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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1939

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ERRATA

309 U. S., p. 160, line 4, "debts" should be "debits".

308 U. S., p. 504, line 6, "225 App. Div." should be 255 App. Div.

308 U. S., p. 522, line 16, "N. Y. 53" should be N. Y. 669.

308 U. S. 607. In No. 440, *Gouax* v. *Bovay*, it should have appeared that *Messrs. George Gunby, Wm. H. Watkins, Sr., F. G. Hudson, Jr.*, and *Allen Sholars* were for the respondents.

JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, 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.
FRANK MURPHY, Associate Justice.[1]

RETIRED

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

FRANK MURPHY, Attorney General.
ROBERT H. JACKSON, Attorney General.[2]
ROBERT H. JACKSON, Solicitor General.
FRANCIS BIDDLE, Solicitor General.[3]
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] Attorney General Murphy was nominated to be Associate Justice by President Roosevelt on January 4, 1940; the nomination was confirmed January 16th; he was commissioned and took the constitutional oath January 18th; and he took the judicial oath and was seated February 5, 1940. He resigned as Attorney General January 17th.

[2] Solicitor General Jackson was nominated as Attorney General by President Roosevelt on January 4, 1940; the nomination was confirmed January 16th, and he was commissioned and took the oath of office cn January 18, 1940. He resigned as Solicitor General January 17th.

[3] Mr. Francis Biddle, of Pennsylvania, was nominated as Solicitor General by President Roosevelt on January 4, 1940; the nomination was confirmed January 16th, and he was commissioned and took the oath of office on January 22, 1940.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES

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

For the First Circuit, 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, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, STANLEY REED, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, STANLEY REED, Associate Justice.

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

February 12, 1940.

(For next previous allotment, see 308 U. S. p. iv.)

SUPREME COURT OF THE UNITED STATES

THURSDAY, FEBRUARY 1, 1940.

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.

Mr. Attorney General Jackson addressed the Court as follows:

Mr. Chief Justice and Associate Justices of the Supreme Court of the United States: The Bar of the Supreme Court, including those who here represent the executive branch of the government, desires to observe with you the one hundred fiftieth anniversary of this Court's service. We do so in a spirit of rededication to the great principles of freedom and order which come to life in your judgments.

The Court as we know it could hardly have been foreseen from its beginnings. When it first convened, no one seemed in immediate need of its appellate process, and it adjourned—to await the perpetration of errors by lower courts. Errors were, of course, soon forthcoming. The Justices who sat upon the Bench, although not themselves aged, were older than the Court itself. The duration of an argument was then measured in days instead of hours. All questions were open ones, and neither the statesmanship of the Justices nor the imagination of the advocate was confined by the ruling case. Some philosophers have so feared the weight of tradition as to assert that happy are a people who have no history. We, however, may at least believe that there was some happiness in belonging to a bar that had little occasion to distinguish precedents or in sitting upon a Court that could not be invited to overrule

itself. Few tribunals have had greater opportunity for original and constructive work, and none ever seized opportunity with more daring and wisdom.

From the very beginning the duties of the Court required it, by interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve. Luther Martin, in his great plea in *McCulloch* v. *Maryland,* was not only an advocate but a witness of what had been and a prophet of things to come. He said: "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory." Thus, controversies so delicate that the framers would have risked their unity if an answer had been forced were bequeathed to this Court. During its early days it had the aid of counsel who expounded the Constitution from intimate and personal experience in its making. They knew that to get acceptance of its fundamental design for government many controversial details were left to be filled in from time to time by the wisdom of those who were to follow. This knowledge made them bold.

The passing of John Marshall marked the passing of that phase of the Court's experience. Thereafter the Constitution became less a living and contemporary thing—more and more a tradition. The work of the Court became less an exposition of its text and setting and purposes, and became more largely a study of what later men had said about it. The Constitution was less resorted to for deciding cases, and cases were more resorted to for deciding about the Constitution. This was the inevitable consequence of accumulating a body of judicial experience and opinion which the legal profession would regard as precedents.

It would, I am persuaded, be a mistake to regard the work of the Court of our own time as either less important or less constructive than that of its earlier days. It is perhaps more difficult to revise an old doctrine to fit changed conditions than to write a new doctrine on a clean slate. But,

as the underlying structure of society shifts, its law must be reviewed and rewritten in terms of current conditions if it is not to be a dead science.

In this sense, this age is one of founding fathers to those who follow. Of course, they will reëxamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes, when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own. But the greater number of your judgments become a part of the basic philosophy on which a future society will adjust its conflicts.

We who strive at your bar venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law.

However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own. There seems no likelihood that the tensions and conflicts of our society are to decrease. Time increases the disparity between underlying economic and social conditions, in response to which our Federation was fashioned, and those in which it must function. Adjustment grows more urgent, more extensive, and more delicate. I see no reason to doubt

that the problems of the next half century will test the wisdom and courage of this Court as severely as any half century of its existence.

In a system which makes legal questions of many matters that other nations treat as policy questions, the bench and the bar share an inescapable responsibility for fostering social and cultural attitudes which sustain a free and just government. Our jurisprudence is distinctive in that every great movement in American history has produced a leading case in this Court. Ultimately, in some form of litigation, each underlying opposition and unrest in our society finds its way to this judgment seat. Here, conflicts were reconciled or, sometimes, unhappily, intensified. In this forum will be heard the unending contentions between liberty and authority, between progress and stability, between property rights and personal rights, and between those forces defined by James Bryce as centrifugal and centripetal, and whose struggle he declared made up most of history. The judgments and opinions of this Court deeply penetrate the intellectual life of the nation. This Court is more than an arbiter of cases and controversies. It is the custodian of a culture and is the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity. Without it our representative system would be impossible.

Lord Balfour made an observation about British government, equally applicable to American, and expressed a hope that we may well share, when he wrote:

"Our alternating Cabinets, though belonging to different parties, have never differed about the foundation of society, and it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict. May it always be so."

Mr. Charles A. Beardsley, President of the American Bar Association, addressed the Court as follows:

Mr. Chief Justice and the Associate Justices of the Supreme Court of the United States: I appreciate this opportunity, which has been accorded to me, as the representative of the American Bar Association, to participate in this commemoration of the 150th anniversary of the first session of this honorable Court.

It is most fitting that this event should be commemorated. Its commemoration may well serve to recall to the minds of the American people the purposes of the founders of our National Government, and the part, in the fulfillment of those purposes, that this Court was intended to take, has taken, and will take in the years to come. And this commemoration may well serve, further, to challenge the American people to dedicate themselves anew to the fulfillment of those purposes.

In the Preamble of our Constitution, its framers recited the purposes to attain which the Constitution was to be ordained and established. In this recital, the purpose to "establish justice" is second only to the purpose "to form a more perfect union."

Daniel Webster reminds us that justice is "the ligament that holds civilized beings together," and "the greatest interest of man on earth."

To the end that they might "establish justice," to the end that they might provide "the ligament that holds civilized beings together," to the end that they might strengthen the foundation of civilization on the North American Continent, and to the end that they might serve "the greatest interest of man on earth," the framers of the Constitution provided therein for a federal judiciary, with this Court as its head, to administer "justice" under and pursuant to law.

In the words of President Washington, this Court was intended to be "the keystone of our political fabric." And it was intended to be the protector of our Constitution, and of the inalienable rights of a free people.

Gladstone's characterization of our Constitution as "the most wonderful product ever struck off at a given time by the brain and purpose of man," is justified by the fact that, for 150 years, this Court has approached as near as any human institution might well be expected to approach, the fulfillment of the purpose of the framers of the Constitution, to "establish justice" for the American people.

We may properly take pride in the extent to which this Court has approached that fulfillment, realizing as we do, as Addison reminds us, that to be just "to the utmost of our abilities, is the glory of man," and that "to be perfectly just, is an attribute of the divine nature."

Not only is it permissible on this occasion for us to recall that this Court is a human institution, but it is also desirable for the American people to recall, on this occasion, that this human institution will endure, and that justice, under and pursuant to law, will be preserved for the American people, only so long as the American people, by their alertness, fidelity, and sanity cause them to be preserved and to endure.

For there are forces at work in the world today that are inimical to the continued fulfillment by this Court of the purpose for which it was created.

As a result of the workings of these forces, in substantial parts of the world, national temples of justice are no longer honored or worthy of honor, and international morality and law are giving ground to international immorality and anarchy. And many hundreds of millions of people are engaged in war, seeking to settle their differences, not according to justice, but by force—by the use of a means that is calculated to bring victory to the strongest, or to the most unscrupulous, of the contending peoples, wholly regardless of justice.

And, even within our own borders, there are forces at work that are inimical to the principles upon which our Government is founded, including the principle of justice under and pursuant to law.

Thus, there is a tendency, among groups of employers and employees, to use physical force as the means of settling differences, instead of being willing to use the administration of justice—the institution devised by man, when he was emerging from barbarism, as a substitute for combats, for fights and for wars—an institution that is calculated to bring victory to the contending party who has the most justice on his side, regardless of the relative physical strength of the contending parties.

Also, we have among us many people who are eternally striving to inculcate doctrines that, in other parts of the world, are producing international lawlessness, anarchy, and war, doctrines that, in other parts of the world, are destroying temples of justice, and doctrines that, in other parts of the world, are depriving the people of their liberties, and of their lives.

