. Gallagher,* and *Earl B. Wilkinson* for petitioners in No. 159; *Mr. Franklin J. Stransky* for peti-

tioners in Nos. 160, 161, and 162. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Harold Rosenwald, Warner W. Gardner, Clifford J. Durr,* and *Hans A. Klagsbrunn* for respondent. Reported below: 102 F. 2d 305.

No. 169. BLAFFER *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 170. FARISH *v.* SAME. October 9, 1939. The application that these cases be consolidated for the purpose of filing petitions for writs of certiorari and that only the record in No. 169 be printed is granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. Walter E. Barton* for petitioners. *Assistant Solicitor General Bell* and *Mr. Sewall Key* and *Miss Helen R. Carloss* for respondent. Reported below: 103 F. 2d 489, 1007; 104 *id.* 833.

No. 180. THOMPSON, TRUSTEE, *v.* MURPHY ET AL., EXECUTORS, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE REED and MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Fred L. Williams, Earl F. Nelson,* and *Fred L. English* for petitioner. *Messrs. William H. Boyd* and *Ben B. Wickham* for Murphy et al., and *Messrs. Clan Crawford, Benj. F. Fiery,* and *Howard F. Burns* for Tomlinson et al., respondents. Reported below: 104 F. 2d 10.

Nos. 218 and 219. THOMPSON, TRUSTEE, *v.* TERMINAL SHARES, INC., ET AL. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. MR. JUSTICE REED and MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. R. B. Caldwell* for petitioner. *Mr. William B. Cockley* for Terminal Shares, Inc. et al.; *Messrs. Godfrey Goldmark* and *Henry N. Ess* for Guaranty Trust Co. et al.; and *Messrs. Clan Crawford, Benj. F. Fiery,* and *Howard F. Burns* for Tomlinson et al., respondents. Reported below: 104 F. 2d 1, 9.

No. 213. OLLEY ET AL. *v.* PHILADELPHIA & READING COAL & IRON CO. ET AL. October 9, 1939. The motion to dispense with the printing of the record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Vincent A. Carroll* for petitioners. *Mr. Penrose Hertzler* for respondents. Reported below: 103 F. 2d 869.

No. 313. DAYTON HOTEL CO. *v.* CHAS. A. KRAUSE MILLING CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Robert W. Wales* for petitioner. *Mr. Morris Karon* for respondents.

No. 257. STANDARD OIL CO. *v.* BONICI. October 9, 1939. It appearing that the judgment has been paid and that the cause has become moot the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application.

Messrs. Vernon S. Jones and *Raymond Parmer* for petitioner. No appearance for respondent. Reported below: 103 F. 2d 437.

No. 36. TOSTE *v.* MACLEOD, AUDITOR OF PUERTO RICO, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. James R. Beverley* for petitioner. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for respondents. Reported below: 101 F. 2d 20.

No. 41. ALLIED AGENTS, INC. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. William J. Duiker, Clyde Y. Morris,* and *Bradford S. Magill* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. By special leave of Court, *Mr. Donald Horne* filed a brief, as *amicus curiae,* in support of the petition; *Mr. Thomas M. Wilkins* was on the brief. Reported below: 88 Ct. Cls. 315; 26 F. Supp. 98.

No. 46. GRIFFIN *v.* SMITH, COLLECTOR OF INTERNAL REVENUE, and

No. 47. SAME *v.* UNITED STATES. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. S. Leo Ruslander, James E. Watson,* and *Frank C. Dailey* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondents. Reported below: 101 F. 2d 348.

No. 147. SMITH *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Sher* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key, J. Louis Monarch, Joseph M. Jones,* and *Warner W. Gardner* for respondent. Reported below: 102 F. 2d 456.

No. 179. JONES *v.* PAGE ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joseph B. Brennan* and *W. A. Sutherland* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch,* and *Mills Kitchin* for respondents. Reported below: 102 F. 2d 144.

No. 50. CONSOLIDATED FREIGHT LINES, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Erskine Wood* for petitioner. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 101 F. 2d 813.

No. 51. F. J. KRESS BOX CO. ET AL. *v.* CITY OF PITTSBURGH ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. A. E. Kountz* for petitioners. *Mr. Cornelius D. Scully* for respondents. Reported below: 333 Pa. 121; 4 A. 2d 528.

No. 52. LYDERS *v.* COUNTY OF DEL NORTE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. F. R. Ogilby* and *Eric Lyders* for petitioner. *Mr. Charles Reagh* for respondent. Reported below: 100 F. 2d 876.

No. 53. HYMAN, TRUSTEE IN BANKRUPTCY, *v.* McLENDON ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. L. D. Jennings* and *Marion W. Seabrook* for petitioner. No appearance for respondents. Reported below: 102 F. 2d 189; 103 *id.* 294.

No. 54. BALL *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *John D. Ball, pro se. Solicitor General Jackson* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Young M. Smith* and *W. Marvin Smith* for the United States. Reported below: 101 F. 2d 272.

No. 55. MARSHALL ET AL. *v.* DESERT PROPERTIES CO., A COMMON LAW TRUST, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George R. Wickham* for petitioners. *Mr. Harry H. Parsons* for respondents. Reported below: 103 F. 2d 551.

No. 59. BLAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Everett Sanders* and *L. A. Gravelle* for petitioners. *Solicitor General Jackson, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 102 F. 2d 157.

No. 60. CHICAGO & NORTHWESTERN RY. CO. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Cook County, Illinois, denied. *Mr. Weldon A. Dayton* for petitioner. *Mr. Joseph F. Elward* for respondents.

No. 61. McCue et al., Trustees, *v.* Hutchinson et al. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James M. Guiher* for petitioners. No appearance for respondents. Reported below: 101 F. 2d 111.

No. 62. Hutchinson et al. *v.* McCue et al., Trustees. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Okey P. Keadle* for petitioners. No appearance for respondents. Reported below: 101 F. 2d 111.

No. 65. Edward & John Burke, Ltd. *v.* United States. October 9, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Benjamin A. Levett, James L. Gerry* and *Allan R. Brown* for petitioner. *Assistant Solicitor General Bell* and *Mr. John R. Benney* for the United States. Reported below: 26 C. C. P. A. (Customs) 374.

No. 66. Louisville Trust Co. *v.* National Bank of Kentucky et al. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Squire R. Ogden* for petitioner. *Messrs. Robert S. Marx, Frank E. Wood, Edward P. Humphrey,* and *Harry Kasfir* for respondents. Reported below: 102 F. 2d 137.

No. 67. Walker, Trustee in Bankruptcy, et al. *v.* L. Maxcy, Inc. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Claude L. Gray* and *John W.*

Harrell for petitioners. *Messrs. Howell M. Hampton* and *O. K. Reaves* for respondent. Reported below: 103 F. 2d 24.

No. 71. ROBY-SOMERS COAL CO. *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Arthur C. Denison, Raymond T. Jackson,* and *John C. Morley* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 100 F. 2d 228.

No. 76. ROURANGE, ADMINISTRATRIX, *v.* COLUMBIAN STEAMSHIP CO. October 9, 1939. Petition for writ of certiorari to the Court of Appeals of New York denied. *Messrs. Silas Blake Axtell* and *Charles A. Ellis* for petitioner. *Mr. Ray Rood Allen* for respondent. Reported below: 254 App. Div. 906; 280 N. Y. 591; 5 N. Y. S. 2d 537; 20 N. E. 2d 28.

No. 79. STILL ET AL. *v.* UNION CIRCULATION CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur I. Obre* for petitioners. *Mr. I. Maurice Wormser* for respondent. Reported below: 101 F. 2d 11.

No. 81. CUDAHY PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward S. Stringer* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Charles A. Horsky, Charles Fahy, Robert B. Watts,* and *Mortimer B. Wolf* for respondent. Reported below: 102 F. 2d 745.

No. 82. PITTSBURGH FORGING CO. ET AL. *v.* AMERICAN FOUNDRY EQUIPMENT CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight* and *William F. Hall* for petitioners. *Messrs. George Wharton Pepper, Drury W. Cooper,* and *Albert M. Austin* for respondent. Reported below: 102 F. 2d 964.

No. 83. ORTIZ OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key, Joseph M. Jones,* and *Robert K. McConnaughey* for respondent. Reported below: 102 F. 2d 508.

No. 84. PITCAIRN ET AL., RECEIVERS, *v.* AMERICAN REFRIGERATOR TRANSIT CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Homer Hall* and *Frank C. Nicodemus, Jr.* for petitioners. *Messrs. J. A. C. Kennedy* and *Thomas T. Railey* for respondents. Reported below: 101 F. 2d 929.

No. 85. SHAPIRO ET AL. *v.* EVENING TIMES PRINTING & PUBLISHING CO. October 9, 1939. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Carol King* and *Mr. Abraham J. Isserman* for petitioners. *Mr. Louis Adler* for respondent. Reported below: 125 N. J. Eq. 270; 4 A. 2d 843.

No. 90. PHOENIX BLUE DIAMOND EXPRESS *v.* MENDEZ ET AL. October 9, 1939. Petition for writ of certi-

orari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henderson Stockton* for petitioner. *Mr. Allen K. Perry* for respondents. Reported below: 103 F. 2d 66.

No. 91. CALIFORNIA FRUIT GROWERS EXCHANGE *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied. *Messrs. George E. Farrand, James W. Carpenter, Preston C. King, Jr.,* and *Karl D. Loos* for petitioner. *Mr. Edward R. Brumley* for respondent. Reported below: 125 Conn. 241; 5 A. 2d 353.

No. 93. F. S. LEWIS & CO. ET AL. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Cassius M. Doty* for petitioners. *Assistant Solicitor General Bell* and *Messrs. Sewall Key* and *Robert K. McConnaughey* for the United States. Reported below: 102 F. 2d 177.

No. 97. GELLMAN *v.* OLIVER MACHINERY CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clarence E. Threedy* for petitioner. *Mr. Frank E. Liverance, Jr.* for respondent. Reported below: 104 F. 2d 11.

No. 99. ROBINSON, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert E. Barber* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key, J. Louis Monarch,* and *L. W. Post* for respondent. Reported below: 100 F. 2d 847.

No. 100. SOUTHERN EXTRACT CO. *v.* GREEN. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Forrest Andrews* for petitioner. *Mr. W. W. Piper* for respondent. Reported below: 103 F. 2d 232.

No. 105. LOUISVILLE REFINING CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. A. Shelby Winstead* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Charles A. Horsky, Charles Fahy, Robert B. Watts,* and *Mortimer B. Wolf* for respondent. Reported below: 102 F. 2d 678.

No. 107. KRASKIN *v.* KRASKIN. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Lester Wood* and *Bernard M. Chernoff* for petitioner. *Mr. Raymond Neudecker* for respondent. Reported below: 70 App. D. C. 85; 104 F. 2d 218.

No. 108. HOSPELHORN, RECEIVER, *v.* CORBIN. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Northampton County, Virginia, denied. *Mr. J. Purdon Wright* for petitioner. *Mr. Stewart K. Powell* for respondent.

No. 109. LANE ET AL. *v.* EWALD. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. H. Mason Welch* and *Herbert R. Grossman* for petitioners. *Messrs. William J. Rowan* and *Eldridge Hood Young* for respondent. Reported below: 70 App. D. C. 89; 104 F. 2d 222.

No. 113. BOWEN ET AL. *v.* HART. October 9, 1939. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. A. H. Dagnall* for petitioners. No appearance for respondent. Reported below: 190 S. C. 473; 2 S. E. 2d 52.

No. 114. TOLEDO RAILWAYS & LIGHT CO. *v.* MCMAKEN, COLLECTOR OF INTERNAL REVENUE, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George D. Welles* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key, J. Louis Monarch,* and *Robert K. McConnaughey* for respondents. Reported below: 103 F. 2d 72.

No. 115. CARBO-FROST, INC. *v.* PURE CARBONIC, INC., ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Paul R. Stinson, Arthur Mag,* and *Roy B. Thomson* for petitioner. *Messrs. Sanford H. E. Freund* and *Samuel W. Sawyer* for respondents. Reported below: 103 F. 2d 210.

No. 116. SCHMIDT ET AL. *v.* UNITED STATES ET AL.; and

No. 117. NORTHERN PACIFIC RAILROAD CO., BY SCHMIDT ET AL. *v.* SAME. October 9, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas Boylan, Robert L. Edmiston, Raymond M. Hudson, Minor Hudson,* and *Geoffrey Creyke, Jr.* for petitioners. *Assistant Solicitor General Bell, Assistant Attorney General Littell,* and *Messrs. E. E. Danly, Walter L. Pope,* and *Warner W. Gardner* for the United States. *Messrs. Lorenzo B.*

daPonte, Grandin Tracy Vought, Alfred N. Heuston, and *John B. Marsh* for Northern Pacific Ry. Co. et al., respondents. Reported below: 102 F. 2d 589.

No. 118. GRAIN HANDLING CO. ET AL. *v.* MCMANIGAL, DEPUTY COMMISSIONER, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John B. Richards* for petitioners. *Solicitor General Jackson* and *Messrs. Paul Campbell, Paul A. Sweeney,* and *Warner W. Gardner* for McManigal, and *Mr. Charles H. Kendall* entered an appearance for Sweeney, respondents. Reported below: 102 F. 2d 464.

No. 123. FIRST NATIONAL BANK OF HUGHES SPRINGS, TEXAS, ET AL. *v.* CENTURY INSURANCE CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hugh Carney* for petitioners. No appearance for respondent. Reported below: 102 F. 2d 726.

No. 125. IDENTIFICATION DEVICES, INC. ET AL. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Court of Claims denied. *James M. Rulong, pro se. Solicitor General Jackson* and *Mr. Paul A. Sweeney* for the United States. Reported below: 89 Ct. Cls. 141.

No. 126. SHREVE ET AL. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leslie C. Hardy* for petitioners. *Assistant Solicitor General Bell, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll,* and *M. Joseph Matan* for the United States. Reported below: 103 F. 2d 796.

No. 127. DEVOE *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clyde Taylor* for petitioner. *Assistant Solicitor General Bell, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *Robert K. McConnaughey* for the United States. Reported below: 103 F. 2d 584.

No. 131. GALVESTON TRUCK LINE CORP. *v.* TEXAS. October 9, 1939. Petition for writ of certiorari to the Court of Civil Appeals, 5th Supreme Judicial District, of Texas, denied. *Mr. Frank A. Leffingwell* for petitioner. *Messrs. Gerald C. Mann,* Attorney General of Texas, *R. E. Kepke, H. Grady Chandler, James Noel,* Assistant Attorneys General, and *Harold W. McCracken* for respondent. Reported below: 123 S. W. 2d 797.

No. 133. FETTY *v.* CARROLL, ADMINISTRATOR. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. Arthur G. Stone* and *Donald O. Blagg* for petitioner. *Mrs. Lillian S. Robertson* for respondent. Reported below: 2 S. E. 2d 521.