And, finally, there is an all-too-widespread inclination to disregard the fundamental principles upon which our Government, and our Civilization, are founded, and an all-too-general disposition to ignore the historic warning that "eternal vigilance is the price of liberty."

For 150 years the American people have honored, respected, and sustained this Court, and, through the years this Court has gained for itself the gratitude and affectionate regard of the American people, because the American people have been steadfast in their devotion to the fundamental principles upon which our Government is founded, and because the American people have seen in the record of this Court the evidence of the striving by its members to be just, "to the utmost of" their "abilities."

This Court has gained, and has retained, this honor, this respect, this gratitude, and this affectionate regard, although, in the words of a nineteenth-century publicist, this Court has no "palaces or treasures, no arms but truth and wisdom, and no splendor but the justice and publicity of its judgments."

On this occasion, as we commemorate the 150th anniversary of the first session of this Court, we dedicate our-

selves anew, to the task of defending our Constitution, to the task of guarding our liberties, and to the task of strengthening, defending, and preserving this Court, as "the keystone of our political fabric," as the protector of our Constitution, and as the guarantor of justice for the American people under and pursuant to law, not only for another 150 years, but also for all time.

The Chief Justice said:

Mr. Attorney General and Mr. Beardsley: The Court welcomes the words of appreciation you have spoken in recognition of the one hundred and fiftieth anniversary of the day appointed for the first session of this tribunal. We are highly gratified at the presence of distinguished Senators and Representatives,—the members of the Judiciary Committees of the Houses of Congress and of the Special Joint Committee appointed in relation to this occasion. We trust that what has been said echoes a sentiment cherished in the hearts of the American people. They have again and again evinced the sound instinct which leads them, regardless of any special knowledge of legal matters, to cherish as their priceless possession the judicial institutions which safeguard the reign of law as opposed to despotic will. Democracy is a most hopeful way of life, but its promise of liberty and of human betterment will be but idle words save as the ideals of justice, not only between man and man, but between government and citizen, are held supreme.

The States have the power and privilege of administering justice except in the field delegated to the Nation, and in that field there is a distinct and compelling need. The recognition of this anniversary implies the persistence, through the vicissitudes of one hundred and fifty years, of the deep and abiding conviction that amid the clashes of political policies, the martial demands of crusaders, the appeals of sincere but conflicting voices, the outbursts of passion and of the prejudices growing out of particular in-

terests, there must be somewhere the quiet, deliberate and effective determination of an arbiter of the fundamental questions which inevitably grow out of our constitutional system and must be determined in controversies as to individual rights. It is the unique function of this Court, not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals.

But necessary as is this institution, its successful working has depended upon its integrity and the confidence thus inspired. By the method of selection, the tenure of office, the removal from the bias of political ambition, the people have sought to obtain as impartial a body as is humanly possible and to safeguard their basic interests from impairment by the partiality and the passions of politics. The ideals of the institution cannot, of course, obscure its human limitations. It does most of its work without special public attention to particular decisions. But ever and anon arise questions which excite an intense public interest, are divisive in character, dividing the opinion of lawyers as well as laymen. However serious the division of opinion, these cases must be decided. It should occasion no surprise that there should be acute differences of opinion on difficult questions of constitutional law when in every other field of human achievement, in art, theology, and even on the highest levels of scientific research, there are expert disputants. The more weighty the question, the more serious the debate, the more likely is the opportunity for honest and expert disagreement. This is a token of vitality. It is fortunate and not regrettable that the avenues of criticism are open to all whether they denounce or praise. This is a vital part of the democratic process. The essential thing is that the independence, the fearlessness, the impartial thought and conscientious motive of those who decide should both exist and be recognized. And at the end of 150 years, this tribunal still stands as an embodiment of the ideal of the independence of the judicial function in this, the highest and most important sphere of its exercise.

We cannot recognize fittingly this anniversary without recalling the services of the men who have preceded us and whose work has made possible such repute as this institution enjoys. This tribunal works in a highly concrete fashion. The traditions it holds have been wrought out through the years at the conference table and in the earnest study and discussions of men constantly alive to a supreme obligation. We do not write on a blank sheet. The Court has its jurisprudence, the helpful repository of the deliberate and expressed convictions of generations of sincere minds addressing themselves to exposition and decision, not with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility.

To one who over twenty-nine years ago first took his seat upon this Bench, this day is full of memories of associations with those no longer with us, who wrought with strength and high purpose according to the light that was given them, in complete absorption in their judicial duty. We pay our tribute to these men of the more recent period as we recognize our indebtedness to their eminent predecessors. We venerate their example. Reflection upon their lives brings emphasis to the thought that even with the tenure of the judicial office, the service of individuals however important in their day soon yields to the service of others who must meet new problems and carry on in their own strength.

The generations come and go but the institutions of our Government have survived. This institution survives as essential to the perpetuation of our constitutional form of government,—a system responsive to the needs of a people who seek to maintain the advantages of local government over local concerns and at the same time the necessary national authority over national concerns, and to make sure that the fundamental guarantees with respect to life, liberty and property, and of freedom of speech, press, assembly and religion shall be held inviolate. The fathers deemed that system of government well devised to secure the blessings of liberty to themselves and their posterity.

Whether that system shall continue does not rest with this Court but with the people who have created that system. As Chief Justice Marshall said: "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." It is our responsibility to see that their will as expressed in their Constitution shall be faithfully executed in the determination of their controversies.

And deeply conscious of that responsibility, in the spirit and with the loyalty of those who have preceded us, we now rededicate ourselves to our task.

TABLE OF CASES REPORTED

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Cited in Opinions

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(B) STATUTES OF THE STATES AND TERRITORIES.

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(D) FOREIGN STATUTES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1939

MILLER *v.* HATFIELD, TRUSTEE IN FARMER DEBTOR BANKRUPTCY, ET AL.

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

No. 237. Argued January 5, 1940.—Decided January 15, 1940.

Upon finding that a necessary party to an appeal is absent, the Circuit Court of Appeals should sustain a motion of the appellant for a citation to bring him in, not dismiss the appeal.
101 F. 2d 748, reversed.

Mr. Elmer McClain for petitioner.

Mr. Kent W. Hughes, with whom *Mr. H. E. Garling* was on the brief, for respondents.

PER CURIAM.

This proceeding was instituted by a farmer-debtor pursuant to § 75 of the Bankruptcy Act. Under an order of the District Court, approving an order of the conciliation commissioner, petitioner's farm was sold to one of the co-trustees of a mortgage upon the property and the sale was confirmed by the District Court.

A petition for rehearing was denied. Upon appeal to the Circuit Court of Appeals, that court found that the purchaser at the sale was not a party to the appeal and

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dismissed it. Petitioner sought a rehearing upon the ground that the purchaser had actual notice of the appeal and had appeared in the Court of Appeals joining in an objection to an enlargement of time for filing the record and also seeking appointment of a receiver or an additional supersedeas bond. Petitioner also asked that if it be considered that the purchaser was not already before the court, a citation should be issued to bring him in. The Court of Appeals denied both applications. Certiorari was granted, 308 U. S. 534.

We are of the opinion that the action of the Court of Appeals was erroneous. If the court deemed the purchaser to be a necessary party and not before the court, the motion to issue a citation to him should have been granted. R. S. 954, 28 U. S. C. 777. *Dodge* v. *Knowles,* 114 U. S. 430, 438; *Knickerbocker Life Insurance Co.* v. *Pendleton,* 115 U. S. 339; *In re Knox-Powell-Stockton Co.,* 97 F. 2d 61.

The decree is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* GULF OIL CORP.*

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 473. Argued January 2, 3, 1940.—Decided January 15, 1940.

Jurisdiction to review the judgment of a state court can not be entertained if it does not affirmatively appear that the decision did not rest upon an adequate non-federal ground.

CERTIORARI, 308 U. S. 545, to review 281 N. Y. 647; 22 N. E. 2d 480, dismissed.

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* Rehearing granted, Feb. 5, 1940, see *post,* p. 692.

Mr. Paxton Blair, with whom *Messrs. William C. Chanler* and *Sol Charles Levine* were on the brief, for petitioner.

Mr. Matthew S. Gibson for respondent.

By leave of Court, *Messrs. George deForest Lord* and *Woodson D. Scott* filed a brief on behalf of the Cunard White Star, Ltd., as *amici curiae,* challenging the validity of the tax.

PER CURIAM.

The City of New York, through its Comptroller, assessed a tax against respondent with respect to sales of oil manufactured in that city in a bonded manufacturing warehouse, Class 6, established pursuant to the customs laws of the United States, the crude oil having been imported from Venezuela and the sales of the manufactured oil having been made to supply fuel to vessels engaged exclusively in foreign commerce. The Appellate Division, First Department, annulled the determination of the Comptroller considering the tax to be a burden upon foreign commerce. 256 App. Div. 207. The Court of Appeals affirmed the order of the Appellate Division, without opinion. 281 N. Y. 647. Certiorari was granted, 308 U. S. 545.

In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax solely because of violation of the federal Constitution, we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. Jud. Code, § 237 (b), 28 U. S. C. 344 (b). *Lynch* v. *New York,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14; *New York City* v. *Central Savings Bank,* 306 U. S. 661.

The writ of certiorari is dismissed for the want of jurisdiction.

Dismissed.

OKLAHOMA PACKING CO. ET AL. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL.*

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

No. 19. Argued October 17, 1939.—Decided December 4, 1939. Opinion on Petition for Rehearing delivered January 15, 1940.

1. A Delaware corporation, pursuant to the laws of Oklahoma, designated an agent for service of process "in any action in the State of Oklahoma." *Held* amenable to suit in the federal District Court in Oklahoma upon a cause of action arising in that State. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165. P. 6.
2. A determination of the Supreme Court of Oklahoma that its judgments, on appeal from rate orders of the Corporation Commission, were formerly legislative in character and that they can not be given the effect of *res judicata* by the retroactive influence of a later doctrine of that court characterizing such judgments as judicial,—*held* binding on this Court. P. 7.
3. Where an action upon supersedeas bonds given by a gas company for the security of one of its consumers in connection with its appeal from a rate order, was pending in a state court and defended by the company's answer upon the ground that the order violated the Federal Constitution, *held* that a subsequent suit by the company, on the same ground, to enjoin the consumer from prosecuting the action could not be entertained by a federal court. Jud. Code, § 265. P. 8.

100 F. 2d 770, reversed.

CERTIORARI, 306 U. S. 629, to review the affirmance of a decree enjoining the prosecution of an action in the state court.

Mr. Paul Ware, with whom *Mr. W. R. Brown* was on the brief, for petitioners.

* The original opinion of the Court delivered December 4, 1939, which, on petition for rehearing, was withdrawn and replaced (308 U. S. 530) by the one here reported, appears in the Appendix, *post,* p. 703. For separate opinion of the CHIEF JUSTICE and MCREYNOLDS and ROBERTS, JJ., delivered December 4, 1939, see *post,* p. 9.

Messrs. I. J. Underwood and *Streeter B. Flynn,* with whom *Mr. Robert M. Rainey* was on the brief, for respondents.

Mr. Justice Frankfurter delivered the opinion of the Court.

The case concerns a rate controversy which has been winding its slow way through state and federal courts for thirteen years.[1] While the relationship of two utilities with Wilson & Co., a consumer of natural gas, complicates the situation, the legal issues before us may be disposed of as though this were a typical case of a utility resisting an order reducing its rates.[2] Oklahoma Gas & Electric Company (hereafter called Gas & Electric) appealed to

[1] A history of the controversy is to be found in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 146 Okla. 272; 288 P. 316; *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 54 F. 2d 596; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 6 F. Supp. 893; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 178 Okla. 604; 62 P. 2d 703; *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 100 F. 2d 770.

[2] Oklahoma Natural Gas Co. and Oklahoma Gas and Electric Co., both engaged in the sale of natural gas in and about Oklahoma City, had agreed to a division of territory. Under that agreement, Wilson & Co. bought gas from Gas & Electric. The Oklahoma Corporation Commission found that Natural Gas had held itself out to provide gas to industrial consumers at a lower rate than that at which Wilson & Co. was able to buy from Gas & Electric. The Commission then ordered Natural Gas to provide Wilson & Co. with its gas at prevailing industrial rates. Both Natural Gas and Gas & Electric resisted the order. Natural Gas contended that it had never held itself out to industrial consumers; Gas & Electric claimed that it was being unconstitutionally deprived of its right to sell to Wilson & Co. at the higher rate. If, pending appeal from the Commission, the order were not stayed, Wilson & Co. would have been able to purchase gas from Natural Gas at the lower rate and Gas & Electric would have been forced either to lower its rates to meet the competition or to lose the business.

the Oklahoma Supreme Court from such an order by the Oklahoma Corporation Commission. The reduction was stayed pending the appeal, but to protect Wilson & Co. against a potential overcharge, Gas & Electric gave a supersedeas bond. Gas & Electric lost its appeal, *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 146 Okla. 272, 288 P. 316, and Wilson & Co. brought suit on the bond. That suit was instituted on December 3, 1931, in one of the district courts of Oklahoma. To enjoin prosecution of the latter suit Gas & Electric on May 20, 1932, invoked the jurisdiction of the United States District Court for the Western District of Oklahoma.[3] After a complicated series of moves in both state and federal courts, not necessary here to detail, this relief was granted by the District Court on September 10, 1937, and on December 19, 1938, sustained by the Circuit Court of Appeals. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 100 F. 2d 770. Since the case in part was in conflict with the Second Circuit's decision in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 103 F. 2d 765, and also presented novel aspects of important questions of federal law, we granted certiorari, 306 U. S. 629. We are not concerned with the merits of the Commission's order.

At the threshold we are met by the procedural objection, seasonably made, that Wilson & Co., a Delaware corporation, was improperly sued in the District Court of the Western District of Oklahoma. The objection is

[3] In 1928 Natural Gas complied with the order; and since that time Wilson & Co. has been buying gas at the lower rate prescribed by the Commission. The sole question now involved in these proceedings is the liability of Gas & Electric to Wilson & Co. for alleged overcharges between 1926 and 1928. The District Court found specifically that the Corporation Commission had made no threat to enforce penalties for violations of the 1926 order, and as to the Commission, declined to grant any injunctive relief. Cf. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 390.

unavailable. Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process "in any action in the State of Oklahoma." Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, Wilson & Co. was amenable to suit in the Western District of Oklahoma.

Petitioners further urge (1) that their plea of *res judicata* should have been sustained, and (2) that § 265 of the Judicial Act (Act of March 3, 1911, 36 Stat. 1162, 28 U. S. C. § 379, derived from § 5 of the Act of March 2, 1793, 1 Stat. 333, 335), was a bar to the suit.

The claim of *res judicata* is based on the prior determination in 1930 by the Supreme Court of Oklahoma that the contested order of the Corporation Commission was valid. *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272; 288 P. 316. The pronouncements of the Oklahoma Supreme Court concerning the character of such a determination—whether under the Oklahoma Constitution it was a "legislative" or "judicial" review—have for a time, however, been ambiguous and fluctuating. After the present bill was filed but before the challenged injunction was decreed, the Oklahoma Supreme Court had held that its decision in cases like that of *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, was a judicial judgment. *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243; 51 P. 2d 327. But, in *Community Natural Gas Co.* v. *Corporation Commission,* 182 Okla. 137; 76 P. 2d 393, decided after the decree here in issue, the Oklahoma court formally characterized its review in cases prior to the decision in the *Ginners'* case as "legislative," re-

fused to give that decision retroactive effect, and therefore deemed the *res judicata* doctrine inapplicable to these prior reviews. Hence, the plea of *res judicata* in this case must fail, for on that issue state law is determinative here. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71; *Covington* v. *First National Bank,* 198 U. S. 100; *Wright* v. *Georgia Railroad & Banking Co.,* 216 U. S. 420.

There remains, therefore, the applicability of § 265 of the Judicial Code.[4] That provision would operate as a bar upon the power of the District Court to enjoin proceedings previously brought in the state court on the supersedeas bond, if "the only thing sought to be accomplished by this equitable action" is to stay the continuance of that action. Such was the construction placed upon the bill by the earlier District Court of three judges, and such was this Court's assumption when the latter decision came here on appeal. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 6 F. Supp. 893, 895; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 389. That case eliminated the Corporation Commission as party to the litigation. The District Court to which this Court remanded the matter summarized Gas & Electric's claim by way of answer to the action brought by Wilson & Co. in the state court as an attack upon the Commission's order "for substantially the same reasons as set out" in the present bill.

The present suit, therefore, is one for an injunction "to stay proceedings" previously begun in a state court. The decree below is thus within the plain interdiction of an Act of Congress, and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon a limitation of the power of the federal courts dat-

[4] Section 265 provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

ing almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts. Compare *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239; *Simon* v. *Southern Railway Co.*, 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175. See Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 345, 372–77. That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial. *Hill* v. *Martin*, 296 U. S. 393, 403. Cf. *Kohn* v. *Central Distributing Co.*, 306 U. S. 531. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, pressed upon us by respondents and relied upon below, is plainly inapplicable.

Neither record nor findings below give any other basis for injunctive relief save the threatened injury implied in the state court lawsuit; and that could not be enjoined. The decree below is reversed, with directions to dismiss the bill.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS adhere to the views expressed in their separate opinion in this case.

The separate opinion referred to was delivered December 4, 1939 (see footnote, p. 4), and is as follows:

MR. CHIEF JUSTICE HUGHES:

I concur in the reversal of the judgment upon the ground that Wilson & Co., a Delaware corporation, was not amenable to suit in the federal District Court in Oklahoma. The question is essentially the same as that presented in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, and what was said in the dissenting opinion in that case need not be repeated here. (See, as to the scope of the consent under the Oklahoma statute, the

observations of the Circuit Court of Appeals in the *Neirbo* case, 103 F. 2d 765, 769.)