No. 134. HANSON ET AL. *v.* BRUUN ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Therrett Towles* for petitioners. *Messrs. O. C. Moore* and *W. Lair Thompson* for respondents. Reported below: 103 F. 2d 685.

No. 135. PENN MUTUAL LIFE INSURANCE CO. *v.* FORCIER ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Messrs. Robert Dechert, James C. Jones, Lon O. Hocker,* and *James C. Jones, Jr.* for petitioner. No appearance for respondents. Reported below: 103 F. 2d 166.

No. 136. MEACHAM *v.* HALLEY. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. C. Ray* for petitioner. *Mr. W. E. Wassell* for respondent. Reported below: 103 F. 2d 967.

No. 137. NEW YORK LIFE INSURANCE CO. *v.* MALLOY ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Jonathan Piper* and *Louis H. Cooke* for petitioner. *Mr. Robert W. Upton* for respondents. Reported below: 103 F. 2d. 439.

No. 140. TOLENTINO *v.* PHILIPPINE ISLANDS. October 9, 1939. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Moises T. Tolentino, pro se. Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip, Fred E. Strine, Jose Abad Santos,* Secretary of Justice and Attorney General of the Philippines, and *Roman Ozaeta,* Solicitor General of the Philippines, for respondent.

No. 142. MCVAY *v.* SWIFT ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hanun Gardner* for petitioner. *Mr. E. B. Dubuisson* for respondents. Reported below: 102 F. 2d 771.

No. 144. DODD *v.* AETNA LIFE INSURANCE CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shields M. Goodwin* for petitioner. *Messrs. Grover T. Owens, S. Lasker Ehrman,* and *E. L. McHaney, Jr.* for respondent. Reported below: 103 F. 2d 793.

No. 148. BARNETT *v.* HINES, ADMINISTRATOR OF VETERANS' AFFAIRS. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Robert H. McNeill* and *Ashby Williams* for petitioner. *Solicitor General Jackson* and *Messrs. Paul A. Sweeney* and *John M. George* for respondent. Reported below: 70 App. D. C. 217; 105 F. 2d 96.

No. 149. AMERICAN RIO GRANDE LAND & IRRIGATION CO., DEBTOR, ET AL. *v.* HIDALGO & CAMERON COUNTY WATER CONTROL & IMPROVEMENT DISTRICT No. 9. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joel H. Berry, Dexter Hamilton,* and *William A. Vinson* for petitioners. No appearance for respondent. Reported below: 103 F. 2d 509.

No. 153. UNITED STATES EX REL. JORCZAK *v.* RAGEN, WARDEN. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Steve Jorczak, pro se* and *Richard E. Westbrooks* for petitioner. *Messrs. John E. Cassidy,* Attorney General of Illinois, and *Wm. C. Clausen,* Assistant Attorney General, for respondent. Reported below: 102 F. 2d 184.

No. 154. INTERNATIONAL-GREAT NORTHERN RAILROAD CO. ET AL. *v.* LUCAS ET AL. October 9, 1939. Petition for

writ of certiorari to the Court of Civil Appeals, 11th Supreme Judicial District, of Texas, denied. *Messrs. Robert H. Kelley* and *Roy C. Sewell* for petitioners. No appearance for respondents. Reported below: 123 S. W. 2d 760.

No. 155. WILSON ET AL. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James F. Kemp* for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge, Messrs. Mahlon D. Kiefer, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 104 F. 2d 81.

No. 163. DAVIS *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert H. Montgomery, Thomas G. Haight, J. Marvin Haynes,* and *James O. Wynn* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Arnold Raum* for the United States. By special leave of Court, *Mr. Hugh Satterlee* filed a brief, as *amicus curiae,* in support of the petition. Reported below: 88 Ct. Cls. 579; 26 F. Supp. 1007.

No. 312. UNITED LIGHT & POWER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert N. Miller, Homer Hendricks,* and *Kenneth F. Burgess* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Richard H. Demuth* for respondent. Reported below: 105 F. 2d 866.

No. 390. GILBERT D. HEDDEN, TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 391. CONNEEN, TRANSFEREE, *v.* SAME.

No. 392. HATTIE S. HEDDEN, TRANSFEREE, *v.* SAME; and

No. 393. GERTRUDE S. HEDDEN, TRANSFEREE, *v.* SAME. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frederick H. Wood* and *Ralph E. Lum* for petitioners. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Maurice J. Mahoney* for respondent. Reported below: 105 F. 2d 311.

No. 164. ILLINOIS EX REL. HOLLIE ET AL. *v.* CHICAGO PARK DISTRICT ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Walter F. Dodd, Myer N. Rosengard,* and *Samuel A. Rinella* for petitioners. *Mr. Joseph B. Fleming* for respondents. Reported below: 296 Ill. App. 365; 16 N. E. 2d 161.

No. 165. CLIFFS CORPORATION *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Luther Day* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch,* and *Warner W. Gardner* for the United States. Reported below: 103 F. 2d 77.

No. 166. CABLE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Nelson Anderson* for petitioner. *Solici-*

tor General Jackson and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 102 F. 2d 977.

No. 167. CORRIGAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Nelson Anderson* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 103 F. 2d 1010.

No. 168. R. L. BLAFFER & CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter E. Barton* for petitioner. *Assistant Solicitor General Bell* and *Messrs. Sewall Key, Berryman Green,* and *Warner W. Gardner* for respondent. Reported below: 103 F. 2d 487.

No. 171. BODINE *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. R. Spofford* and *Schofield Andrews* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, Arnold Raum,* and *Joseph M. Jones* for respondent. Reported below: 103 F. 2d 982.

No. 172. RENNER COMPANY *v.* MCNEFF BROTHERS. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Norman A. Emery* for petitioner. *Messrs. James R. Garfield* and *Clare M. Vrooman* for respondent. Reported below: 102 F. 2d 664.

No. 175. McKesson & Robbins, Inc. *v.* Edwards, Collector of Internal Revenue. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Donald Horne* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch, W. Croft Jennings,* and *Warner W. Gardner* for respondent. Reported below: 102 F. 2d 995.

No. 177. Minnesota Tribune Co. *v.* Willcuts et al. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arnold L. Guesmer* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch, Arnold Raum,* and *Paul S. McMahon* for respondents. Reported below: 103 F. 2d 947.

No. 178. United States ex rel. New River Co. *v.* Morgenthau, Secretary of the Treasury, et al. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. J. Bruce Kremer, George S. Fuller, Herbert M. Bingham, Bruce A. Low,* and *H. Donald Kistler* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key, Arnold Raum,* and *Lee A. Jackson* for respondents. Reported below: 70 App. D. C. 171; 105 F. 2d 50.

No. 181. Minnec *v.* United States. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ray E Lane* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll, M. Joseph Matan,* and *W. Marvin Smith* for the United States. Reported below: 104 F. 2d 575.

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No. 185. FABIAN, EXECUTRIX, ET AL. *v.* CONWAY ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Montana denied. *Mr. S. P. Wilson* for petitioners. *Mr. J. A. Poore* for respondents. Reported below: 108 Mont. 287; 89 P. 2d 1022.

No. 186. LEVEY, EXECUTRIX, *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph J. Daniels* and *G. R. Redding* for petitioner. *Solicitor General Jackson* and *Mr. Sewall Key* and *Louise Foster* for respondent. Reported below: 103 F. 2d 643.

No. 187. MILINKOVITCH *v.* SUPERINTENDENT OF INSURANCE OF NEW YORK, LIQUIDATOR, ET AL. October 9, 1939. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Louis Boehm* for petitioner. *Mr. J. Paul Brennan* for the Superintendent of Insurance, and *Messrs. Edwin D. Hays* and *Ralph Wolf* for National Bondholders Corp. et al., respondents. Reported below: 254 App. Div. 835; 280 N. Y. 514; 6 N. Y. S. 2d 160; 19 N. E. 2d 921.

No. 191. BANK OF COMMERCE LIQUIDATING CO. *v.* BECKER, COLLECTOR OF INTERNAL REVENUE; and

No. 192. MERCANTILE LIQUIDATING CO. *v.* SAME. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt* and *Stanley S. Waite* for petitioners. *Solicitor General Jackson* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 102 F. 2d 633; 103 *id.* 1007.

No. 197. FEDERAL CRUDE OIL CO. *v.* YOUNT-LEE OIL CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William D. Gordon* and *E. E. Easterling* for petitioner. *Messrs. Beeman Strong* and *Will E. Orgain* for respondents. Reported below: 103 F. 2d 171.

No. 198. WELLS, TRUSTEE, *v.* BOYLE, TREASURER OF CUYAHOGA COUNTY, OHIO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Amos Burt Thompson* for petitioner. *Mr. Fred W. Green* for respondent. Reported below: 103 F. 2d 237.

No. 202. RALPH FELDMAN *v.* UNITED STATES; and

No. 203. JACOB FELDMAN *v.* SAME. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Warren H. Van Kirk* for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 104 F. 2d 255.

No. 206. A. S. BOYLE CO. *v.* PACIFIC MARINE SUPPLY CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George P. Dike* and *Cedric W. Porter* for petitioner. *Mr. Fred H. Miller* for respondents. Reported below: 103 F. 2d 288.

No. 207. MCLEAN ET AL. *v.* TEXAS COMPANY. October 9, 1939. Petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit denied. *Messrs. William D. Gordon* and *E. E. Easterling* for petitioners. *Messrs. C. R. Wharton, John C. Jackson,* and *John E. Green, Jr.* for respondent. Reported below: 103 F. 2d 989.

No. 209. ROGERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. L. A. Luce, Claude I. Parker,* and *John B. Milliken* for petitioners. *Solicitor General Jackson* and *Messrs. Sewall Key, J. Louis Monarch, S. Dee Hanson,* and *Richard H. Demuth* for respondent. Reported below: 103 F. 2d 790.

No. 211. CONNERS MARINE CO. *v.* AMERICAN MOLASSES CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles W. Hagen* for petitioner. *Mr. Chauncey I. Clark* for respondents. Reported below: 103 F. 2d 772.

No. 217. BASS, ADMINISTRATRIX, *v.* DEHNER, EXECUTRIX. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. R. Preston Shealey* for petitioner. *Mr. Austin F. Canfield* for respondent. Reported below: 103 F. 2d 28.

No. 221. MANILA ELECTRIC CO. *v.* PASAY TRANSPORTATION CO. October 9, 1939. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Mr. Ewald E. Selph* for petitioner. *Mr. Ramon Diokno* for respondent.

No. 223. CARRIER ENGINEERING CORP. *v.* HORVATH ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles J. Staples* for petitioner. *Messrs. Richard Ford* and *Merlin Whiley* for Horvath, and *Mr. Frank Parker Davis* for McCord Radiator & Mfg. Co., respondents. Reported below: 100 F. 2d 326.

No. 225. DE ARYAN *v.* AKERS. October 9, 1939. Petition for writ of certiorari to the Supreme Court of California denied. *C. Leon de Aryan, pro se. Roy O. Akers, pro se.* Reported below: 12 Cal. 2d 781; 87 P. 2d 695.

No. 228. GENERAL TIRE & RUBBER CO. *v.* FISK RUBBER CORP. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs Albert L. Ely* and *William C. McCoy* for petitioner. *Messrs. F. O. Richey* and *F. G. Neal* for respondent. Reported below: 104 F. 2d 740.

No. 231. GARRISON *v.* THOMPSON ET AL., TRUSTEES. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Walter H. Maloney* for petitioner. *Messrs. Thomas J. Cole, A. Z. Patterson,* and *DeWitt C. Chastain* for respondents. Reported below: 344 Mo. 579; 127 S. W. 2d 649.

No. 232. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* SHEEHAN, ADMINISTRATRIX. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. T. M. Pierce* and *Walter Naylor Davis* for petitioner. *Messrs. Mark D. Eagleton* and

Roberts P. Elam for respondent. Reported below: 344 Mo. 586; 127 S. W. 2d 657.

No. 241. NOBLE, COMMITTEE, *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob W. Friedman* for petitioner. *Messrs. N. A. Townsend, Julius C. Martin, Wilbur C. Pickett, Thomas E. Walsh,* and *W. Marvin Smith* for the United States. Reported below: 103 F. 2d 1017.

No. 244. KELLOGG SWITCHBOARD & SUPPLY CO. *v.* MICHIGAN BELL TELEPHONE CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. S. Ashley Guthrie* and *Curtis B. Camp* for petitioner. *Messrs. Merrill E. Clark* and *William R. Ballard* for respondents. Reported below: 99 F. 2d 203.

No. 245. KELLOGG SWITCHBOARD & SUPPLY CO. *v.* MICHIGAN BELL TELEPHONE CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. S. Ashley Guthrie* and *Curtis B. Camp* for petitioner. *Messrs. Merrill E. Clark* and *William R. Ballard* for respondents. Reported below: 99 F. 2d 207.

No. 247. GREANEY *v.* DEITRICK, RECEIVER. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioner. No appearance for respondent. Reported below: 103 F. 2d 83.

No. 248. LITCHFIELD & MADISON RY. CO. *v.* GIESEKING. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Samuel H. Liberman* and *T. M. Pierce* for petitioner. *Mr. Louis E. Miller* for respondent. Reported below: 344 Mo. 672; 127 S. W. 2d 700.

No. 254. MERRITT, RECEIVER, ET AL. *v.* MT. FOREST FUR FARMS. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Wilson Brashear* for petitioners. *Messrs. Ross W. Shumaker* and *Robert S. Marx* for respondent. Reported below: 103 F. 2d 69.

No. 258. COULTER, TRUSTEE, *v.* BLIEDEN, TRUSTEE, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edward H. Coulter* and *Kenneth W. Coulter* for petitioner. *Mr. Arthur L. Adams* for respondents. Reported below: 104 F. 2d 29.

No. 259. HINSHAW, ADMINISTRATRIX, *v.* NEW ENGLAND MUTUAL LIFE INSURANCE CO.; and

No. 260. SAME *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ira B. Burns* for petitioner. *Mr. Samuel W. Sawyer* for respondent in No. 259; and *Mr. Edgar Shook* for respondent in No. 260. Reported below: 104 F. 2d 45.

No. 261. PRUDENTIAL INSURANCE CO. *v.* NELSON, TRUSTEE IN BANKRUPTCY. October 9, 1939. Petition for

writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Marshall Bullitt* for petitioner. *Mr. Chas. S. Coffey* for respondent. Reported below: 101 F. 2d 441.

No. 264. WALSH ET AL., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GARBUTT-WALSH *v.* TADLOCK ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lloyd S. Nix* and *Lilian M. Fish* for petitioners. *Mr. Adam Thompson* for respondents. Reported below: 104 F. 2d 131.

No. 267. CROWE COAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank H. Terrell* for petitioner. *Solicitor General Jackson* and *Messrs. Charles Fahy, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 104 F. 2d 633.