But if it be granted that the Delaware Corporation was amenable to the process in question, I am unable to agree that the complainants should be denied relief because of the defense of *res judicata*. The judgment to which this effect is given was rendered by the Supreme Court of Oklahoma in 1930, sustaining, on appeal, an order of the Corporation Commission requiring gas to be furnished to Wilson & Co. at a specified rate. *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272; 288 P. 316. At the time of that decision, the review by the Supreme Court of Oklahoma of such an order of the Corporation Commission was considered to be legislative in character. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, 291; *McAlester Gas & Coke Co.* v. *Corporation Commission*, 101 Okla. 268, 270; 224 P. 698; *City of Poteau* v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 242, 243; 18 P. 2d 523, in which the state court cited with approval the decision to that effect of the Circuit Court of Appeals in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 54 F. 2d 596, 598, 599, applying the Oklahoma decisions. Compare *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 388; *Corporation Commission* v. *Cary*, 296 U. S. 452, 458. The contention of the complainants before the state court was that the Commission's order violated their rights under the Federal Constitution. 146 Okla. 272, 281, 288; 288 P. 316. But in the view, as then held, that the action of the state court was legislative in character, no appeal lay to this Court from the state court's determination of the federal question. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227; *Oklahoma Gas Co.* v. *Russell, supra*. Accordingly, the complainants brought this suit in the federal court to enjoin the enforcement of the Commission's order.

It was not until several years later (in 1935) that the Oklahoma Supreme Court decided, in a suit between other parties, that its action in reviewing such an order of the Commission was judicial and not legislative in character. *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243; 51 P. 2d 327. The manifest injustice of holding that complainants are bound by the state court's ruling in 1930 as a judicial determination, when at that time under the state court's construction of the state constitution the complainants were not at liberty to treat the ruling as a judicial determination and to obtain a review of the federal question by this Court upon that ground, is not met, as it seems to me, by invoking the general doctrine of *res judicata.*

Whether the judgment of a state court is *res judicata* is a question of state law. The federal courts are not bound to give such domestic judgments any greater force than that awarded them by the courts of the State where rendered. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 75; *Covington* v. *First National Bank,* 198 U. S. 100, 109; *Wright* v. *Georgia Railroad & Banking Co.,* 216 U. S. 420, 429. I think that we are not at liberty to assume that the Oklahoma court would so far depart from the plain requirements of justice as to preclude in these circumstances a review of the federal question in a court of competent jurisdiction. The state court has not spoken to that effect and what the state court has said I think clearly imports the contrary.

This appears from its decision in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 178 Okla. 604; 63 P. 2d 703. That was an action in the state court on the supersedeas bond given on the appeal to the Supreme Court from the Commission's order in question, and Wilson & Co., the plaintiff, had judgment. The Supreme Court reversed that judgment and directed a stay pending the deter-

mination in this very suit in the federal court of the validity of the Commission's order. The Supreme Court expressly referred to its decision, in 1935, in *Oklahoma Cotton Ginners' Assn.* v. *State, supra,* that its action in reviewing orders of the Commission affecting rates of public utilities constituted a judicial determination of the questions involved. But instead of holding that the ruling in 1930, upon the order now under review, constituted a final adjudication of the validity of that order, the Supreme Court held that the question of validity was an open one for determination by the federal court in the present suit. After saying that in view of the uncertainty with respect to the "right to a judicial remedy in the state courts," the federal court had acquired jurisdiction of this suit, the state court concluded as follows:

"That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the commission's order. The suit was a direct attack upon such order, and until its validity was established in that suit, the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the commission, the defendants' liability on such order is not finally determined judicially until final determination of the equitable action."

If under the state law as thus declared in Oklahoma upon consideration of the particular circumstances of this case, liability on the Commission's order is not finally determined judicially until the determination of that question in this equity suit, I am at a loss to understand how the action of the state court on the 1930 appeal can be regarded as *res judicata* and thus a bar to that determination.

The decree below enjoining enforcement of the Commission's order appropriately followed the determination of its invalidity. The point that the decree should not

have gone further and enjoined the prosecution of the action in the state court upon the supersedeas bond is at best only one of technical importance, as the state court itself enjoined such proceedings pending the determination of this suit, apparently in the view that a determination herein of the invalidity of the order would dispose of the merits.

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

REAL ESTATE - LAND TITLE & TRUST CO. *v.* UNITED STATES.

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

No. 229. Argued January 5, 1940.—Decided January 15, 1940.

Under the Revenue Act of 1928, § 23 (k), and Treasury Regulations 74, Art. 206, a deduction for obsolescence is not allowed for a plant which has not functionally depreciated but which is a needless duplication acquired in a voluntary business consolidation, and which the management desires to eliminate, preferring another which is also adequate but which can be operated with fewer employees. Pp. 15–17.

102 F. 2d 582, affirmed.

CERTIORARI, 308 U. S. 539, to review a judgment reversing a judgment recovered in the District Court in a suit for a refund of income taxes.

Mr. Joseph Neff Ewing, with whom *Messrs. Maurice Bower Saul* and *Joseph A. Lamorelle* were on the brief, for petitioner.

Miss Helen R. Carloss, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* were on the brief, for the United States.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a Pennsylvania corporation, was formed in October 1927 as a result of a statutory consolidation or merger of three companies. Two of the constituent companies owned title search plants which were among the assets acquired by petitioner as a result of the consolidation. While it was known that two title plants would be acquired on the consolidation, there was at that time no definite plan for their disposition. But an immediate investigation was made and it was decided to store one of the plants in order to effect economies of operation. That was done substantially simultaneously with the consummation of the consolidation. About two months thereafter it was decided that the plant retained in use was adequate and that the one in storage would not be needed. Although for a brief period some slight use appears to have been made of the stored plant,[1] it was not kept up to date by the addition of current recordings. As a result it had only a salvage value by October 31, 1928. Meanwhile, negotiations for its sale had been unsuccessful.

In this action petitioner seeks a refund of income taxes for the fiscal year ended October 31, 1928, based on the refusal of the Collector of Internal Revenue to allow a deduction for obsolescence of this plant. It had been carried on the books of the constituent company at $275,000 and was brought into the consolidation at $800,000. The District Court, however, found that its value on March 1, 1913, was $1,000,000; on October 31, 1928, $125,000—making an actual loss of $875,000, which that court allowed as a deduction for obsolescence for the taxable year 1928. It accordingly allowed a refund. That judgment was reversed by the Circuit Court of Appeals (102

[1] Evidence of use subsequent to the consolidation or merger is quite tenuous, the only specific instances occurring immediately prior to the actual consummation of the consolidation on October 31, 1927.

F. 2d 582). We granted certiorari because of the asserted conflict of that decision with *Crooks* v. *Kansas City Title & Trust Co.*, 46 F. 2d 928.

Sec. 23 (k) of the Revenue Act of 1928 (45 Stat. 791) allows as a deduction from gross income a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." Admittedly, if the deduction is allowed under this provision it must be for obsolescence, as there has been no exhaustion, wear or tear of the title plant within the meaning of the Act. Now it is true that in the popular sense a thing which is obsolete is one which is no longer used, a meaning which gives color to petitioner's claim for deduction since there is no question that the title plant here involved is no longer utilized to any degree whatsoever. But the term "allowance for obsolescence," as used in the Act and in the Treasury Regulations, has a narrower or more technical meaning than that derived from the common, dictionary definition of obsolete. The Treasury Regulations [2] state the cir-

[2] Treasury Regulations 74, Art. 206, promulgated under the Revenue Act of 1928, provides in full:

"With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due." See also Bureau of Internal Revenue Bulletin "F," January, 1931.

cumstances under which an allowance for obsolescence of physical property may be allowed, viz, where such property is "being effected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness." This Court, without undertaking a comprehensive definition, has held that obsolescence for purposes of the revenue acts "may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value." *United States Cartridge Co.* v. *United States,* 284 U. S. 511, 516. See also *Burnet* v. *Niagara Falls Brewing Co.,* 282 U. S. 648, 654. Such specific examples illustrate the type of "economic conditions" whose effect on physical property is recognized as obsolescence by the Treasury Regulations. Others could be mentioned which similarly cause or contribute to the relentless march of physical property to the junk pile. But in general, obsolescence under the Act connotes functional depreciation, as it does in accounting and engineering terminology.[3] More than non-use or disuse is necessary to establish it.[4] To be sure, reasons of economy may cause a management to discard a title plant either where it has become outmoded by improved devices or where it is acquired as a duplicate and therefore is useless. But not every deci-

[3] Kester, Advanced Accounting (3rd ed. 1933) ch. 10; Hatfield, Accounting (1927) ch. V; Saliers, Depreciation Principles and Applications (3rd ed. 1939) ch. 4; Kester, Depreciation (1924); Transactions, Amer. Soc. C. E., vol. 81, p. 1527 (1917); Marston & Agg, Engineering Valuation (1936) pp. 83–85.

[4] 2 Paul & Mertens, Law of Federal Income Taxation, § 20.114.

sion of management to abandon facilities or to discontinue their use gives rise to a claim for obsolescence. For obsolescence under the Act requires that the operative cause of the present or growing uselessness arise from external forces which make it desirable or imperative that the property be replaced. What those operative causes may be will be dependent on a wide variety of factual situations. "New and modern methods" appear to have been one of the real causes of abandonment of the title plant in *Crooks* v. *Kansas City Title & Trust Co., supra.* Suffice it here to say that no such external causes are present, for the record shows little more than the desire of a management to eliminate one plant which was a needless duplication of another but which functionally was adequate.[5] The fact that fewer employees were required to operate the one retained than the one discarded is inconclusive here. For this is not the case of acquisition of a new plant to take the place of one outmoded or less efficient. Rather the conclusion is irresistible that the plant was discarded only as a proximate result of petitioner's voluntary action in acquiring excess capacity.