No. 269. HAYNES DRILLING CO. *v.* INDIAN TERRITORY ILLUMINATING OIL CO. October 9, 1939. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Harry O. Glasser* for petitioner. *Messrs. W. P. McGinnis* and *Donald Prentice* for respondent. Reported below: 185 Okla. 122; 90 P. 2d 639.

No. 273. FRANK HODOROWICZ *v.* UNITED STATES;

No. 274. DOWAIT *v.* SAME; and

No. 275. PETER HODOROWICZ *v.* SAME. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George*

K. Bowden for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 105 F. 2d 218.

No. 276. MIKE HODOROWICZ *v.* UNITED STATES; and

No. 277. DOWAIT *v.* SAME. October 9, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George K. Bowden* for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 105 F. 2d 220.

No. 278. PENNSYLVANIA RAILROAD CO. *v.* SELWAY, ADMINISTRATRIX. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ray Rood Allen* and *Frederic D. McKenney* for petitioner. *Mr. Simone N. Gazan* for respondent. Reported below: 105 F. 2d 1021.

No. 279. SCHENCK EX REL. CHU GUAY OI *v.* WARD, U. S. COMMISSIONER OF IMMIGRATION. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John W. Schenck* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for respondent. Reported below: 104 F. 2d 93.

No. 280. WOODS *v.* RAINS ET UX. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit denied. *Weightstill Woods, pro se.* No appearance for respondents. Reported below: 104 F. 2d 137.

No. 282. ZEGURA *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *Richard H. Demuth* for the United States. Reported below: 104 F. 2d 34.

No. 283. SOUTHWESTERN GAS & ELECTRIC CO. *v.* CITY OF TEXARKANA ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John J. King* and *William H. Arnold, Jr.* for petitioner. *Mr. Ed B. Levee, Jr.* for respondents. Reported below: 104 F. 2d 847.

No. 285. LOS ANGELES *v.* IRVING TRUST CO., TRUSTEE, ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David M. Wood* and *W. Morton Carden* for petitioner. *Mr. Allen R. Memhard* for respondents. Reported below: 103 F. 2d 785.

No. 287. VALLETTE ET AL. *v.* CITY OF VERO BEACH. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. R. Sloan* for petitioners. *Mr. Robert J. Pleus* for respondent. Reported below: 104 F. 2d 59.

No. 288. CITY OF MOHALL ET AL. *v.* FIRST NATIONAL BANK OF SLEEPY EYE ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. W. H. Shure* and *P. M. Clark* for petitioners. No appearance for respondents. Reported below: 105 F. 2d 315.

No. 289. HEININGER ET AL. *v.* FARLEY, POSTMASTER GENERAL. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. John J. Sirica* and *Floyd Lanham* for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *George F. Kneip* for respondent. Reported below: 70 App. D. C. 200; 105 F. 2d 79.

No. 290. RAMBUSCH DECORATING CO. *v.* BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Groberg* for petitioner. No appearance for respondents. Reported below: 105 F. 2d 134.

No. 291. WEST, TRUSTEE, ET AL. *v.* CITY OF EL PASO; and

No. 292. CITY OF EL PASO *v.* WEST, TRUSTEE, ET AL. October 9, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James H. Pershing* and *Robert G. Bosworth* for West et al. *Mr. A. W. Norcop* for the City of El Paso. Reported below: 102 F. 2d 927; 104 *id.* 96.

No. 293. RAKONICK *v.* HAMILTON BROWN SHOE CO. ET AL. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Joseph Rakonick, pro se.* No appearance for respondents. Reported below: 103 F. 2d 533.

No. 295. JAMISON *v.* WILLOUGHBY. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Inghram D. Hook* for petitioner. No appearance for respondent. Reported below: 103 F. 2d 821.

No. 299. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. October 9, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Paul M. Segal* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Robert E. Sher, Hugh B. Cox,* and *William J. Dempsey* for respondents. Reported below: 70 App. D. C. 196; 105 F. 2d 75.

No. 304. MCKEEVER ET AL., LIQUIDATORS, ET AL. *v.* FONTENOT, U. S. COLLECTOR. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. David Paine* for petitioners. *Solicitor General Jackson* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 104 F. 2d 326.

No. 306. READING *v.* TRAVELERS INSURANCE CO. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Mr. J. Fred Katzmaier for petitioner. *Mr. R. Granville Curry* for respondent. Reported below: 104 F. 2d 257.

No. 320. LAMBORN & CO. *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Alfred C. B. McNevin* for petitioner. *Solicitor General Jackson* and *Messrs. Charles D. Lawrence* and *John R. Benney* for the United States. Reported below: 104 F. 2d 75.

No. 325. BOB *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George F. Thompson* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll, William J. Connor,* and *W. Marvin Smith* for the United States. Reported below: 106 F. 2d 27.

No. 328. NUDELMAN *v.* UNITED STATES. October 9, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leo L. Donahoe* for petitioner. *Solicitor General Jackson* and *Assistant Attorney General Littell* for the United States. Reported below: 104 F. 2d 549.

No. 226. CLEVELAND *v.* SANFORD, WARDEN. October 16, 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. *Gaylie R. Cleveland, pro se.* No appearance for respondent. Reported below: 103 F. 2d 887.

No. 374. WILSON *v.* LOUISVILLE JOINT STOCK LAND BANK ET AL. October 16, 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. Morton S. Hawkins* for petitioner. *Mr. Gerald R. Redding* for respondents. Reported below: 105 F. 2d 302.

No. 157. WEBER *v.* UNITED STATES. October 16, 1939. Petition for writ 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 this application. *Mr. H. C. Wade* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 103 F. 2d 301; 104 *id.* 300.

No. 266. VIRGINIAN RAILWAY CO. *v.* UNITED STATES. October 16, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. W. H. T. Loyall* and *John C. Donnally* for petitioner. *Solicitor General Jackson* and *Mr. Paul A. Sweeney* for the United States. Reported below: 88 Ct. Cls. 142.

No. 268. FEDERAL EXPORT CORPORATION *v.* UNITED STATES. October 16, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Henry M. Ward, Kingman Brewster,* and *O. R. Folsom-Jones* for petitioner. *Solicitor General Jackson* and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 88 Ct. Cls. 60; 25 F. Supp. 109.

No. 302. PALMER ET AL., TRUSTEES OF THE PROPERTY OF OLD COLONY RAILROAD CO., *v.* PALMER ET AL., TRUS-

TEES OF THE PROPERTY OF NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.; and

No. 321. PALMER ET AL., TRUSTEES OF THE PROPERTY OF NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. *v.* PALMER ET AL., TRUSTEES OF THE PROPERTY OF OLD COLONY RAILROAD CO. October 16, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert G. Dodge* and *Oscar M. Shaw* for the Trustees of the Old Colony R. Co. *Mr. Hermon J. Wells* for the Trustees of the New York, N. H. & H. R. Co. Reported below: 104 F. 2d 161.

No. 308. UNION DREDGING CO. *v.* BRASHEAR, ADMINISTRATRIX. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jewel Alexander* for petitioner. *Messrs. Daniel W. Hone, S. Hasket Derby,* and *Joseph C. Sharp* for respondent. Reported below: 104 F. 2d 762.

No. 315. STATE AUTOMOBILE MUTUAL INSURANCE CO. *v.* YORK ET AL. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Murray Allen* for petitioner. *Mr. Kenneth C. Royall* for respondents. Reported below: 104 F. 2d 730.

No. 319. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* PENNSYLVANIA RAILROAD CO. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Speer* for petitioner. *Mr. Chauncey I. Clark* for respondent. Reported below: 103 F. 2d 428.

No. 323. MITCHELL ET AL. *v.* OTTINGER, RECEIVER. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Messrs. Walter B. Gibbons and *John Martin Doyle* for petitioners. No appearance for respondent. Reported below: 105 F. 2d 334.

No. 326. UNIVIS CORPORATION ET AL. *v.* RIPS ET AL.; and

No. 327. SAME *v.* GRIMSHAW. October 16, 1939. Petition for writs 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. Victor D. Borst* and *Otto F. Barthel* for respondents. Reported below: 104 F. 2d 749.

No. 330. AMERICAN NATIONAL INSURANCE CO. *v.* YEE LIM SHEE ET AL. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Walton Dinkelspiel* for petitioner. *Messrs. A. B. Bianchi* and *James M. Hanley* for respondents. Reported below: 104 F. 2d 688.

No. 331. NEW YORK LIFE INSURANCE CO. *v.* OSTROFF ET AL. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edwin A. Meserve* and *Louis H. Cooke* for petitioner. No appearance for respondents. Reported below: 104 F. 2d 986.

No. 332. WATERMAN *v.* NEW YORK LIFE INSURANCE CO. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur Rosenblum* for petitioner. *Mr. Louis H. Cooke* for respondent. Reported below: 104 F. 2d 990.

No. 333. TAYLOR *v.* MERRILL, TRUSTEE. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John W. Ross* and *Francis M. Hartman* for petitioner. *Mr. Fred Blair Townsend* for respondent. Reported below: 104 F. 2d 710.

No. 334. STARK *v.* HOWE SOUND CO. ET AL. October 16, 1939. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Anthony Kabatt* for petitioner. *Mr. Thomas D. Thacher* for respondents. Reported below: 241 App. Div. 637; 242 *id.* 668; 254 *id.* 919; 280 N. Y. 622, 837; 148 Misc. 686; 266 N. Y. S. 368; 269 N. Y. S. 936; 271 N. Y. S. 1097; 5 N. Y. S. 2d 551; 20 N. E. 2d 1007; 21 N. E. 2d 885.

No. 337. CORPORATION OF AMERICA *v.* CAMPBELL. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Hugo A. Steinmeyer* and *Louis Ferrari* for petitioner. *Mr. George A. Judson* for respondent. Reported below: 105 F. 2d 197.

No. 338. SCHUMACHER ET AL., TRUSTEES, *v.* KING. October 16, 1939. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Messrs. Allan P. Matthew* and *John O. Moran* for petitioners. *Mr. Louis E. Goodman* for respondent. Reported below: 32 Cal. App. 2d 172; 89 P. 2d 466.

No. 339. DOTY, SECRETARY OF BANKING, RECEIVER, *v.* UNITED STATES. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Albert T. Bauerle* for petitioner.

Solicitor General Jackson and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 104 F. 2d 260.

No. 344. MARTIN, TRUSTEE, *v.* NEW YORK LIFE INSURANCE CO. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Marshall Giltinon* for petitioner. *Messrs. John E. MacLeish* and *Louis H. Cooke* for respondent. Reported below: 104 F. 2d 573.

No. 345. MARTIN, TRUSTEE, *v.* EQUITABLE LIFE ASSURANCE SOCIETY. October 16, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Marshall Giltinon* for petitioner. *Messrs. Frederic Burnham* and *David F. Rosenthal* for respondent. Reported below: 104 F. 2d 573.

No. 348. LUKE HANNON *v.* UNITED STATES;

No. 349. JOSEPH HANNON *v.* SAME;

No. 350. THOMAS HANNON *v.* SAME;

No. 351. ROSENBERG *v.* SAME; and

No. 352. STONE *v.* SAME. October 16, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Jacob Weinstein* for petitioners. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 105 F. 2d 390.

No. 406. ALLEN *v.* ILLINOIS; and

No. 448. GENDUSA *v.* LOUISIANA. See *ante,* p. 511.

No. 94. BURAK *v.* UNITED STATES. October 23, 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. *Mr. Theodore S. Turner* for petitioner. No appearance for the United States. Reported below: 101 F. 2d 137.

No. 189. BERNARDS ET AL. *v.* JOHNSTON ET AL. October 23, 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. *Martin J. Bernards* and *Lena Bernards, pro se. Messrs. H. G. Platt* and *William L. Brewster* for respondents. Reported below: 103 F. 2d 567.

No. 233. LARGE *v.* METROPOLITAN LIFE INSURANCE CO. October 23, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Herbert Large, pro se.* No appearance for respondent. Reported below: 103 F. 2d 593.

No. 234. WHARTON ET AL. *v.* SHENANDOAH PUBLISHING HOUSE ET AL. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Annie R. Wharton* and *M. Elston Wharton, pro se.* No appearance for respondents. Reported below: 101 F. 2d 310.

No. 284. HILL *v.* TOPEKA MORRIS PLAN. October 23, 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. *Robt. L. Hill, pro se.* No appearance for respondent. Reported below: 105 F. 2d 299.

No. 404. LEWIS-KURES ET AL. *v.* EDWARD R. WALSH & Co. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Silas Blake Axtell* and *Winter S. Martin* for petitioners. *Mr. William Butler* for respondent. Reported below: 102 F. 2d 42.

No. 439. LEWIS *v.* ASHE, WARDEN, ET AL. October 23, 1939. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Thomas Lewis, pro se.* No appearance for respondents. Reported below: 335 Pa. 575; 7 A. 2d 296.

No. 353. MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, ET AL. *v.* MEADOWMOOR DAIRIES, INC. October 23, 1939. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. The petitioner for writ of certiorari to the Supreme Court of Illinois is denied. *Messrs. Joseph Padway* and *Myron D. Alexander* for petitioners. *Mr. Charles S. Deneen* for respondent. Reported below: 371 Ill. 377; 21 N. E. 2d 308.

No. 372. HARVEY *v.* CITY OF ST. PETERSBURG. October 23, 1939. Petition for writ of certiorari to the

Supreme Court of Florida denied for the want of a final judgment. *Mr. C. I. Carey* for petitioner. *Mr. Erle B. Askew* for respondent. Reported below: 138 Fla. 597; 189 So. 861.

No. 375. STACKPOLE SONS, INC., ET AL. *v.* HOUGHTON MIFFLIN CO. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this application. *Messrs. Murray C. Bernays* and *Henry Gale* for petitioners. *Mr. Archie O. Dawson* for respondent. Reported below: 104 F. 2d 306.

No. 307. MARSHALL *v.* UNITED STATES. October 23, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. C. Leo DeOrsey, Milton W. King,* and *Bernard I. Nordlinger* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 88 Ct. Cls. 393; 26 F. Supp. 474.

No. 335. WESTERN UNION TELEGRAPH CO. ET AL. *v.* PARKER RUST-PROOF CO. ET AL.; and

No. 414. PARKER RUST-PROOF CO. ET AL. *v.* WESTERN UNION TELEGRAPH CO. ET AL. October 23, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Alfred M. Houghton, Wade H. Ellis, Challen B. Ellis,* and *Woodson P. Houghton* for Western Union Telegraph Co. et al. *Messrs. Scott H. Lilly* and *Wilber Owen* for Parker Rust-Proof Co. et al. Reported below: 105 F. 2d 976.

No. 356. IN THE MATTER OF DAN W. TRACY. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Isaac Lobe Straus for petitioner. *Mr. Walter Gordon Merritt* for Allen Bradley Co. et al. Reported below: 106 F. 2d 96.

No. 358. STANDARD SURETY & CASUALTY CO. *v.* STANDARD ACCIDENT INSURANCE CO. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. E. R. Morrison* and *Douglas Stripp* for petitioner. *Messrs. Paul V. Barnett* and *Henry N. Ess* for respondent. Reported below: 104 F. 2d 492.

No. 360. COLTMAN *v.* COLGATE-PALMOLIVE-PEET CO. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel E. Darby, Jr.* for petitioner. *Messrs. Drury W. Cooper, Louis Quarles, Arthur M. Hood, Mason Trowbridge,* and *David A. Fox* for respondent. Reported below: 104 F. 2d 508.

Nos. 361 and 362. JAMES TALCOTT, INC. *v.* GLAVIN, TRUSTEE. October 23, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Sidney L. Jacobs* and *Emanuel Weitz* for petitioner. *Mr. Walter J. Bilder* for respondent. Reported below: 104 F. 2d 851.

No. 363. GLENN ET AL. *v.* LEWIS ET AL. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. H. A. Ledbetter* for petitioners. *Mr. William Belton Moore* for Lewis, and *Solicitor General Jackson, Assistant Attorney General Littell,* and *Messrs. C. W. Leaphart* and *Norman MacDonald* for the United States, respondents. Reported below: 105 F. 2d 398.

No. 364. WALES *v.* JACOBS. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry F. Payer* for petitioner. *Mr. R. T. Jackson* for respondent. Reported below: 104 F. 2d 264.

No. 368. NEIDICH *v.* COMMISSIONER OF INTERNAL REVENUE. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ruby R. Vale* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 105 F. 2d 1019.

No. 369. SIG ELLINGSON & Co. *v.* MASON CITY PRODUCTION CREDIT ASSOCIATION. October 23, 1939. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Clarence G. Myers* for petitioner. *Solicitor General Jackson* and *Messrs. Peyton R. Evans, Russell D. Burchard, Richard H. Demuth,* and *Joseph F. Cowern* for respondent. Reported below: 205 Minn. 537; 286 N. W. 713.

No. 373. ACME TANK CLEANING PROCESS CORP. *v.* SALVAGE PROCESS CORP. ET AL. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Hastings Swenarton* for petitioner. *Messrs. Albert Stickney* and *Hersey Egginton* for respondents. Reported below: 104 F. 2d 105.

No. 377. UNITED STATES *v.* AMERICAN MEDICAL ASSOCIATION ET AL. October 23, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Solicitor General Jackson* for peti-

tioner. *Messrs. William E. Leahy, Chas. S. Baker, Seth W. Richardson,* and *John E. Laskey* for respondents. Reported below: 28 F. Supp. 752.

No. 378. BRITISH-AMERICAN TOBACCO CO. *v.* FEDERAL RESERVE BANK OF NEW YORK. October 23, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph M. Hartfield* and *Roy H. Callahan* for petitioner. *Messrs. Walter S. Logan, Dean G. Acheson,* and *Charles A. Horsky* for respondent. Reported below: 104 F. 2d 652; 105 *id.* 935.

No. 408. DEAN *v.* UNITED STATES. November 6, 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. *Harry Dean, pro se.* No appearance for the United States. Reported below: 104 F. 2d 1013.

No. 434. QUEEN *v.* UNITED STATES. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Chas. G. Lee, Jr.,* for petitioner. No appearance for the United States. Reported below: 105 F. 2d 146.

No. 286. PARMELE *v.* OHIO. November 6, 1939. The motion for leave to proceed on a typewritten record is granted. The motion of John Rossel to be made a party is denied because filed too late. The petition for writ of certiorari to the Supreme Court of Ohio is denied. *Mr. Robert W. Newton* for petitioner. *Mr. Joel S. Rhinefort* for respondent. Reported below: 135 Ohio St. 134; 19 N. E. 2d 901.

No. 382. McKENNEY *v.* SWAYNE & HOYT, LTD., ET AL. November 6, 1939. The motion for leave to proceed on a typewritten record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Mr. Alex W. Swords* for petitioner. *Messrs. Geo. H. Terriberry* and *Jos. M. Rault* for respondents. Reported below: 104 F. 2d 20.

No. 428. CLARK *v.* DEITRICK, RECEIVER, ET AL. November 6, 1939. The motion for leave to file typewritten documents as part of the record in lieu of printing is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit is denied. *Messrs. Thomas H. Mahony* and *David Stoneman* for petitioner. *Messrs. Brenton K. Fisk* and *Andrew J. Aldridge* entered an appearance for respondents. Reported below: 105 F. 2d 265.

No. 441. STANDARD OIL COMPANY OF NEW JERSEY *v.* A/B SVENSKA AMERIKA LINIEN. November 6, 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 and decision of this application. *Messrs. William H. McGrann* and *Ira A. Campbell* for petitioner. *Mr. John W. Griffin* for respondent. Reported below: 105 F. 2d 924.

No. 318. TEXAS COMPANY ET AL. *v.* PARISH OF JEFFERSON. November 6, 1939. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. R. E. Milling, Chas. H. Blish, R. C. Milling,* and *Eugene Saunders* for petitioners. *Mr. Henry H. Chaffe* for respondent. Reported below: 192 La. 934; 189 So. 580.

No. 357. HAMMOND CLOCK CO. *v.* ELECTRIC AUTO-LITE CO. November 6, 1939. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clifford C. Bradbury* for petitioner. *Mr. Edmund B. Whitcomb* for respondent. Reported below: 104 F. 2d 288.

No. 379. FRAZIE *v.* ORLEANS DREDGING CO. November 6, 1939. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. William H. Watkins, C. F. Engle, S. B. Laub,* and *Jos. E. Brown* for petitioner. *Messrs. Gerald Brandon* and *Gerald H. Brandon* for respondent. Reported below: 188 So. 538.

No. 381. RIECK *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. W. A. Seifert* and *W. W. Booth* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Richard H. Demuth* for respondent. Reported below: 104 F. 2d 294.

No. 385. CITY OF LONG BEACH ET AL. *v.* METCALF, TRUSTEE. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roland G. Swaffield* for petitioners. No appearance for respondent. Reported below: 103 F. 2d 483.

No. 387. VIDAL, RECEIVER, *v.* GARCIA, ATTORNEY GENERAL OF PUERTO RICO, ET AL. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Henri Brown* and

Carroll G. Walter for petitioner. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for respondents. Reported below: 104 F. 2d 606.

No. 389. LUCKENBACH STEAMSHIP CO. *v.* THE SYLVAN ARROW ET AL. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Herman J. Galloway* and *George R. Shields* for petitioner. *Messrs. Chauncey I. Clark* and *Paul Speer* for respondents. Reported below: 104 F. 2d 102.

No. 395. CARNEGIE-ILLINOIS STEEL CORP. *v.* BERGER, RECEIVER. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. H. E. Hackney* and *John C. Bane, Jr.,* for petitioner. *Mr. George H. McWherter* for respondent. Reported below: 105 F. 2d 485.

No. 398. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* GRIZZARD, ADMINISTRATOR. November 6, 1939. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. R. E. Steiner, B. P. Crum,* and *Robert E. Steiner, Jr.,* for petitioner. *Messrs. Richard T. Rives* and *Walter J. Knabe* for respondent. Reported below: 238 Ala. 49; 189 So. 203.

No. 401. ALVORD ET AL. *v.* TOWN OF BELLEAIR ET AL. November 6, 1939. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. O. K. Reaves* for petitioners. *Mr. Harry L. Thompson* for respondents. Reported below: 133 Fla. 221, 345; 136 *id.* 549; 139 *id.* 1; 183 So. 711; 188 So. 652; 191 So. 434.

No. 402. HAVERSTICK *v.* DRAINAGE DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Walter P. Armstrong* and *C. T. Carpenter* for petitioner. *Mr. Chas. D. Frierson* for respondent. Reported below: 104 F. 2d 696.

No. 403. BARRY *v.* HUGHES ET AL. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Laurence A. Janney* for petitioner. *Mr. Arthur F. Driscoll* for respondents. Reported below: 103 F. 2d 427.

No. 410. SUNSHINE ANTHRACITE COAL CO. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry Adamson* and *Geo. O. Patterson* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Mr. Robert E. Sher* for respondents. Reported below: 105 F. 2d 559.

No. 311. WRIGHT *v.* ALBANY PORT DISTRICT COMMISSION ET AL. November 6, 1939. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Isadore Bookstein* for petitioner. *Mr. Gerald Donovan* for respondents. Reported below: 254 App. Div. 915; 280 N. Y. 731; 281 N. Y. 666; 21 N. E. 2d 512; 22 N. E. 2d 489.

No. 405. LYKES BROTHERS RIPLEY STEAMSHIP CO. *v.* SMITH. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Cir-

cuit denied. *Messrs. George H. Terriberry* and *Jos. M. Rault* for petitioner. No appearance for respondent. Reported below: 105 F. 2d 604.

No. 415. CROSLEY CORPORATION *v.* FEDERAL COMMUNICATIONS COMMISSION. November 6, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Duke M. Patrick* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. Hugh B. Cox, Robert M. Cooper, William J. Dempsey, William C. Koplovitz,* and *Miss Fanney Neyman* for respondent. Reported below: 106 F. 2d 833.

No. 416. VILLAGE OF DOWNERS GROVE *v.* JOSEPH, RECEIVER. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lester C. Davidson* for petitioner. No appearance for respondent. Reported below: 104 F. 2d 974.

No. 418. STACKPOLE CARBON CO. *v.* NATIONAL LABOR RELATIONS BOARD. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Earl F. Reed* for petitioner. *Solicitor General Jackson* and *Messrs. Wilber Stammler, Charles Fahy, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 105 F. 2d 167.

No. 420. GENERAL AMERICAN LIFE INSURANCE CO. *v.* CENTRAL NATIONAL BANK OF CLEVELAND, TRUSTEE. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert H. Jamison* for petitioner. *Mr. H. H. Marshman* for respondent. Reported below: 105 F. 2d 878.

No. 421. McKay *v.* Fort Shelby Hotel Co., Debtor, et al. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Burt D. Cady* for petitioner. No appearance for respondents. Reported below: 104 F. 2d 1015.

No. 422. Royal Indemnity Co. *v.* United States. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Graham Sumner* and *Robert H. O'Brien* for petitioner. *Solicitor General Jackson* and *Messrs. Robert K. McConnaughey* and *Vine H. Smith* for the United States. Reported below: 104 F. 2d 641.

No. 423. Bornn, doing business as Bornn Distilling Co., *v.* United States. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Redmond F. Kernan* for petitioner. *Solicitor General Jackson* and *Messrs. Robert K. McConnaughey* and *Vine H. Smith* for the United States. Reported below: 104 F. 2d 641.

No. 424. Dennis et al. *v.* Pitner et al. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William P. Bair* for petitioners. *Mr. Frank Parker Davis* for respondents. Reported below: 106 F. 2d 142.

No. 432. United States *v.* Rosario, Beneficiary. November 6, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Solicitor General Jackson* for the United States. *Mr. Warren E. Miller* for respondent. Reported below: 106 F. 2d 844.

No. 435. McAllister Towing & Transportation Co. *v.* American Diamond Lines, Inc., et al. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. John W. Crandall* for respondents. Reported below: 101 F. 2d 45; 104 *id.* 670.

No. 436. Danciger et al. *v.* Jacobs, Administrator, et al. November 6, 1939. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. I. J. Ringolsky, Wm. G. Boatright,* and *Harry L. Jacobs* for petitioners. *Messrs. Donald W. Johnson* and *Charles V. Garnett* for respondents. Reported below: 345 Mo. —; 130 S. W. 2d 588.

No. 440. Gouax et al. *v.* Bovay et al., Trustees, et al. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Jackson* for petitioners. No appearance for respondents. Reported below: 105 F. 2d 256.

No. 451. City of Reading *v.* Rae. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert T. McCracken* for petitioner. *Mr. Roy G. Bostwick* for respondent. Reported below: 106 F. 2d 458.

No. 469. Peterson et al. *v.* Woods, Court Trustee, et al. November 6, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George T. Buckingham, Don Kenneth Jones,* and *Vincent O'Brien* for petitioners. No appearance for respondents. Reported below: 104 F. 2d 970.

No. 400. First National Bank of Albuquerque *v.* State Tax Commission et al. See *ante*, p. 515.

No. 470. Spruill *v.* Ballard et al. November 13, 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. *Georgia M. Spruill, pro se.* *Mr. Ross H. Snyder* for respondents.

No. 478. Cato *v.* Smith, Warden. November 13, 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. *Joseph Cato, pro se.* No appearance for respondent. Reported below: 104 F. 2d 885.

No. 484. Fischer *v.* McCauley, Warden. November 13, 1939. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis*, denied. *Clarence H. Fischer, pro se.* No appearance for respondent.

No. 87. White *v.* Texas. November 13, 1939. Petition for writ of certiorari to the Court of Criminal Appeals of Texas, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Carter Wesley* for petitioner. No appearance for respondent. Reported below: 138 Texas Crim. Rep. —; 128 S. W. 2d 51.

No. 128. Potter *v.* Mayo, Custodian of the Florida State Prison, et al. November 13, 1939. Petition for writ of certiorari to the Supreme Court of Florida, and

motion for leave to proceed further *in forma pauperis*, denied. *Ed. Potter, pro se. Mr. George Couper Gibbs*, Attorney General of Florida, for respondents. Reported below: 137 Fla. 593; 188 So. 784.

No. 376. WARFIELD COMPANY *v.* AMERICAN LECITHIN CO.; and

No. 455. AMERICAN LECITHIN CO. *v.* WARFIELD COMPANY. November 13, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Russell Wiles* and *George A. Chritton* for the Warfield Company. *Messrs. Thomas G. Haight, Edward G. Curtis, Daniel L. Morris,* and *Ira J. Wilson* for the American Lecithin Co. By leave of Court, *Messrs. George P. Dike* and *Cedric W. Porter* filed a brief on behalf of the Dewey & Almy Chemical Co., as *amicus curiae,* in support of the petition. Reported below: 105 F. 2d 207.

No. 409. DIXIE WHOLESALE GROCERY, INC. *v.* MARTIN, COMMISSIONER OF REVENUE, ET AL. November 13, 1939. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. Richard T. Von Hoene* and *Frank Lee Dils* for petitioner. No appearance for respondents. Reported below: 278 Ky. 705; 129 S. W. 2d 181.

No. 425. GALENA MANUFACTURING CO. *v.* SUPERIOR OIL WORKS. November 13, 1939. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Henry M. Huxley, Ralph Munden,* and *E. W. Shepard* for petitioner. *Mr. James Hamilton* for respondent. Reported below: 104 F. 2d 400.

No. 433. FULLERTON ET AL. *v.* PITTSBURGH. November 13, 1939. Petition for writ of certiorari to the Supreme

Court of Pennsylvania denied. *William G. Fullerton, pro se.* No appearance for respondent.