In view of this conclusion, we do not reach respondent's further objections to allowance of this claim on grounds of obsolescence.

But petitioner contends that in any event it has abandoned the plant and hence is entitled to a deduction under § 23 (f) of the 1928 Act which allows a corporation to deduct "losses sustained during the taxable year and not compensated for by insurance or otherwise." Whether petitioner has satisfied those requirements we do not de-

[5] According to petitioner's own witnesses, the discarded plant was a "more complete plant than any other plant in the City'; and it had a "background which went all the way back to William Penn."

cide, for its claim for refund was based exclusively and solely on the ground that it was entitled to an allowance for obsolescence. Hence, in absence of a waiver by the government, *Tucker* v. *Alexander,* 275 U. S. 228, or a proper amendment, petitioner is precluded in this suit from resting its claim on another ground. *United States* v. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269. There has been no amendment and there are no facts establishing a waiver.

Accordingly, the judgment of the Circuit Court of Appeals is

Affirmed.

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

YEARSLEY ET AL. *v.* W. A. ROSS CONSTRUCTION CO.

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

No. 156. Argued January 3, 4, 1940.—Decided January 29, 1940.

1. A contractor working for improvement of river navigation in conformity with a contract with the Government authorized by a valid Act of Congress, is not liable for injury resulting to private riparian land, even though what is so done amounts to a taking of property by the Government. P. 20.

   Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.

2. For a taking of private property in the course of authorized navigation improvement, the Government impliedly promises to pay just compensation, recoverable by suit against the United States in the Court of Claims. P. 21.

3. The remedy thus afforded is plain and adequate, and satisfies the Fifth Amendment. Payment in advance of taking is not required by the Amendment. Pp. 21, 22.

103 F. 2d 589, affirmed.

CERTIORARI, 308 U. S. 538, to review the reversal of a judgment recovered by the present petitioners in an action against the respondent for damages to their riparian lands.

Mr. Robert Van Pelt, with whom *Mr. Ernest B. Perry* was on the brief, for petitioners.

Mr. Clay C. Rogers for respondent.

By leave of Court, *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Warner W. Gardner, Thomas Harris,* and *Frederick T. Johnson* filed a brief on behalf of the United States, as *amicus curiae,* in support of respondent.

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

In this action, brought in the state court of Nebraska and removed to the federal court, petitioners sought to recover damages upon the ground that the respondent company had built dikes in the Missouri River and, using large boats with paddles and pumps to produce artificial erosion, had washed away a part of petitioners' land. Respondent alleged in defense that the work was done pursuant to a contract with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States, for the purpose of improving the navigation of the Missouri River, as authorized by an Act of Congress. Petitioners in reply alleged that the contract did not contemplate the taking of their land without just

compensation and that the acts of the contractor resulted in the destruction of petitioners' property in violation of their rights under the Fifth Amendment of the Federal Constitution.

Petitioners had judgment which the Circuit Court of Appeals reversed. 103 F. 2d 589. Certiorari was granted because of alleged conflict with applicable decisions of this Court. 308 U. S. 538. The Government has been permitted to appear as *amicus curiae*.

The Circuit Court of Appeals found that the evidence established "that two dikes built in the river above, and one dike built opposite, their (petitioners') land had diverted the channel or the current of the river from the Iowa shore to the Nebraska shore" and that as a result the "accretion land" of petitioners "to the extent of perhaps 95 acres had been eroded and carried away." There was evidence tending to show that in extending the dike opposite petitioners' land, the contractor, "apparently to keep open an adequate channel for navigation between the end of the dike and the shore," had accelerated the erosion "by using the paddle wheels of its steamboats to increase the action of the current." But there was no evidence, as the Court of Appeals said, that this "paddle washing" had done "anything more than hasten the inevitable." The Court of Appeals also found it to be undisputed "that the work which the contractor had done in the river bed was all authorized and directed by the Government of the United States for the purpose of improving the navigation of this navigable river." It is also conceded that the work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. 1010, 1013.

In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress,

there is no liability on the part of the contractor for executing its will. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 283; *Lamar* v. *Browne,* 92 U. S. 187, 199; *The Paquete Habana,* 189 U. S. 453, 465. Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 619, 620. See *United States* v. *Lee,* 106 U. S. 196, 220, 221; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165, 171, 172; *Tindal* v. *Wesley,* 167 U. S. 204, 222; *Scranton* v. *Wheeler,* 179 U. S. 141, 152; *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 108, 110.

Petitioners present the question whether the building of the dikes and the erosion of their land, because of the consequent diversion of the current of the river, constituted a taking of their property for which compensation must be made. We do not find it necessary to pass upon that question, for if the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims. 28 U. S. C. 250. *United States* v. *Great Falls Manufacturing Co.,* 112 U. S. 645, 656, 657; *Great Falls Manufacturing Co.* v. *Attorney General,* 124 U. S. 581, 600; *United States* v. *Lynah,* 188 U. S. 445, 465, 466; *Tempel* v. *United States,* 248 U. S. 121, 129, 130; *Hurley* v. *Kincaid,* 285 U. S. 95, 104, 105. "The Fifth Amendment does not entitle him [the owner] to be paid in advance of the taking" and the statute affords a plain and adequate remedy. *Hurley* v. *Kincaid, supra.* It follows that as the Government in such a case promises just compensation and provides a complete

remedy, action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred. The action of the agent is "the act of the government." *United States* v. *Lynah, supra.*

This principle has been applied under the statute providing compensation for the use by the Government of patented inventions without license of the owner. Act of June 25, 1910, 36 Stat. 423. In *Crozier* v. *Krupp,* 224 U. S. 290, 305, the Court said: "The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided." In view of later decisions limiting the scope of that statute (*Cramp & Sons* v. *Curtis Turbine Co.,* 246 U. S. 28; *Marconi Wireless Telegraph Co.* v. *Simon,* 246 U. S. 46), Congress amended the statute so as to insure complete compensation by the Government and thus it operated to relieve the contractor from liability of every kind "for the infringement of patents in manufacturing anything for the Government." The provision for the recovery from the United States of "entire" compensation "emphasized the exclusive and comprehensive character of the remedy provided." *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 343.

So, in the case of a taking by the Government of private property for public use such as petitioners allege here, it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking.

The Government contends that in this instance there has been no taking of petitioners' lands within the mean-

ing of the Fifth Amendment. The Circuit Court of Appeals took that view, holding that petitioners had sustained merely "consequential damages from the deflection of waters by reason of structures lawfully constructed in aid of navigation." Petitioners, as we have said, combat this ruling. We do not undertake to review it or the authorities cited by the parties and the Government in that relation, for petitioners' claim, resting upon the theory that there has been a "taking," has been found untenable, and there is no contention, or basis for one, that if the contractor was acting for the Government in prosecuting its work in aid of navigation without the taking of property, the contractor would be subject to the asserted liability.

The judgment of the Circuit Court of Appeals in reversing that of the District Court is affirmed but upon the grounds stated in this opinion.

Affirmed.

CARPENTER *v.* WABASH RAILWAY CO. ET AL.

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

No. 230. Argued January 9, 1940.—Decided January 29, 1940.

1. Applicable legislation enacted while the case was pending for review will be enforced by the appellate court. P. 26.
2. The amendment of § 77 (n) of the Bankruptcy Act, approved Aug. 11, 1939, and providing that ". . . in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation . . . shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad," *held* applicable in this case and within the power of Congress. P. 27.
3. Claims of superior equities may be accorded priority of payment from the earnings of a railroad in an equity receivership, although they arose prior to the receivership. Congress may

determine reasonable classification of claims as entitled to priority because of superior equities in receivership cases in the federal courts. P. 27.

4. In an equity railroad receivership case, where the District Court denied a petition to intervene with a claim of priority of payment for a judgment for personal injuries recovered before the equity proceeding was begun, *held* that, inasmuch as the Act of Aug. 11, 1939, *supra*, is explicit and mandatory and as the District Court has no discretion to act contrary to its terms, there is no occasion to remand to that court in order that it may reconsider the claim under that Act and decide whether the intervention should be allowed at the stage reached by the proceedings; but that the court should be directed to allow the claim in accordance with the statute. P. 29.

103 F. 2d 996, vacated.

CERTIORARI, 308 U. S. 539, to review affirmance of a judgment of the District Court which denied a petition to intervene in a railroad receivership case. The review here was limited to the right of the petitioner to intervene in order to assert priority of a claim based on personal injuries.

Mr. Hyman G. Stein, with whom *Messrs. Mark D. Eagleton* and *Roberts P. Elam* were on the brief, for petitioner.

Mr. Arthur A. Gammell, with whom *Messrs. Charles Nagel* and *Allen C. Orrick* were on the brief, for respondents. *Mr. Thomas W. White* was on a brief for Central Hanover Bank & Trust Co., Trustee, and *Mr. Thomer Hall* was on a brief for Wabash Railway Co. et al., respondents.

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

In February, 1931, petitioner recovered a judgment in the state court of Missouri for $15,000 against the Wabash Railway Company for personal injuries sustained in

the course of his employment by that Company. On appeal, the judgment reduced to $10,000 was affirmed.

In December, 1931, on a complaint in equity brought by a creditor of the Wabash Railway Company in the federal court in Missouri, setting forth its financial difficulties and that its undisputed liabilities exceeded the actual value of its assets, receivers were appointed. Suits brought by mortgage trustees were consolidated with the first suit. A special master was appointed to take proof of claims and it appears that in January, 1936, the master allowed petitioner's claim as an unsecured claim without lien or priority.

In January, 1938, petitioner asked leave to file a petition seeking termination of the receivership on various grounds not important here. Among other things, petitioner then alleged that the master's ruling was erroneous and that the claim was entitled to priority. In denying that petition, the District Court considered this contention and held that the "status and classification of petitioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim" had been "correctly and finally determined in this cause" and that petitioner was "estopped from asserting a claim for preference and priority of payment." The Circuit Court of Appeals affirmed the decree of the District Court and in doing so passed upon that question. The court said that no statute of Missouri and no decisions of its courts had been shown which provided or held that claims for personal injuries by employees were entitled to priority as operating expenses. Considering the contention of petitioner that the Wabash Railway Company was an Indiana corporation operating in that State and in Ohio and that the laws of those States accorded priority to his claim, the court thought that, even if so, "that situation can have no effect upon the operation and effect of this Missouri judgment." The court

also observed that while by subsection (n) of § 77 of the Bankruptcy Act claims for personal injuries to employees of a railroad corporation are entitled to priority, that provision applied expressly to proceedings in bankruptcy and the present case at this stage is an equity receivership. And, apart from that, the court considered petitioner foreclosed from asserting such rights in this suit, approving the ruling of the District Court in that respect. 103 F. 2d 996.

Petition for certiorari was filed on July 26, 1939. Subsequently, by Act of Congress approved August 11, 1939, 53 Stat. 1406, subsection (n) of § 77 of the Bankruptcy Act was amended so as to apply to equity receiverships and thus to read as follows:

"In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

Petitioner then presented a supplemental brief in support of his application for certiorari, directing our attention to this statute, and in view of the importance of the question raised by the amendment, we granted certiorari, limited to the question of the right of the petitioner to intervene in order to assert priority. 308 U. S. 539.

For the present purpose, we may assume, without deciding, that the determination of the court below was

correct upon the record before it and in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in *United States* v. *Schooner Peggy,* 1 Cranch 103, 110:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

See, also, *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115, 120; *Crozier* v. *Krupp,* 224 U. S. 290, 302; *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 506; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21.

We are of the opinion that the amended statute is applicable to this proceeding. The statute applies to "equity receiverships of railroad corporations now . . . pending in any court of the United States." This is such a case. The statute applies to "claims for personal injuries to employees of a railroad corporation." This is such a claim. The statute says that a claim of that sort "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad." This is a direct requirement governing the action of the court in this cause.

We have no doubt that Congress has constitutional power to impose this requirement. We have held that earnings, while a railroad is in possession of the court and

operated by its receivers, "are not necessarily and exclusively the property of the mortgagees" but are subject to the payment of claims which have superior equities as these may be found to exist. *Fosdick* v. *Schall,* 99 U. S. 235; *Hale* v. *Frost,* 99 U. S. 389, 392. Claims having such equities may be accorded priority in payment although they arose prior to the receivership. *Miltenberger* v. *Logansport Railway Co.,* 106 U. S. 286; *Burnham* v. *Bowen,* 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Ry. Co.,* 117 U. S. 434. It is manifest that the reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings. See *Kuehner* v. *Irving Trust Co.,* 299 U. S. 445, 451, 452. In this view, the provision of subsection (n) of § 77 of the Bankruptcy Act, as it stood prior to the amendment of August 11, 1939, was sustained by the Circuit Court of Appeals of the Seventh Circuit in *Wise* v. *Chicago, R. I. & P. Ry. Co.* (90 F. 2d 312) with respect to certain unsecured surety bonds, and by the Circuit Court of Appeals of the Eighth Circuit with respect to claims for injuries to railroad employees. *Central Hanover Bank & Trust Co.* v. *Williams,* 95 F. 2d 210; *Thompson* v. *Siratt,* 95 F. 2d 214.

We see no ground for a different conclusion with respect to the power of Congress to enact the amendment in relation to the distribution of assets in the case of an equity receivership. And the fact that the provision as to the latter is included in a section of the bankruptcy statute does not derogate from its controlling authority as an expression of the will of Congress. The Circuit Court of Appeals of the Eighth Circuit has recently held this provision as to equity receiverships to be applicable and valid in relation to claims for personal injuries sustained by employees of this railroad corporation. *Ameri-*

can Surety Co. v. *Wabash Railway Co.*, 107 F. 2d 685. We think the conclusion is sound.

It is urged in opposition to petitioner's contention that unless and until the District Court upon proper application has passed upon the question as to extending the time for filing petitioner's claim under the amended statute, the question of its priority is not properly before this Court; that petitioner has not asked the District Court to pass upon that question in the light of the amended statute. But when the Act of August 11, 1939, was passed, the case was before this Court upon petition for certiorari, which has been granted, and in order properly to dispose of the case we are bound, as already stated, to consider and apply the amended statute. Then, the argument is pressed that, at least, we should remand the case to the District Court in order that it may determine whether the claim for preference and payment under the amendment should be entertained. It is said that such applications may be considered in the light of existing circumstances, or of the stage which the proceedings have reached, as, for example, in relation to steps which may have been taken in carrying out plans for reorganization.

We find no provision in the statute for the exercise of such a discretion by the District Court where the proceedings to which the statute refers are pending and the claims are within the statute. There is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending. The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms. The statute says that the described claims "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad." Petitioner's claim is within the class described and should be preferred and paid accordingly.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to allow petitioner's claim in accordance with the statutory provision.

Judgment vacated.

BELL TELEPHONE COMPANY OF PENNSYLVANIA *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA.

No. 252. Argued January 10, 1940.—Decided January 29, 1940.

1. When the Supreme Court of Pennsylvania has refused appeal from an order of the Superior Court affirming a rate order of the Pennsylvania Public Utility Commission, an appeal to this Court is from the judgment of the Superior Court. P. 31.
2. In the absence of other constitutional objections, it can not be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. P. 32.
3. Where there is no claim of confiscation, the state authority is competent to establish intrastate telephone rates and in so doing to decide what constitutes an unreasonable discrimination with respect to intrastate traffic. P. 32.

APPEAL from 135 Pa. Super. Ct. 218; 5 A. 2d 410, dismissed for want of a substantial federal question.

Mr. Benjamin O. Frick, with whom *Messrs. William H. Lamb* and *E. Everett Mather, Jr.* were on the brief, for appellant.

Messrs. Claude T. Reno, Attorney General of Pennsylvania, *A. Jere Creskoff,* and *Harry M. Schowalter* were on a brief for appellee.

By leave of Court, *Messrs. John E. Benton* and *Clyde S. Bailey* filed a brief on behalf of the National Association of Railroad & Utilities Commissioners, as *amicus curiae,* urging affirmance.

PER CURIAM.

The Pennsylvania Public Utility Commission, by order of March 15, 1938, required appellant, The Bell Telephone Company of Pennsylvania, to revise its intrastate toll rates for distances exceeding 36 miles so as to conform to rates charged by the American Telephone & Telegraph Company for comparable distances for interstate services. The Commission found, after full hearing, that the rates charged for long distance service in Pennsylvania were higher than the interstate rates for the same facilities for a like or greater distance, and constituted an unreasonable discrimination against intrastate patrons in violation of § 304 of the Public Utility Law of Pennsylvania of May 28, 1937, P. L. 1053. On appeal, the Superior Court of Pennsylvania affirmed the order. 135 Pa. Super. Ct. 218; 5 A. 2d 410. The Supreme Court of Pennsylvania refused appeal. The case comes here on appeal from the judgment of the Superior Court. See *Pennsylvania Railroad Co.* v. *Public Service Commission,* 250 U. S. 566.

Appellant expressly disclaimed below, and also here, raising the question of confiscation. Its contentions are (1) that the Commission's order is wholly without support in the evidence and thus constitutes a denial of due process contrary to the Fourteenth Amendment; (2) that the order based on discrimination only, and prescribing rates not found to be reasonable and depriving appellant of considerable revenue, is arbitrary and hence a denial of due process; and (3) that the order is a regulation of

interstate rates and imposes a direct burden upon interstate commerce.

As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question. *Arrowsmith* v. *Harmoning,* 118 U. S. 194, 196; *Bonner* v. *Gorman,* 213 U. S. 86, 91; *American Railway Express Co.* v. *Kentucky,* 273 U. S. 260, 273.

As to the second contention, where there is no claim of confiscation, the state authority is competent to establish intrastate rates and in so doing to decide what constitutes an unreasonable discrimination with respect to intrastate traffic. See *Stone* v. *Farmers' Loan & Trust Co.,* 116 U. S. 307, 325; *Portland Railway, L. & P. Co.* v. *Railroad Commission,* 229 U. S. 397, 410; *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 304, 305; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 70.