No. 442. CAMPISI *v.* UNITED STATES. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 106 F. 2d 994.

No. 443. DAVIS *v.* SHELLY ET AL. November 13, 1939. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District of California, denied. *Messrs. Alvin Gerlack* and *Warren E. Miller* for petitioner. No appearance for respondents. Reported below: 32 Cal. App. 2d 711; 90 P. 2d 842.

No. 444. NATIONAL CANDY CO. *v.* FEDERAL TRADE COMMISSION;

No. 445. MARCH OF TIME CANDIES, INC. *v.* SAME; and

No. 446. DIETZ GUM CO. ET AL. *v.* SAME. November 13, 1939. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Abraham Lowenhaupt* and *Irvin H. Fathchild* for petitioners. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Wilber Stammler,* and *W. T. Kelley* for respondent. Reported below: 104 F. 2d 999.

No. 450. ALTON RAILROAD CO. *v.* JACKSON COUNTY, MISSOURI. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles M. Miller* for petitioner. *Mr. John B. Pew* for respondent. Reported below: 105 F. 2d 633.

No. 452. COBB *v.* HOWARD UNIVERSITY. November 13, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Wm. E. Leahy* and *George D. Horning, Jr.,* for petitioner. *Messrs. Spencer Gordon* and *Fontaine C. Bradley* for respondent. Reported below: 106 F. 2d 860.

No. 454. GLOBE & RUTGERS FIRE INSURANCE CO. ET AL. *v.* UNITED STATES ET AL. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Forrest E. Single* for petitioners. *Solicitor General Jackson, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 105 F. 2d 160.

No. 456. GEORGE *v.* VICTOR TALKING MACHINE CO. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert L. Nase* and *Q. C. Davis, Jr.,* for petitioner. *Messrs. Lawrence B. Morris, Floyd H. Bradley, David Mackay, Louis Levinson, Samuel H. Richards,* and *Isaac Levy* for respondent. Reported below: 105 F. 2d 697.

No. 438. CARTER, CHAIRMAN, ET AL. *v.* POWELL ET AL. November 13, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theo. T. Turnbull* for petitioners. *Mr. Jos. F. Johnston* for respondents. Reported below: 104 F. 2d 428, 1012.

No. 411. LOVVORN *v.* DAVIDSON, JUDGE. November 22, 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.

James A. Lovvorn, pro se. No appearance for respondent.

No. 483. WILSON *v.* UNITED STATES. November 22, 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. *Mr. Thomas M. David* for petitioner. No appearance for the United States. Reported below: 107 F. 2d 253.

No. 507. HARTMAN *v.* GREENE. November 22, 1939. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Robert A. Hartman, pro se.* No appearance for respondent. Reported below: 193 La. 234; 190 So. 390.

No. 490. UNITED STATES *v.* DESROCHERS. See *ante,* p. 519.

No. 417. NEW WORLD LIFE INSURANCE CO. *v.* UNITED STATES. November 22, 1939. Petition for writ of certiorari to the Court of Claims denied. *Mr. Walter E. Barton* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Guy Patten* for the United States. Reported below: 88 Ct. Cls. 405; 26 F. Supp. 444.

No. 453. GOLD, SILVER & TUNGSTEN, INC. *v.* WALLACE, EXECUTOR, ET AL. November 22, 1939. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Horace N. Hawkins* for petitioner. *Mr. Melvin C. Goss* for respondents. Reported below: 104 Colo. 273; 91 P. 2d 975.

No. 457. GANS STEAMSHIP LINE *v.* UNITED STATES. November 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Jacob S. Seidman* and *John E. Hughes* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Paul R. Russell* for the United States. Reported below: 105 F. 2d 955.

No. 471. SCHLAFLY, EXECUTOR, *v.* BECKER, COLLECTOR OF INTERNAL REVENUE. November 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt* and *Stanley S. Waite* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 104 F. 2d 871.

No. 472. BEMIS, EXECUTOR, *v.* BECKER, COLLECTOR OF INTERNAL REVENUE. November 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt* and *Stanley S. Waite* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 104 F. 2d 871.

No. 481. THOMPSON, TRUSTEE, *v.* MAGNOLIA PETROLEUM CO. ET AL. November 22, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas T. Railey* for petitioner. *Messrs. Craig Van Meter* and *Fred H. Kelly* for respondents. Reported below: 106 F. 2d 217.

No. 506. BENNETT *v.* UNITED STATES. December 4, 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. *Mr. C. L. Dawson* for petitioner. No appearance for the United States. Reported below: 107 F. 2d 204.

No. 553. SCHENK *v.* CALIFORNIA ET AL. December 4, 1939. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Robert Schenk, pro se.* No appearance for respondents. Reported below: 19 Cal. App. 2d 503; 65 P. 2d 895.

No. 555. NALLY *v.* MISSOURI. December 4, 1939. Petition for writ of certiorari to the Supreme Court of Missouri, and motion for leave to proceed further *in forma pauperis,* denied. *George W. Nally, pro se.* No appearance for respondent.

No. 549. GROSECLOSE *v.* PLUMMER, WARDEN. December 4, 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. The motion for leave to file petition for writ of habeas corpus is denied. *Mrs. Gladys Towles Root* for petitioner. No appearance for respondent. Reported below: 106 F. 2d 311.

No. 488. DUGAN *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. December 4, 1939. The motion of petitioner for an order releasing the proceedings in this case from the various orders of

secrecy imposed thereon by the court below is denied. On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is denied. The petition for a writ of certiorari is also denied and the Clerk of this Court is directed to return to the Court of Claims the papers filed in this case. *Joseph Dugan, pro se.* No appearance for the United States.

No. 491. HAMRICK ET AL. *v.* BRYAN ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Rollin E. Gish* for petitioners. *Messrs. Grover C. Spillers* and *I. J. Underwood* for respondents. Reported below: 106 F. 2d 245.

No. 501. COOPER *v.* O'CONNOR ET AL. December 4, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE FRANKFURTER took no part in the consideration and decision of this application. *Mr. George B. Fraser* and *Wade H. Cooper, pro se,* for petitioner. *Messrs. Brice Clagett, George Baillie Springston,* and *Charles E. Wainwright* for respondents. Reported below: 107 F. 2d 207.

No. 461. TITAN METAL MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clarence R. Kramer* for petitioner. *Solicitor General Jackson* and *Messrs. Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Owsley Vose* for respondent. Reported below: 106 F. 2d 254.

No. 489. UNITED STATES GUARANTEE CO. *v.* ELKINS ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Joseph W. Henderson, Thomas F. Mount,* and *George M. Brodhead, Jr.* for petitioner. *Mr. Earl G. Harrison* for respondents. Reported below: 106 F. 2d 136.

No. 492. OAK WOODS CEMETERY ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul E. Shorb* and *M. P. Wormhoudt* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Robert K. McConnaughey* for respondent.

No. 493. EMERSON ELECTRIC MANUFACTURING CO. *v.* EMERSON RADIO & PHONOGRAPH CORP. ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lawrence C. Kingsland* and *Edmund C. Rogers* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Louis D. Fletcher* for respondents. Reported below: 105 F. 2d 908.

No. 480. JUSTIN HAYNES & CO. *v.* FEDERAL TRADE COMMISSION. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur L. Kitchin* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Wilber Stammler,* and *W. T. Kelley* for respondent. Reported below: 105 F. 2d 988.

No. 505. METRO-GOLDWYN PICTURES CORP. ET AL. *v.* SHELDON ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis* and *Samuel D. Cohen* for petitioners. *Mr. Arthur F. Driscoll* for respondents. Reported below: 106 F. 2d 45.

No. 485. TWEEDIE *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles W. Hagen* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 104 F. 2d 1016.

No. 494. HERDER ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. December 4, 1939. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Camden R. McAtee* for petitioners. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 70 App. D. C. 287; 106 F. 2d 153.

No. 495. PORTO RICO RAILWAY, LIGHT & POWER CO. *v.* COLOM, COMMISSIONER OF THE INTERIOR OF PUERTO RICO, ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Henri Brown* and *Carroll G. Walter* for petitioner. *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. William Cattron Rigby* and *Robert E. Sher* for respondents. Reported below: 106 F. 2d 345.

No. 496. RIOS *v.* BAETJER ET AL., TRUSTEES. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Nelson Gammans* and *Henry G. Molino* for petitioner. *Mr. Earle T. Fiddler* for respondents. Reported below: 106 F. 2d 163.

No. 497. SEASIDE IMPROVEMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Koenigsberger* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 105 F. 2d 990.

No. 498. STONEGA COKE & COAL CO. *v.* PRICE ET AL. December 4, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Mercer B. Tate, Jr.* for petitioner. *Mr. Robert G. Kelly* for respondents. Reported below: 106 F. 2d 411.

No. 517. GUY *v.* UNITED STATES. December 11, 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. *Mr. James J. Laughlin* for petitioner. No appearance for the United States. Reported below: 107 F. 2d 288. See *ante,* p. 525.

No. 510. UNITED STATES *v.* KLEIN, ESCHEATOR OF PENNSYLVANIA. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE REED took no part in the

consideration and decision of this application. *Solicitor General Jackson* for the United States. *Messrs. Albert H. Ladner, Jr.* and *A. Jere Creskoff* for respondent. Reported below: 106 F. 2d 213.

No. 359. NATIONAL CITY BANK OF CLEVELAND, TRUSTEE, *v.* EUCLID-DOAN CO. ET AL. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Clan Crawford* and *Frank Harrison* for petitioner. *Messrs. James A. Butler* and *Morris Berick* for respondents. Reported below: 104 F. 2d 712.

No. 324. A. F. HAMACEK MARINE CORP. *v.* UNITED STATES. December 11, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Hyman M. Goldstein* and *Harry C. Bierman* for petitioner. *Solicitor General Jackson* and *Assistant Attorney General Shea* for the United States. Reported below: 26 F. Supp. 467.

No. 504. D'ALLESSANDRO ET AL. *v.* BECHTOL. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Bell* for petitioners. *Mr. Harry L. Thompson* for respondent. Reported below: 104 F. 2d 845.

No. 511. BOEING *v.* COMMISSIONER OF INTERNAL REVENUE. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Elmer E. Todd* and *Frank E.*

Holman for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, F. E. Youngman,* and *Richard H. Demuth* for respondent. Reported below: 106 F. 2d 305.

No. 512. CRISCUOLO ET AL. *v.* SWEINS ET AL. December 11, 1939. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. H. W. Hutton* for petitioners. *Mr. Thomas A. Thacher* for respondents. Reported below: 32 Cal. App. 2d 244; 89 P. 2d 674.

No. 513. SHOAF *v.* FITZPATRICK. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. E. Gwinn* for petitioner. No appearance for respondent. Reported below: 104 F. 2d 290.

No. 516. DUNN ET AL. *v.* MICCO ET AL. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Chas. B. Rogers* for petitioners. *Mr. Preston C. West* for respondents. Reported below: 106 F. 2d 356.

No. 539. ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* BAKER, TREASURER OF BACA COUNTY, ET AL. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. W. W. Grant, Morrison Shafroth, Chas. H. Woods,* and *Henry W. Toll* for petitioner. *Messrs. Byron G. Rogers* and *Henry E. Lutz* for respondents. Reported below: 106 F. 2d 525.

Nos. 429 and 430. ABRAHAM & STRAUS, INC. *v.* ART METAL WORKS, INC. December 11, 1939. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Holland S. Duell* for petitioner. *Messrs. Kenneth S. Neal* and *Joseph Lorenz* for respondent. Reported below: 107 F. 2d 940, 944.

No. 449. NEW YORK LIFE INSURANCE CO. *v.* GAMER, EXECUTRIX. December 11, 1939. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles R. Leonard* and *J. A. Poore* for petitioner. *Mr. William Meyer* for respondent. Reported below: 106 F. 2d 375.

No. 487. WINCHESTER MANUFACTURING CO. *v.* UNITED STATES. December 18, 1939. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Claude E. Koss* and *Oscar P. Mast* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 88 Ct. Cls. 89; 25 F. Supp. 102; 29 *id.* 695.

No. 515. KANSAS CITY SOUTHERN RY. CO. ET AL. *v.* CITY OF SHREVEPORT. December 18, 1939. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. Frank H. Moore, C. Huffman Lewis, W. Scott Wilkinson, A. B. Freyer,* and *James B. McDonough, Jr.,* for petitioners. No appearance for respondent. Reported below: 193 La. 277; 190 So. 404.

No. 540. CARROLL, EXECUTOR, ET AL. *v.* NEW YORK LIFE INSURANCE CO. December 18, 1939. Petition for

writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. W. McAfee* for petitioners. No appearance for respondent. Reported below: 106 F. 2d 445.

No. 509. LEVINE *v.* FARLEY, POSTMASTER GENERAL, ET AL. January 2, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Frederick A. Ballard* for petitioner. No appearance for respondents. Reported below: 107 F. 2d 186.

No. 535. UNIVERSAL SERVICE ASSOCIATION ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Justus Chancellor* for petitioners. *Solicitor General Jackson* and *Messrs. Warner W. Gardner, Chester T. Lane, Chistopher M. Jenks,* and *W. McNeil Kennedy* for respondent. Reported below: 106 F. 2d 232.

No. 502. CASSEL ET AL. *v.* RADIO-KEITH-ORPHEUM CORP. ET AL.; and

No. 577. STIRN *v.* ATLAS CORPORATION ET AL. January 2, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Mr. Myron Kommel* for petitioners in No. 502. *Messrs. George L. Schein* and *Joseph M. Cohen* for Independent Committee for the Protection of Common Stockholders of Radio-Keith-Orpheum Corp., and *Mr. Thomas D. Thacher* for Atlas

Corporation, respondents in No. 502. *Mr. Wm. D. Saltiel* for petitioner in No. 577. *Mr. Whitney North Seymour* for Atlas Corporation, respondent in No. 577. Reported below: 106 F. 2d 22.

No. 551. ATLANTIC REFINING CO. *v.* JAMES B. BERRY SONS' CO. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Theodore S. Kenyon* and *Edgar F. Baumgartner* for petitioner. *Messrs. Thomas G. Haight* and *William F. Hall* for respondent. Reported below: 106 F. 2d 644.

No. 546. SCHOLARSHIP ENDOWMENT FOUNDATION *v.* NICHOLAS, COLLECTOR OF INTERNAL REVENUE. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Wilbur F. Denious* and *Hudson Moore* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 106 F. 2d 552.

No. 547. STEINBRECHER, TRUSTEE, *v.* TOMAN, COUNTY TREASURER AND COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Dwight S. Bobb* and *Charles S. Macaulay* for petitioner. *Messrs. Jacob Shamberg* and *Francis S. Clamitz* for respondent. Reported below: 105 F. 2d 704.

No. 548. NEUBERGER *v.* COMMISSIONER OF INTERNAL REVENUE. January 2, 1940. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph M. Proskauer* and *Wilbur H. Friedman* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, F. E. Youngman* and *Richard H. Demuth* for respondent. Reported below: 104 F. 2d 649.