Finally, it appears that the Commission's order related exclusively to intrastate traffic and that there was no attempt to regulate interstate rates.

The appeal is dismissed for want of a substantial federal question.

Dismissed.

Syllabus.

McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* BERWIND-WHITE COAL MINING CO.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 475. Argued January 2, 1940.—Decided January 29, 1940.

1. By contracts of sale made, through a sales office in the City of New York, with public utility and steamship companies in that city, a Pennsylvania corporation agreed to sell and deliver to them large quantities of coal of specified grades (said to possess unique qualities) produced at its Pennsylvania mines. The coal moved by rail to Jersey City and thence by barge to the City of New York and was there delivered to the purchasers' plants or steamships. *Held,* that the imposition of a tax by New York City on the purchasers of the coal, measured by the sales price, and the requirement that the tax be collected by the seller, do not infringe the commerce clause of the Federal Constitution. Pp. 42 *et seq.*

   The tax is 2% of the receipts upon every sale, for consumption, of tangible personal property in the city, "sale" being defined as "any transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." The tax is upon the buyer, the seller being liable only if he fails to collect and pay over. It is conditioned upon transfer of title or possession or an agreement therefor, consummated in the State.
2. Considering the necessity of reconciling the competing constitutional demands, that commerce between the States shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed, the Court finds no adequate ground for saying that this tax is a regulation which, in the absence of Congressional action, the commerce clause forbids. P. 49.
3. The tax as here applied is not open to the objections that it is aimed at or discriminates against interstate commerce, or that it is laid upon the privilege of interstate commerce, or that it is a tax upon interstate transportation or its gross earnings, or upon merchandise in the course of an interstate journey. P. 48.

   The only relation of the tax to interstate commerce arises from the fact that, immediately preceding transfer of possession to the purchaser within the State, the merchandise has been transported

in interstate commerce. In its effect upon interstate commerce it does not differ from taxes on the "use" of property which has just been moved in interstate commerce, or on storage or withdrawal for use, or a property tax on goods after arrival.

4. There is no valid distinction in this relationship between a tax on property—the sum of all the rights and powers incident to ownership—and a tax on the exercise of some of its constituent elements. P. 52.
5. The burden and effect of the tax are no greater when the purchase order or contract precedes than when it follows the interstate shipment. P. 54.
6. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, has been narrowly limited to fixed-sum license taxes imposed only on the business of soliciting orders for the purchase of goods to be shipped interstate. P. 57.
7. The tax being conditioned upon a local activity—delivery of goods within the State upon their purchase for consumption—is not subject to the objection applicable to a tax on gross receipts from interstate commerce, which exacts tribute for the commerce carried on both within and without the State. *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, distinguished. P. 57.
8. The question whether the taxing statute is intended to apply where contracts for purchase made in New York City call for delivery outside of the State is a question for the state court. P. 58.

281 N. Y. 610, 670; 22 N. E. 2d 173, 764, reversed.

CERTIORARI, 308 U. S. 546, to review the affirmance of a judgment sustaining a sales tax assessed by the Comptroller of the City of New York.

Mr. William C. Chanler, with whom *Messrs. Sol Charles Levine, Edmund B. Hennefeld,* and *Jerome R. Hellerstein* were on the brief, for petitioner.

From whatever angle the problem is approached, the burden and effect of the tax are the same, whether imposed upon a sale of goods produced or stored within or without the State.

If we are correct in that analysis, the tax must be sustained, for if its effect on interstate commerce is identical with its effect upon local commerce, it can not violate the commerce clause.

A state taxing statute can be invalidated under the commerce clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States. *Gibbons* v. *Ogden,* 9 Wheat. 1. Whether it does interfere with interstate commerce is a question of fact. *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, 295; *Kansas City Ry. Co.* v. *Kansas,* 240 U. S. 227, 233.

The goods brought in by the "stranger from afar" stand upon exactly the same footing, so far as this tax is concerned, as those of the local merchant. True, he may have been taxed by his home State or even by the various States which he traversed on his way to the market. But, under the rulings of this Court he can have been subjected only to such taxes as were either imposed upon local events in the other States, or apportioned according to the proportion of his business done in such States.

What difference does it make whether the merchant brings the actual goods to the market place with him, or whether he sells from samples? The purchaser will not be influenced by the question of where the warehouse, factory or mine may be located. Even though he may insist upon the product of a particular named factory or mine, it is immaterial whether that factory or mine is located in upstate New York or in Pennsylvania. His sole concern is to get the particular product which he wants, at the lowest price.

On the other hand, if the tax at bar is held void, the effect upon commerce becomes immediately apparent. No local merchant will make any sales at all if similar goods are offered by his competitors from other States; for every purchaser will pass him by to seek the vendor whose goods are free from tax.

Such a result is repugnant to every principle of equality between the citizens of the several States inherent in our federal system.

The present tax is indistinguishable from the "use tax," recently sustained by this Court. *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Gallagher,* 306 U. S. 182.

A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it can not be imposed in more than one State. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Western Live Stock* v. *Bureau,* 303 U. S. 250; *Coverdale* v. *Pipe Line Co.,* 303 U. S. 604; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472.

The tax here is upon the transfer of possession for use or consumption, a local event which can take place in only a single State. It is imposed not upon the seller but upon local buyers, who can not be taxed in any other State. *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169; *Utah Power Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* case, *supra.*

The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation merely because the commerce is being done, since such a tax could also be imposed upon local sellers. *American Mfg. Co.* v. *St. Louis, supra; Gregg Dyeing Co.* v. *Query, supra; Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434.

Practical, social and economic considerations require that the tax at bar be sustained.

It may be noted that no taxes have been imposed by other States in connection with the transactions involved in this case. Cf. *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 172.

The burden of the imaginary taxes suggested by respondent, if they are valid in their own right, would exist independently of the New York tax and would be

equally borne by similar transactions of local origin. If not valid in their own right, a decision sustaining the present tax would not open the door to their imposition.

Mr. John W. Davis, with whom *Messrs. Montgomery B. Angell* and *Marvin Lyons* were on the brief, for respondent.

A tax directed in terms or in its practical operation against interstate commerce as such, thereby discriminating in favor of local commerce, is invalid. *Walling* v. *Michigan,* 116 U. S. 446; *Webber* v. *Virginia,* 103 U. S. 344; *Welton* v. *Missouri,* 91 U. S. 275; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Brown* v. *Maryland,* 12 Wheat. 419.

A tax upon interstate sales, even though laid equally upon local sales, violates the commerce clause if it is measured by the entire gross receipts without apportionment to the activities carried on within the State; for if the tax were upheld, each State involved in the interstate movement could with equal right impose a tax similarly measured upon the same transactions. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434; *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255–6; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Case of the State Freight Tax,* 15 Wall. 232.

On the other hand, a nondiscriminatory local tax laid upon the ownership or the use of property purchased in interstate commerce is valid even though measured by the purchase price of the property, since the events or activities upon which the tax is imposed are purely local, occurring after interstate commerce has come to an end. *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62; *Pacific Telephone & Telegraph Co.* v. *Gallagher,* 306 U. S. 182; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577; *Monamotor Oil*

Co. v. *Johnson,* 292 U. S. 86. Similarly, a local tax laid upon an event or activity, such as manufacturing or storage and withdrawal, completed within the taxing State before the interstate commerce begins, is valid though measured by the sale price of the property. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249; *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U. S. 147.

The protection of the commerce clause extends to transactions in which interstate shipment of goods is contemplated and required. *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Banker Bros. Co.* v. *Pennsylvania,* 294 U. S. 169; *Graybar Electric Co.* v. *Curry,* 308 U. S. 513, affirming, 189 So. 186.

The sales tax here was held invalid as applied to interstate sales by the New York Court of Appeals. *Matter of National Cash Register Co.* v. *Taylor,* 276 N. Y. 208; cert. den. 303 U. S. 656; *Matter of West Publishing Co.* v. *Taylor,* 276 N. Y. 535; cert. den. 303 U. S. 656. The highest court of Michigan has followed the same principles. *Montgomery Ward & Co.* v. *Fry,* 277 Mich. 260; 269 N. W. 166.

In the case at bar direct shipment from seller to buyer was contemplated and required. Each sale was an integrated whole and may not be broken down into a succession of local events in an effort to divorce each component event (here the transfer of title and possession, or the making of the contract of sale) from the interstate transaction and to treat it as something purely local and so outside the scope of the commerce clause.

The measure of the tax is the entire gross receipts from the sales, without apportionment to activities or events occurring within the State or City of New York. If, as we maintain, these sales (including as their integral parts the negotiation and execution of the contracts, the trans-

portation of the goods and the transfer of title) are interstate sales and fully within the protection of the commerce clause, then the final question is whether the measure of the tax is such that without the protection of the commerce clause the transactions would be subject to the risk of multiple tax burdens, the aggregate of which would work a discrimination against such transactions, and might even destroy them entirely. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255.

The transactions here involved constitute a steady stream of bituminous coal flowing daily in large quantities from the natural source of the coal at the seller's mines in Pennsylvania, through New Jersey to the ships and plants of the buyers at New York tidewater. The interstate character of these transactions, carried on in the same manner without variation for over forty years, was required by the practical necessities of the business, from the standpoint of both the buyer and the seller, and was as far from a device for the avoidance of taxes as anything could be.