No. 556. ANGLO CALIFORNIA NATIONAL BANK ET AL. *v.* LAZARD ET AL. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. T. B. Cosgrove* and *John N. Cramer* for petitioners. *Messrs. Byron C. Hanna* and *Harold C. Morton* for respondents. Reported below: 106 F. 2d 693.

No. 565. DEAN RUBBER MANUFACTURING CO. ET AL. *v.* KILLIAN, TRUSTEE. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arthur C. Brown* for petitioners. *Messrs. F. O. Richey* and *B. D. Watts* for respondent. Reported below: 106 F. 2d 316.

No. 554. BROWN ET UX. *v.* MAGRUDER, U. S. COLLECTOR OF INTERNAL REVENUE. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thos. F. Cadwalader* for petitioners. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum, Berryman Green,* and *Richard H. Demuth* for respondent. Reported below: 106 F. 2d 428.

No. 560. PUBLICKER *v.* SHALLCROSS ET AL. January 2, 1940. Petition for writ of certiorari to the Circuit Court

of Appeals for the Third Circuit denied. *Mr. Harry Shapiro* for petitioner. *Mr. Gordon A. Block* for respondents. Reported below: 106 F. 2d 949.

No. 566. GREAT ATLANTIC & PACIFIC TEA CO. *v.* FEDERAL TRADE COMMISSION. January 2, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Caruthers Ewing* for petitioner. *Solicitor General Jackson, Assistant Attorney General Arnold,* and *Messrs. James C. Wilson, Robert K. McConnaughey, Wilber Stammler, W. T. Kelley,* and *Joseph J. Smith, Jr.* for respondent. Reported below: 106 F. 2d 667.

No. 568. MERRICK ET AL. *v.* AMERICAN SECURITY & TRUST CO. January 2, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Richard L. Merrick, Leo A. Rover,* and *William J. Rowan* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill,* and *John E. Larson* for respondent. Reported below: 107 F. 2d 271.

Nos. 575 and 576. JOHNSON *v.* COMMISSIONER OF INTERNAL REVENUE. January 2, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Justin D. Bowersock* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum* and *Miss Louise Foster* for respondent. Reported below: 105 F. 2d 454.

No. 610. SANDERS *v.* ALDREDGE, SHERIFF. January 8, 1940. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in*

forma pauperis, denied. *Mr. Joseph S. Crespi* for petitioner. No appearance for respondent. Reported below: 186 Ga. 335; 197 S. E. 801.

No. 550. MIMS *v.* NEW MEXICO. January 8, 1940. Petition for writ of certiorari to the Supreme Court of New Mexico denied for the want of a final judgment. *Mr. Edwin Mechem* for petitioner. No appearance for respondent. Reported below: 43 N. M. 318; 92 P. 2d 993.

No. 557. INTERSTATE OIL CO. ET AL. *v.* GORMLEY, RECEIVER. January 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Cyril W. McClean* for petitioners. *Mr. C. Roy Smith* for respondent. Reported below: 105 F. 2d 431.

No. 574. HARTFORD ACCIDENT & INDEMNITY CO. *v.* PETROLEUM ROYALTIES CO. ET AL. January 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Hunter L. Johnson* for petitioner. *Messrs. A. F. Moss* and *Harry H. Rogers* for respondents. Reported below: 106 F. 2d 440.

No. 621. VILES *v.* PRUDENTIAL INSURANCE CO. January 15, 1940. 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. *Edmond L. Viles, pro se.* No appearance for respondent. Reported below: 107 F. 2d 696.

No. 585. WILTON REALTY CORP. ET AL. *v.* WEADOCK, EXAMINER, SECURITIES & EXCHANGE COMMISSION, ET AL. January 15, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Messrs. Jason L. Honigman* for Wilton Realty Corp., and *Mr. George E. Brand* for Equitable Trust Co., petitioners. *Messrs. Paul Weadock* and *Harold H. Armstrong* for Weadock, and *Solicitor General Jackson* and *Mr. Chester T. Lane* for the Securities & Exchange Commission, respondents. Reported below: 106 F. 2d 1022.

No. 581. WIEGAND ET AL. *v.* W. BINGHAM CO. ET AL. January 15, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Victor D. Borst* and *William E. Chilton* for petitioners. *Messrs. J. Bernhard Thiess* and *George William Hansen* for respondents. Reported below: 106 F. 2d 546.

No. 584. CRANE-JOHNSON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 15, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John E. Hughes* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. By special leave of Court, briefs of *amici curiae* were filed by *Mr. H. H. Hoppe* on behalf of Warren Telephone Co. et al., and by *Messrs. Harry O. Glasser, Robert L. Judd,* and *W. S. Greathouse,* on behalf of several corporate taxpayers, in support of the petition. Reported below: 105 F. 2d 740.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, THROUGH JANUARY 15, 1940.

No. 314. ROEDENBECK FARMS, INC., ET AL. *v.* BROUSSARD ET AL. Appeal from the Court of Civil Appeals, 9th Supreme Judicial District, of Texas. August 24, 1939.

Docketed and dismissed on motion of counsel for appellees. No appearance for appellants. *Mr. Will E. Orgain* for appellees. Reported below: 124 S. W. 2d 929; 127 *id.* 168.

No. 220. DODSON ET AL., ATTORNEYS-IN-FACT, ET AL., *v.* YEATS, EXECUTRIX. On petition for writ of certiorari to the Supreme Court of Missouri. September 8, 1939. Dismissed per stipulation pursuant to Rule 35. *Messrs. J. Francis O'Sullivan* and *Maurice J. O'Sullivan* for petitioners. *Mr. Clay C. Rogers* for respondent. Reported below: 345 Mo. —.

No. 12. ROYAL INDEMNITY CO. *v.* WOODBURY GRANITE CO. ET AL. Certiorari, 306 U. S. 627, to the Court of Appeals for the District of Columbia. October 2, 1939. Dismissed per stipulation of counsel. *Messrs. William F. Kelly* and *P. J. J. Nicolaides* for petitioner. *Messrs. Joseph Fairbanks, Edward Stafford* and *Warren R. Austin, Jr.,* for Woodbury Granite Co., and *Mr. Louis M. Denit* for American Blower Corp., respondents. Reported below: 69 App. D. C. 364; 101 F. 2d 689.

No. 89. GETZ ET AL. *v.* EDINBURG CONSOLIDATED INDEPENDENT SCHOOL DISTRICT. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. October 2, 1939. Dismissed on motion of counsel for the petitioners. *Mr. Vernon B. Hill* for petitioners. *Mr. W. L. Matthews* for respondent. Reported below: 101 F. 2d 734.

No. 101. HAMILTON GAS CO. ET AL. *v.* INLAND GAS CORP., DEBTOR, ET AL.;

Nos. 102 and 104. PINEY OIL & GAS CO. *v.* SAME; and

No. 103. HAMILTON GAS CO. *v.* SAME. On petitions for writs of certiorari to the Circuit Court of Appeals for

the Sixth Circuit. October 2, 1939. Dismissed on motion of counsel for the petitioners. *Mr. James M. Guiher* for petitioners. *Messrs. LeWright Browning* and *George W. Jaques* for respondents. Reported below: 102 F. 2d 131.

No. 407. TRAGLIO ET AL. *v.* HARRIS. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 16, 1939. Dismissed on motion of counsel for the petitioners. *Messrs. Robert F. Maguire* and *Louis M. Denit* for petitioners. *Mr. W. A. Ekwall* for respondent. Reported below: 104 F. 2d 439.

No. 256. BOROUGH OF FORT LEE ET AL. *v.* UNITED STATES EX REL. BARKER ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. November 6, 1939. Dismissed per stipulation of counsel. *Messrs. E. J. Dimock* and *William A. Stevens* for petitioners. *Mr. Arthur T. Vanderbilt* for respondents. Reported below: 104 F. 2d 275.

No. 310. BERRY, ADMINISTRATRIX, *v.* MIDTOWN SERVICE CORP. ET AL. Certiorari, *ante*, p. 536, to the Circuit Court of Appeals for the Second Circuit. December 13, 1939. Dismissed per stipulation of counsel. *Messrs. Harold R. Medina* and *Frank L. Tyson* for petitioner. *Messrs. Samuel H. Kaufman* and *Emil Weitzner* for respondents. Reported below: 104 F. 2d 107.

No. 196. BHAGAT SINGH *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. Certiorari, *ante*, p. 538, to the Circuit Court of Appeals for the Ninth Cir-

cuit. January 2, 1940. Writ of certiorari dismissed on motion of counsel for the petitioner. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 104 F. 2d 122.

PETITIONS FOR REHEARING GRANTED, FROM OCTOBER 2, 1939, THROUGH JANUARY 15, 1940.

No. 481. THOMPSON, TRUSTEE, *v.* MAGNOLIA PETROLEUM CO. ET AL. December 4, 1939. The petition for rehearing is granted. The order denying certiorari *ante,* p. 613, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is granted. *Mr. Thos. T. Railey* for petitioner. *Messrs. Craig Van Meter* and *Fred H. Kelly* for respondents. Reported below: 106 F. 2d 217.

PETITIONS FOR REHEARING DENIED, FROM OCTOBER 2, 1939, THROUGH JANUARY 15, 1940.*

No. 429 (October Term, 1938). PREBYL *v.* PRUDENTIAL INSURANCE CO. October 9, 1939. Motion to annul and vacate the order denying the petition for writ of certiorari (305 U. S. 641) denied.

No. —, original (October Term, 1938). EX PARTE ALBERT LEIGHTON. October 9, 1939. 306 U. S. 668.

*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. —, original (October Term, 1938). Ex parte Harmon Metz Waley. October 9, 1939. 307 U. S. 614.

No. 76 (October Term, 1938). Maytag Company *v.* Hurley Machine Co. et al.;

No. 77 (October Term, 1938). Same *v.* Easy Washing Machine Corp.; and

No. 661 (October Term, 1938). General Electric Supply Corp. *v.* Maytag Company. October 9, 1939. 307 U. S. 243.

No. 590 (October Term, 1938). Bethlehem Steel Co. *v.* Zurich General Accident & Liability Insurance Co. October 9, 1939. 307 U. S. 265.

No. 650 (October Term, 1938). Baldwin et al. *v.* Scott County Milling Co. October 9, 1939. 307 U. S. 478.

No. 687 (October Term, 1938). United States *v.* Powers. October 9, 1939. 307 U. S. 214.

No. 771 (October Term, 1938). United States *v.* Rock Royal Co-operative, Inc., et al. October 9, 1939. 307 U. S. 533.

No. 827 (October Term, 1938). Dairymen's League Cooperative Assn. *v.* Rock Royal Co-operative, Inc., et al. October 9, 1939. 307 U. S. 533.

No. 828 (October Term 1938). Metropolitan Co-operative Milk Producers Bargaining Agency, Inc. *v.*

ROCK ROYAL CO-OPERATIVE, INC., ET AL. October 9, 1939. 307 U. S. 533.

No. 834 (October Term 1938). SEIBERLING ET AL., EXECUTORS, *v.* UNITED STATES. October 9, 1939. 307 U. S. 634.

No. 835 (October Term 1938). LEHIGH VALLEY TRUST CO. ET AL. *v.* UNITED STATES. October 9, 1939. 307 U. S. 634.

No. 842 (October Term 1938). FEDERAL RESERVE BANK *v.* ALGAR ET AL. October 9, 1939. 307 U. S. 631.

No. 891 (October Term 1938). GRAHAM ET AL. *v.* UNITED STATES. October 9, 1939. 307 U. S. 643.

No. 899 (October Term 1938). BIG LAKE OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. 307 U. S. 638, 651.

No. 903 (October Term 1938). SHEPARD *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. 307 U. S. 639.

No. 904 (October Term 1938). RICE, TRUSTEE, *v.* SMITH ENGINEERING CO. October 9, 1939. 307 U. S. 637.

No. 905 (October Term 1938). RICE, TRUSTEE, *v.* SMITH ENGINEERING COMPANY ET AL. October 9, 1939. 307 U. S. 637.

No. 915 (October Term 1938). CITY OF LOS ANGELES *v.* BORAX CONSOLIDATED, LTD., ET AL. October 9, 1939. 307 U. S. 644.

No. 919 (October Term 1938). KAMMERER *v.* NEW YORK. October 9, 1939. 307 U. S. 628.

No. 921 (October Term 1938). MARSHALL COUNTY BANK *v.* CROWTHER. October 9, 1939. 307 U. S. 644.

No. 929 (October Term 1938). FIRST NATIONAL BANK, ADMINISTRATOR, *v.* UNITED STATES. October 9, 1939. 307 U. S. 641.

No. 945 (October Term 1938). CITY & COUNTY OF DENVER *v.* COLORADO. October 9, 1939. 307 U. S. 615.

No. 960 (October Term 1938). TRUSTEES OF LUMBER INVESTMENT ASSN. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. 307 U. S. 647.

No. 962 (October Term 1938). MARTINI *v.* JOHNSTON, WARDEN. October 9, 1939. 307 U. S. 642.

No. 966 (October Term 1938). STEPHENSON *v.* COMMISSIONER OF INTERNAL REVENUE. October 9, 1939. 307 U. S. 647.

No. 974 (October Term 1938). FARNSWORTH *v.* SANFORD, WARDEN. October 9, 1939. 307 U. S. 642.

No. 975 (October Term 1938). KANSAS FARMERS' UNION ROYALTY CO. ET AL. *v.* HUSHAW. October 9, 1939. 307 U. S. 615.

No. 980 (October Term 1938). HARGIS *v.* SWOPE, JUDGE. October 9, 1939. 307 U. S. 642.

No. 833 (October Term 1938). UNITED STATES TRUST CO., EXECUTOR, *v.* UNITED STATES. October 9, 1939. Motion to enlarge the record denied. Petition for rehearing also denied. 307 U. S. 633.

No. 986 (October Term 1938). RITHOLTZ ET AL. *v.* AMERICAN OPTOMETRIC ASSOCIATION. October 9, 1939. Motion for stay denied. Petition for rehearing also denied. 307 U. S. 647.

Nos. 614 and 615 (October Term, 1938). FARMERS' LOAN & TRUST CO., TRUSTEE, ET AL. *v.* BOWERS, EXECUTOR. October 16, 1939. 307 U. S. 651.

No. 141. MILLER *v.* UNITED STATES. October 23, 1939.

No. 144. DODD *v.* AETNA LIFE INSURANCE CO. October 23, 1939.

No. 212. RADIUM DIAL CO. *v.* RYAN, CLERK. October 23, 1939.

Nos. 173 and 174. TRUSTEES OF PILLSBURY ACADEMY *v.* MINNESOTA. November 6, 1939. Petitions for re-

hearing denied. MR. JUSTICE BLACK took no part in the consideration and decision of these applications.

No. 217. BASS, ADMINISTRATRIX, *v.* DEHNER, EXECUTRIX. November 6, 1939. Petition for rehearing denied. MR. JUSTICE BLACK is of opinion that the petition for rehearing and the petition for writ of certiorari in this case should be granted.

No. —, original. EX PARTE J. R. PALMER. November 6, 1939.

No. 54. BALL *v.* UNITED STATES. November 6, 1939.

No. 71. ROBY-SOMERS COAL CO. *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. November 6, 1939.

No. 150. HIGHWAY STEEL & MFG. CO. *v.* CRAWFORD COUNTY CIRCUIT COURT ET AL. November 6, 1939.

No. 168. R. L. BLAFFER & CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1939.

No. 209. ROGERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. November 6, 1939.

No. 238. MADDEN, DOING BUSINESS AS KOHL & MADDEN PRINTING INK CO., *v.* MAC SIM BAR PAPER CO. November 6, 1939.

No. 249. WOODS, COURT TRUSTEE, *v.* INDEMNITY INSURANCE CO. November 6, 1939.

No. 250. WOODS, COURT TRUSTEE, *v.* GRANADA APARTMENTS, INC., ET AL. November 6, 1939.

No. 257. STANDARD OIL COMPANY OF NEW JERSEY *v.* BONICI. November 6, 1939.

No. 263. GARRISON *v.* JOHNSTON, WARDEN. November 6, 1939.

No. 296. ILLINOIS EX REL. EITEL ET AL. *v.* TOMAN ET AL.; and

No. 297. ILLINOIS EX REL. SEARS, ROEBUCK & CO. *v.* SAME. November 6, 1939.

No. 223. CARRIER ENGINEERING CORP. *v.* HORVATH ET AL. November 13, 1939.

No. 322. HIBBARD, SPENCER, BARTLETT & CO. *v.* CITY OF CHICAGO. November 13, 1939.

No. 390. HEDDEN, TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1939.

No. 391. CONNEEN, TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE. November 13, 1939.

No. 392. HATTIE S. HEDDEN, TRANSFEREE, *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 393. GERTRUDE S. HEDDEN, TRANSFEREE, *v.* SAME. November 13, 1939.

No. 144. DODD *v.* AETNA LIFE INSURANCE CO. November 22, 1939. Motion for leave to file a second petition for rehearing denied.

No. 157. WEBER *v.* UNITED STATES. November 22, 1939.

No. 360. COLTMAN *v.* COLGATE-PALMOLIVE-PEET CO. November 22, 1939.

No. 369. SIG ELLINGSON & CO. *v.* MASON CITY PRODUCTION CREDIT ASSOCIATION. November 22, 1939.

Nos. 15 and 16. BOTELER, TRUSTEE, *v.* INGELS, DIRECTOR OF MOTOR VEHICLES OF CALIFORNIA, ET AL. See *ante*, p. 521.

Nos. 23 and 24. CASE ET AL. *v.* LOS ANGELES LUMBER PRODUCTS CO. December 4, 1939.

No. 31. TEXAS ELECTRIC RAILWAY CO. *v.* EASTUS, U. S. ATTORNEY, ET AL. December 4, 1939.

No. 34. ESTATE OF SANFORD *v.* COMMISSIONER OF INTERNAL REVENUE. December 4, 1939.

No. 234. WHARTON ET AL. *v.* SHENANDOAH PUBLISHING HOUSE ET AL. December 4, 1939.

No. 353. MILK WAGON DRIVERS UNION ET AL. *v.* MEADOWMOOR DAIRIES, INC. December 4, 1939.

No. 358. STANDARD SURETY & CASUALTY CO. *v.* STANDARD ACCIDENT INSURANCE CO. December 4, 1939.

No. 388. GRAYBAR ELECTRIC CO. *v.* CURRY, COMMISSIONER, ET AL. December 4, 1939.

No. 402. HAVERSTICK *v.* DRAINAGE DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS. December 4, 1939.

No. 408. DEAN *v.* UNITED STATES. December 4, 1939.

No. 410. SUNSHINE ANTHRACITE COAL CO. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL. December 4, 1939.

No. 892 (October Term 1938). JENKINS ET AL. *v.* BITGOOD, FORMERLY ACTING COLLECTOR OF INTERNAL REVENUE. December 4, 1939. Motion for leave to file a petition for rehearing denied. See 307 U. S. 636.

No. 1. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WILSHIRE OIL CO. December 11, 1939.

No. 456. GEORGE *v.* VICTOR TALKING MACHINE CO. December 11, 1939.

No. 470. SPRUILL *v.* BALLARD ET AL. December 11, 1939.

No. 411. LOVVORN *v.* DAVIDSON, JUDGE. December 18, 1939.

No. 453. GOLD, SILVER, & TUNGSTEN, INC. *v.* WALLACE, EXECUTOR, ET AL. December 18, 1939.

No. 249. WOODS, COURT TRUSTEE, *v.* INDEMNITY INSURANCE CO.; and

No. 250. SAME *v.* GRANADA APARTMENTS, INC., ET AL. January 2, 1940. Motion for leave to file a second petition for rehearing denied.

No. 488. DUGAN *v.* UNITED STATES. January 2, 1940.

No. 494. HERDER ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. January 2, 1940.

No. 77. INTERSTATE NATURAL GAS CO. ET AL. *v.* STONE, COMMISSIONER OF FRANCHISE TAX, ET AL. January 8, 1940.

No. 365. LEONA PIATT GRAY *v.* UNION JOINT STOCK LAND BANK OF DETROIT;

No. 366. CARL H. GRAY *v.* SAME; and

No. 367. PIATT *v.* SAME. January 8, 1940.

No. 503. CAVICCHI, DOING BUSINESS AS WADE BUTTON CO. *v.* MOHAWK MANUFACTURING CO., INC. January 8, 1940.

No. 512. CRISCUOLO ET AL. *v.* SWEINS ET AL. January 8, 1940.

No. 516. DUNN ET AL. *v.* MICCO ET AL. January 8, 1940.

No. 517. GUY *v.* UNITED STATES. January 8, 1940.

No. 19. OKLAHOMA PACKING CO. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL. See *ante*, p. 530.

No. 17. FORD MOTOR CO. *v.* BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL. January 15, 1940.

No. 68. HELIS *v.* WARD, EXECUTRIX, ET AL. January 15, 1940.

ORDERS.

It is ordered that the members of the Advisory Committee appointed by Orders of June 3, 1935, and February 17, 1936, to assist the Court in the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, or so many of such members as are willing to serve, be requested to prepare and submit to the Court such amendments as they may deem advisable to the Rules of Civil Procedure adopted by the Court and reported to Congress by the Attorney General on January 3, 1938.

NOVEMBER 6, 1939.

The Court appoints Mr. Elmore Whitehurst, of Texas, to be Assistant Director of the Administrative Office of the United States Courts, pursuant to the Act to provide for the administration of the United States Courts, and for other purposes, approved August 7, 1939.

NOVEMBER 6, 1939.

It is ordered that, pursuant to the provisions of Public Resolution No. 50, 76th Congress, approved August 10, 1939, there be transferred $25,000 from the appropriation "Miscellaneous Salaries, United States Courts, 1940," to an appropriation to be designated "Salaries, Administrative Office, United States Courts, 1940," and that $25,000 be transferred from the appropriation "Miscellaneous Expenses, United States Courts, 1940," to an appropriation to be designated "Contingent Expenses, Administrative Office, United States Courts, 1940."

NOVEMBER 6, 1939.

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The Court appoints Mr. Henry P. Chandler, of Chicago, Illinois, to be Director of the Administrative Office of the United States Courts, pursuant to the Act to provide for the administration of the United States Courts, and for other purposes, approved August 7, 1939.

NOVEMBER 22, 1939.

The following order was adopted by the Supreme Court on December 28, 1939.

ORDERED:

1. That the first sentence of Rule 81 (a) (6) of the Rules of Civil Procedure be amended so as to read as follows:

"(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, §13 (25 Stat. 479) as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act."

2. *Effective Date.*—That the foregoing amendment take effect on the day which is three months subsequent to the adjournment of the second regular session of the 76th Congress, but if that day is prior to September 1, 1940, then this amendment shall take effect on September 1, 1940. This amendment governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the Court its application in a particular action pending when the amendment takes effect would not be feasible or would work injustice, in which event the former procedure applies.

3. That the CHIEF JUSTICE be authorized to transmit this amendment to the Attorney General with the request that he report it to the Congress at the beginning of the regular session in January, 1940.

MR. JUSTICE BLACK does not approve of the adoption of this amendment.

RULES OF CIVIL PROCEDURE

FOR THE

DISTRICT COURTS OF THE UNITED STATES

Adopted by the
SUPREME COURT OF THE UNITED STATES
pursuant to
the Act of June 19, 1934, Ch. 651

LETTER OF TRANSMITTAL

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 3, 1938.

To the Senate and House of Representatives of the United States of America in Congress assembled:

I have the honor to report to the Congress, under section 2 of the act of June 19, 1934 (c. 651, 48 Stat. 1064; U. S. C., title 28, sec. 723c), at the beginning of a regular session thereof commencing this 3d day of January 1938, the enclosed Rules of Civil Procedure for the District Courts of the United States.

By a letter of December 20, 1937, from the Chief Justice of the United States, a printed copy of which appears as a prefix to the rules transmitted herewith, I am advised that such rules have been adopted by the Supreme Court pursuant to the act of June 19, 1934, chapter 651 (48 Stat. 1064) and that, in accordance with section 2 of that act, the Court has united the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; and I am requested by the Supreme Court to report these rules to the Congress at the beginning of the regular session in January 1938.

Respectfully,

HOMER CUMMINGS,
Attorney General.

LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., December 20, 1937.

MY DEAR MR. ATTORNEY GENERAL:

By direction of the Supreme Court, I transmit to you herewith the Rules of Civil Procedure for the District Courts of the United States which have been adopted by the Supreme Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064).

In accordance with Section 2 of that Act, the Court has united the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. The Court requests you, as provided in that section, to report these rules to the Congress at the beginning of the regular session in January next.

I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules.

I have the honor to remain,

Respectfully yours,

(Signed) CHARLES E. HUGHES,
Chief Justice of the United States.

Honorable HOMER CUMMINGS,
Attorney General of the United States,
Washington, D. C.

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.]

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

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RULES OF CIVIL PROCEDURE
FOR THE
DISTRICT COURTS OF THE UNITED STATES

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. One Form of Action. There shall be one form of action to be known as "civil action".

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action. A civil action is commenced by filing a complaint with the court.

Rule 4. Process.

(a) SUMMONS: ISSUANCE. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) SAME: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) BY WHOM SERVED. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with

such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by

sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) SAME: OTHER SERVICE. Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an

order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

(g) RETURN. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

(h) AMENDMENT. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) SERVICE: WHEN REQUIRED. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each

of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) SAME: NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due

notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) FILING. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) FILING WITH THE COURT DEFINED. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 6. Time.

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally

prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) UNAFFECTED BY EXPIRATION OF TERM. 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 court to do any act or take any proceeding in any civil action which has been pending before it.

(d) FOR MOTIONS—AFFIDAVITS. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions.

(a) PLEADINGS. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) MOTIONS AND OTHER PAPERS.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) DEMURRERS, PLEAS, ETC., ABOLISHED. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall

contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) DEFENSES; FORM OF DENIALS. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge

in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

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(f) CONSTRUCTION OF PLEADINGS. All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading Special Matters.

(a) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) CONDITIONS PRECEDENT. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is

sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) TIME AND PLACE. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) SPECIAL DAMAGE. When items of special damage are claimed, they shall be specifically stated.

Rule 10. Form of Pleadings.

(a) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) PARAGRAPHS; SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) ADOPTION BY REFERENCE; EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rule 11. Signing of Pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after

service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of any motion provided for in this rule alters the time fixed by these rules for serving any required responsive pleading as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement or for a bill of particulars, the responsive pleading may be served within ten days after the service of the more definite statement or bill of particulars. In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before

pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)–(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order

as it deems just. A bill of particulars becomes a part of the pleading which it supplements.

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.

(g) CONSOLIDATION OF MOTIONS. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter,

the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) COUNTERCLAIM AGAINST THE UNITED STATES. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) ADDITIONAL PARTIES MAY BE BROUGHT IN. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 14. Third-Party Practice.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be

liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent

of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a

supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 16. Pre-Trial Procedure; Formulating Issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representa-

tive may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 18. Joinder of Claims and Remedies.

(a) JOINDER OF CLAIMS. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) JOINDER OF REMEDIES; FRAUDULENT CONVEYANCES. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 19. Necessary Joinder of Parties.

(a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) EFFECT OF FAILURE TO JOIN. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Rule 20. Permissive Joinder of Parties.

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in

respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) SEPARATE TRIALS. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Rule 21. Misjoinder and Non-Joinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the

claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U. S. C., Title 28, § 41 (26). Actions under that section shall be conducted in accordance with these rules.

Rule 23. Class Actions.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought

(b) SECONDARY ACTION BY SHAREHOLDERS. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant

is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, §1.

Rule 25. Substitution of Parties.

(a) DEATH.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by

the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) INCOMPETENCY. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, §11 (43 Stat. 941), U. S. C., Title 28, §780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his succes-

sor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions Pending Action.

(a) WHEN DEPOSITIONS MAY BE TAKEN. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) EXAMINATION AND CROSS-EXAMINATION. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if orginally taken therefor.

(e) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rule 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) EFFECT OF TAKING OR USING DEPOSITIONS. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 27. Depositions Before Action or Pending Appeal.

(a) BEFORE ACTION.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the district court of the United States in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the

date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently

brought in a district court of the United States, in accordance with the provisions of Rule 26 (d).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(b) IN FOREIGN COUNTRIES. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

(c) DISQUALIFICATION FOR INTEREST. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rule 29. Stipulations Regarding the Taking of Depositions. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 30. Depositions Upon Oral Examination.

(a) NOTICE OF EXAMINATION: TIME AND PLACE. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the

notice is served, the court may for cause shown enlarge or shorten the time.

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) RECORD OF EXAMINATION; OATH; OBJECTIONS. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence pre-

sented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examition, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) SUBMISSION TO WITNESS; CHANGES; SIGNING. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by

the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) CERTIFICATION AND FILING BY OFFICER; COPIES; NOTICE OF FILING.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 31. Depositions of Witnesses Upon Written Interrogatories.

(a) SERVING INTERROGATORIES; NOTICE. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party

may serve recross interrogatories upon the party proposing to take the deposition.

(b) OFFICER TO TAKE RESPONSES AND PREPARE RECORD. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) NOTICE OF FILING. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 32. Effect of Errors and Irregularities in Depositions.

(a) AS TO NOTICE. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) AS TO DISQUALIFICATION OF OFFICER. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes

known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rule 33. 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.

Rule 34. 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 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.

Rule 35. 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.

Rule 36. 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.

Rule 37. 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 Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question 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 34 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 35 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 36 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 wilfully 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 33, 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.

VI. TRIALS

Rule 38. Jury Trial of Right.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by Jury or by the Court.

(a) BY JURY. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The

trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 40. Assignment of Cases for Trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 41. Dismissal of Actions.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without

waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY-DISMISSED ACTION. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 42. Consolidation; Separate Trials.

(a) CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEPARATE TRIALS. The court in furtherance of convenience or to avoid prejudice may order a

separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 43. Evidence.

(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) 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.

(c) RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question

propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court 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.

(d) AFFIRMATION IN LIEU OF OATH. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) EVIDENCE ON MOTIONS. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rule 44. Proof of Official Record.

(a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated

by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

Rule 45. Subpoena.

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

(c) SERVICE. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.

(2) A resident of the district in which the deposition is to be taken may be required to

attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U. S. C., Title 28, §§ 711, 713.

(f) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 46. Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or

sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 47. Jurors.

(a) EXAMINATION OF JURORS. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) ALTERNATE JURORS. The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the

other peremptory challenges allowed by law shall not be used against the alternates.

Rule 48. Juries of Less than Twelve—Majority Verdict. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Rule 49. Special Verdicts and Interrogatories.

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary

to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Rule 50. Motion for a Directed Verdict.

(a) WHEN MADE: EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have

submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 53. Masters.

(a) APPOINTMENT AND COMPENSATION. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master"

includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) POWERS. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence

unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury.

(d) PROCEEDINGS.

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) REPORT.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by

motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

VII. JUDGMENT

Rule 54. Judgments; Costs.

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) COSTS. Except when express provision therefor is made either in a statute of the United States

or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 55. Default.

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice

of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

(d) PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(e) JUDGMENT AGAINST THE UNITED STATES. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appro-

priate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58. Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

Rule 59. New Trials.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new

findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

Rule 60. Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal

representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an

injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond

may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) STAY IN FAVOR OF THE UNITED STATES OR AGENCY THEREOF. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) STAY ACCORDING TO STATE LAW. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof.

Rule 63. Disability of a Judge. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of Person or Property. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 65. Injunctions.

(a) PRELIMINARY; NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts

shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court

deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C.,Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress.

Rule 66. Receivers. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in

the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules.

Rule 67. Deposit in Court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Sections 995 and 996, Revised Statutes, as amended, U. S. C., Title 28, §§ 851, 852; the Act of June 26, 1934, c. 756, § 23 (48 Stat. 1236), U. S. C., Title 31, § 725v; or any like statute.

Rule 68. Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.

Rule 69. Execution.

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Section 989, Revised Statutes, U. S. C., Title 28, §842, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, §8 (18 Stat. 401), U. S. C., Title 2, §118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

Rule 70. Judgment for Specific Acts; Vesting Title. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the

court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Rule 71. Process in Behalf of and Against Persons Not Parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

IX. APPEALS

Rule 72. Appeal from a District Court to the Supreme Court. When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal.

Rule 73. Appeal to a Circuit Court of Appeals.

(a) 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.

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than

the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) BOND ON APPEAL. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is

affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(e) FAILURE TO FILE OR INSUFFICIENCY OF BOND. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent

upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Rule 74. Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.

Rule 75. Record on Appeal to a Circuit Court of Appeals.

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

(b) TRANSCRIPT. If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record.

(c) FORM OF TESTIMONY. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may

require testimony in question and answer form to be substituted for all or part thereof.

(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) RECORD TO BE ABBREVIATED. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) STIPULATION AS TO RECORD. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) RECORD TO BE PREPARED BY CLERK—NECESSARY PARTS. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry

of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals.

(h) POWER OF COURT TO CORRECT RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

(i) ORDER AS TO ORIGINAL PAPERS OR EXHIBITS. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) RECORD FOR PRELIMINARY HEARING IN APPELLATE COURT. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) SEVERAL APPEALS. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) PRINTING. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the circuit court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court.

Rule 76. Record on Appeal to a Circuit Court of Appeals; Agreed Statement. When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of

the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

X. DISTRICT COURTS AND CLERKS

Rule 77. District Courts and Clerks.

(a) DISTRICT COURTS ALWAYS OPEN. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

(c) CLERK'S OFFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the

manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Rule 78. Motion Day. Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Rule 79. Books Kept by the Clerk and Entries Therein.

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the

clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL ORDER BOOK. The clerk shall also keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all final judgments and orders, all orders affecting title to or lien upon real or personal property, all appealable orders, and such other orders as the court may direct.

(c) INDICES; CALENDARS. Separate and suitable indices of the civil docket and of the civil order book shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions".

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence.

(a) STENOGRAPHER. A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The

cost of a transcript shall be paid in the first instance by the party ordering the transcript.

(b) OFFICIAL STENOGRAPHERS. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

(c) STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

XI. GENERAL PROVISIONS

Rule 81. Applicability in General.

(a) To What Proceedings Applicable.

(1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings in copyright under the Act of March 4, 1909, c. 320, § 25 (35 Stat. 1081), as amended, U. S. C., Title 17, § 25, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the District Court of the United States for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States.

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that

matters of procedure are not provided for in those statutes.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the district courts of the United States prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), U. S. C., Title 29, §§ 159 and 160 (e), (g), and (i), for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese, or to proceedings for review of compensation orders under the Longshoremen's and Harbor Workers'

Compensation Act, Act of March 4, 1927, c. 509, § 21 (44 Stat. 1436), U. S. C., Title 33, § 921. The provisions for service by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, remain in effect.

(7) In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.

(b) SCIRE FACIAS AND MANDAMUS. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after

the record of the action is filed in the district court of the United States.

(d) DISTRICT OF COLUMBIA; COURTS AND JUDGES. Whenever in these rules reference is made to a district court or to a district judge, the reference includes the District Court of the United States for the District of Columbia or a justice thereof; and whenever reference is made to a circuit court of appeals or to a judge thereof, the reference includes the United States Court of Appeals for the District of Columbia or a justice thereof.

(e) LAW APPLICABLE. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the District Court of the United States for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

Rule 83. Rules by District Courts. Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.

Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 84. Forms. The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.

Rule 85. Title. These rules may be known and cited as the Federal Rules of Civil Procedure.

Rule 86. Effective Date. These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

APPENDIX OF FORMS

(See Rule 84)

Introductory Statement

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons". In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4 (b), 7 (b) (2), and 10 (a).

3. In Form 3 and the forms following, the words, "Allegation of jurisdiction", are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1.—SUMMONS

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File Number _____

A. B., Plaintiff
v.
C. D., Defendant

Summons

To the above-named Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney, whose address is _____ _____, an answer to the complaint which is herewith served upon you, within 20[1] days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____,
Clerk of Court.

[Seal of the U. S. District Court]

Dated _____

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

Form 2.—ALLEGATION OF JURISDICTION

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a citizen of the State of Connecticut and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under the Constitution of the United States, Article ____, Section ____; [the ____ Amendment to the Constitution of the United States, Section ____]; [the Act of _____, ____ Stat. ____; U. S. C., Title ____, § ____];

[1] If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

[the Treaty of the United States with (here describe the treaty)],[2] as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ____, ____ Stat. ____; U. S. C., Title ____, § ____, as hereinafter more fully appears.

Notes

1. *Diversity of Citizenship.* If the plaintiff is an assignee, he should allege such other facts of citizenship as will show that he is entitled to prosecute his action under U. S. C., Title 28, § 41 (1).

2. *Jurisdiction Founded on Some Fact Other Than Diversity of Citizenship.* The allegation as to the matter in controversy may be omitted in any case where by law no jurisdictional amount is required. See for example, U. S. C., Title 28, § 41 (2)–(28).

3. *Pleading Venue.* Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper.

4. It is sufficient to allege that a corporation is incorporated in a particular state, there being, for jurisdictional purposes, a conclusive presumption that all of its members or stockholders are citizens of that State, *Marshall* v. *Baltimore and Ohio R. R. Co.*, 16 How. 314 (U. S. 1853); Henderson, *Position of Foreign Corporations in American Constitutional Law* (1918) 54–64. See Form No. 124 and note thereto, and Form No. 125, 1 Sylvester's *Bender's Federal Forms.*

Form 3.—COMPLAINT ON A PROMISSORY NOTE

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ten thousand dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

---

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for Plaintiff.

Address: _____

Notes

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See Rules 8 (e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

Form 4.—Complaint on an Account

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

Form 5.—Complaint for Goods Sold and Delivered

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

Note.

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

Form 6.—Complaint for Money Lent

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

Form 7.—COMPLAINT FOR MONEY PAID BY MISTAKE

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9 (b)].

Wherefore (etc. as in Form 3).

Form 8.—COMPLAINT FOR MONEY HAD AND RECEIVED

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

Form 9.—COMPLAINT FOR NEGLIGENCE

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

Note.

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Form 10.—Complaint for Negligence Where Plaintiff Is Unable to Determine Definitely Whether the Person Responsible Is C. D. or E. F. or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence

A. B., Plaintiff
v.
C. D. and E. F., Defendants | *Complaint*

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs.

Form 11.—Complaint for Conversion

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

Form 12.—Complaint for Specific Performance of Contract to Convey Land

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ten thousand dollars.

Note.

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

Form 13.—Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance Under Rule 18 (b)

A. B., Plaintiff *v.* C. D. and E. F., Defendants	*Complaint*

1. Allegation of jurisdiction.

2. Defendant C. D. on or about ____ executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on ____ the sum of five thousand dollars with interest thereon at the rate of ____ percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about ____ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

Form 14.—Complaint for Negligence Under Federal Employer's Liability Act

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at ____ and known as Tunnel No. ____.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ____ dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of ____ dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ____ dollars and costs.

Form 15.—Complaint for Damages Under Merchant Marine Act

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant was the owner of the steamship ____ and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at ____ plaintiff entered the employ of defendant as an able seaman on said steamship under seaman's articles of customary form for a voyage from ____ ports to the Orient and return at a wage of ____ dollars per month and found, which is equal to a wage of ____ dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about ____ days out of the port of ____ and was being navigated by the master and crew on the return voyage to ____ ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ____ dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of ____ dollars for medicine, medical attendance, and hospitalization.

7. Plaintiff elects to maintain this action under the provisions of section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007.

Wherefore plaintiff demands judgment against defendant in the sum of ____ dollars and costs.

Form 16.—Complaint for Infringement of Patent

1. Allegation of jurisdiction.

2. On May 16, 1934, United States Letters Patent No. ____ were duly and legally issued to plaintiff for an inven-

tion in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.

3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits and damages, and an assessment of costs against defendant.

Form 17.—Complaint for Infringement of Copyright and Unfair Competition

1. Allegation of jurisdiction.

2. Prior to March 2, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled ____.

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class ____, No. ____".

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of ____ and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled _____, which was copied largely from plaintiff's copyrighted book, entitled _____ _____.

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2".

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies in his possession or under his control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

Form 18.—Complaint for Interpleader and Declaratory Relief

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars

upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Form 19.—MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12 (b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is an inhabitant thereof.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars exclusive of interest and costs.

Signed: _____

Attorney for Defendant.

Address: _____

Notice of Motion

To: _____

Attorney for Plaintiff.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room ____, United States Courts and Post Office Building, Borough

of Manhattan, City of New York, on the ____ day of ----------, 193__, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: ----------

Attorney for Defendant.

Address: ----------

Note

The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7 (b).

Form 20.—Answer Presenting Defenses Under Rule 12 (b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

Note

The above form contains the various defenses provided for in Rule 12 (b). The first defense raises the legal sufficiency of the complaint. Its effect is equivalent to a general demurrer or a motion to dismiss.

The second defense is equivalent to a plea in abatement.

The third defense is equivalent to an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8 (c).

The answer also includes a counterclaim and a cross-claim.

Form 21.—Answer to Complaint Set Forth in Form 8, With Counterclaim for Interpleader

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.[3]

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Form 22.—MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave to make E. F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed: _____,
Attorney for Defendant C. D.
Address: _____

Notice of Motion

(Contents the same as in Form 19. No notice is necessary if the motion is made before the moving defendant has served his answer.)

[3] Rule 13 (h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

Exhibit A

District Court of the United States for the Southern District of New York

CIVIL ACTION, FILE NUMBER ____

A. B., PLAINTIFF
v.
C. D., DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
E. F., THIRD-PARTY DEFENDANT

Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C. D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

_____,
Clerk of Court.

[Seal of District Court]
Dated _____

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER ____

A. B., PLAINTIFF *v.* C. D., DEFENDANT AND THIRD-PARTY PLAINTIFF *v.* E. F., THIRD-PARTY DEFENDANT	*Third-Party complaint*

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C".

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D., or upon which A. B. is entitled to recover from E. F. and not from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____,

Attorney for C. D., Third-Party Plaintiff.

Address: _____

Form 23.—MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

(Based upon the complaint, Form 16)

District Court of the United States for the Southern District of New York

CIVIL ACTION, FILE NUMBER ____

A. B., PLAINTIFF *v.* C. D., DEFENDANT E. F., APPLICANT FOR INTERVENTION	*Motion to intervene as a defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.[4]

Signed: ----------,
Attorney for E. F., Applicant for Intervention.
Address: ----------.

Notice of Motion

(Contents the same as in Form 19)

[4] For other grounds of intervention, either of right or in the discretion of the court, see Rule 24 (a) and (b).

District Court of the United States for the Southern District of New York

CIVIL ACTION, FILE NUMBER ____

A. B., PLAINTIFF
v.
C. D., DEFENDANT
E. F., INTERVENER

Intervener's answer

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed: _____,
Attorney for E. F., Intervener.
Address: _____.

Form 24.—MOTION FOR PRODUCTION OF DOCUMENTS ETC. UNDER RULE 34

Plaintiff A. B. moves the court for an order requiring defendant C. D.

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them.)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them.)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: _____,
Attorney for Plaintiff.
Address: _____.

Notice of Motion

(Contents the same as in Form 19)

Exhibit A

STATE OF _____,
County of _____

A. B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.)

Signed: A. B.

[Jurat]

Form 25.—REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A. B. requests defendant C. D. to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.
(Here list the statements.)

Signed: _____,
Attorney for Plaintiff.
Address: _____.

Form 26.—ALLEGATION OF REASON FOR OMITTING PARTY

When it is necessary, under Rule 19 (c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; [because he cannot be made a party to this action without depriving this court of jurisdiction].

Form 27.—NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit [from the order (describing it)] [from the final judgment] entered in this action on _____, 19__.

Signed: _____,
Attorney for Appellants C. D. and E. F.
Address: _____.

Note

Use either the material in the first set of brackets or that in the second, as the case requires. If the appeal is from a part only of an order or judgment that part must be specified.

Rule 73 (b) does not require the appellee to be named. It does require the clerk to notify all other parties than appellant.

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