The present case is one in which the purchaser requires a special brand of coal, in large quantities, the only source of which is the producer's own mines in Pennsylvania. The producer sells directly to the consumers in circumstances which, as a matter of practical necessity both from the standpoint of the producing seller and the purchaser, require the shipment of the coal from the seller's mines directly to the purchaser. Here there is only one transaction, namely, the interstate sale; this is not a case of a dealer who buys outside the State and sells locally. Here there is nothing artificial in the interstate character of the transaction; the interstate character of the transaction is the essence of it. Cf. *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390.

The delivery and transfer of title to the purchaser at the terminus can not be divorced from the transportation and

treated as a purely local activity, for it is physically a part of the transportation of the goods. The deliveries were complete, and title passed to the purchasers only when respondent's barges came alongside the purchasers' plants or steamships; unloading was done by the purchasers.

The unloading is an integral part of interstate commerce and within the protection of the commerce clause. *Puget Sound Stevedoring Co.* v. *State Tax Comm'n,* 302 U. S. 90.

Negotiation and execution of the contract of sale are indispensable incidents of the interstate sale, within the protection of the commerce clause. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 437; *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325; *Davis* v. *Virginia,* 236 U. S. 697; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Brennan* v. *Titusville,* 153 U. S. 289; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489. See *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 311.

The doctrine that interstate transactions must be rid of the danger of multiple burdens imposed by different States would be meaningless if it were limited in its application to multiple taxes upon the same component event and the same person. The due process clause prohibits one State from imposing a tax upon an event which occurs in another State or upon a person resident in another State; the commerce clause is not necessary to protect the transactions in that respect. When there is a danger that local taxes may be imposed by more than one State upon different phases of an integrated interstate transaction, then the fact that such taxes will become cumulative burdens upon the transaction and thus create trade barriers between the States or destroy the commerce entirely makes it absolutely necessary to bring the commerce clause into play.

Whether the tax is payable by the buyer, or the seller, or the carrier, or the stevedore, is unimportant; the eco-

nomic burden upon the transaction is the same, since the amount of the tax will be reflected either in an increased cost of the goods to the buyer or a decreased profit to the seller.

The business in which the purchaser is engaged is immaterial, as this is not a tax upon his business but upon an interstate transaction in which he participates. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 441; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 260–1; *Fisher's Blend Station* v. *State Tax Comm'n,* 297 U. S. 650.

The principle of *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, and *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, is that a tax upon interstate transactions may not be imposed by any State if it is measured by entire gross receipts, but may be imposed only if the measure of the tax is a fair proportion of the gross receipts allocated to the activities carried on within the State.

The use tax cases are clearly distinguishable. The difference is one of substance, a difference in the choice of the thing taxed. *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 177.

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to New York City sales tax in the sum of $176,703, the Appellate Division of the New York Supreme Court held that the taxing statute as applied to respondent does so infringe, 255 App. Div. 961; 8 N. Y. S. 2d 668, on the authority of *Matter of National Cash Register Co.* v.

Taylor, 276 N. Y. 208; 11 N. E. 2d 881, cert. den., 303 U. S. 656; *Matter of Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192; 18 N. E. 2d 28. The New York Court of Appeals affirmed without opinion, 281 N. Y. 610, but its amended remittitur declared that the affirmance was upon the sole ground that the taxing statute as applied violated the commerce clause, *id.* 670. We granted certiorari, 308 U. S. 546, the question presented being of public importance, upon a petition which challenged the decision of the state court as not in accord with applicable decisions of this Court in *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169.

Chapter 815 of the New York Laws of 1933, as amended by Chapter 873 of the New York Laws of 1934, authorized the City of New York, for a limited period within which the present tax was laid, "to adopt and amend local laws imposing in . . . [the] city any tax . . . which the legislature has or would have power and authority to impose." It directed that "a tax imposed hereunder shall have application only within the territorial limits" of the city; and that "this Act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of . . . [the] city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits." It required the revenues from the tax to be used exclusively for unemployment relief.

Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By § 2 the tax was fixed at "two percentum upon the amount of the receipts from

every sale in the city of New York," "sale" being defined by § 1(e) as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." Another clause of § 2[1] commands that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of New York." By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By §§ 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller, who is authorized by § 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him. It is conditioned upon events occurring within the state, either

[1] "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts. *Matter of Atlas Television Co.*, 273 N. Y. 51; 6 N. E. 2d 94; *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113; 9 N. E. 2d 799; *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293; 16 N. E. 2d 288.

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. In many instances the price of the coal was stated to be subject to any increase or decrease of mining costs including wages, and of railroad rates between the mines and the Jersey City terminal to which the coal was to be shipped. All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause.

Section 8 of the Constitution declares that "Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States. . . ." In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 187; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.[2]

[2] Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage. See *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227. License taxes requiring a corporation engaged in interstate commerce to pay a fee of a certain percentage of its capital stock have been rejected because of the danger that each state in which the corporation does business may impose a similar tax, measured by its interstate business in all, *Western Union* v. *Kansas,* 216 U. S. 1; *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* 223 U. S. 280; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and have only been sustained when apportioned to that part of the capital thought to be attributable to an intrastate activity. *National Leather Co.* v. *Massachusetts,* 277 U. S. 413; *International Shoe Co.* v. *Shartel,* 279 U. S. 429; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331. Privilege taxes requiring a percentage of the gross receipts from interstate transportation or from

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce,

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other activities in carrying on the movement of that commerce, which if sustained could be imposed wherever the interstate activity occurs, have been struck down for similar reasons. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & S. Steamship Co.* v. *Pennsylvania,* 122 U. S. 326; *Leloup* v. *Mobile,* 127 U. S. 640; *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, cf. *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434. Fixed-sum license fees, regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce, *McCall* v. *California,* 136 U. S. 104; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Barrett* v. *New York,* 232 U. S. 14; *Texas Transportation & Terminal Co.* v. *New Orleans,* 264 U. S. 150. Taxation of articles in course of their movement in interstate commerce is similarly foreclosed. *Case of State Freight Tax,* 13 Wall. 232; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95. See Henderson, The Position of Foreign Corporations in American Constitutional Law, 117; Powell, Indirect Encroachment on Federal Authority by the Taxing Power of the States, 31 Harv. L. Rev. 321, 572, 721, 932; 32 Harv. L. Rev. 234, 374, 634, 902. Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state. See *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 499; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 185, Note 2; cf. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412.

which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce.[3] Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited.[4] The like taxation of property, shipped interstate, before its movement begins,[5] or after it ends,[6] is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use,[7] or withdrawal for use,[8] by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock* v. *Bureau, supra,* 253, and cases cited.

[3] *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413; *Matson Navigation Co.* v. *State Board,* 297 U. S. 441.

[4] *Adams Express Co.* v. *Ohio,* 165 U. S. 194; *Wells Fargo & Co.* v. *Nevada,* 248 U. S. 165; *St. Louis & E. St. L. Ry. Co.* v. *Missouri,* 256 U. S. 314; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519.

[5] *Coe* v. *Errol,* 116 U. S. 517; *Bacon* v. *Illinois,* 227 U. S. 504; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Minnesota* v. *Blasius,* 290 U. S. 1. Cf. *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284.

[6] *Brown* v. *Houston,* 114 U. S. 622; *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *General Oil Co.* v. *Crain,* 209 U. S. 211.

[7] *Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17; *Chassaniol* v. *Greenwood,* 291 U. S. 584.

[8] *Eastern Air Transport* v. *South Carolina,* 285 U. S. 147; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport,* 289 U. S. 249.

In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. See *Woodruff* v. *Parham,* 8 Wall. 123, 131; *Brown* v. *Houston,* 114 U. S. 622; *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 225, 227; *South Carolina Highway Dept.* v. *Barnwell Bros., supra; Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; cf. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, *et seq.; Board of County Comm'rs of Jackson County* v. *United States,* 308 U. S. 343.

Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme,

cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston, supra; American Steel & Wire Co.* v. *Speed,* 192 U. S. 500.

If, as guides to decision, we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action,

the commerce clause forbids.[9] This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package," effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, *Woodruff* v. *Parham, supra; Hinson* v. *Lott,* 8 Wall. 148; *Banker Bros.* v. *Pennsylvania, supra; Wiloil Corp.* v. *Pennsylvania, supra; Graybar Electric Co.* v. *Curry,* 308 U. S. 513; 238 Ala. 116; 189 So. 186, and when the extra-state seller has shipped them into the taxing state for sale there. *Hinson* v. *Lott, supra; Sonneborn Bros. v. Cureton,* 262 U. S. 506. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. *Howe Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296; *Kehrer* v. *Stewart,* 197 U. S. 60; *Baccus* v. *Louisiana,* 232 U. S. 334; *Wagner* v. *Covington,* 251 U. S. 95.

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Cooney* v. *Mountain States Telephone Co.,* 294 U. S. 384; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax

[9] The imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the commerce clause. See *Monamotor Oil Co.* v. *Johnson, supra; Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*

decisions, extending back for more than seventy years from *Graybar Electric Co.* v. *Curry, supra,* decided this term, to *Woodruff* v. *Parham, supra,* the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. *Woodruff* v. *Parham, supra,* 137, 140; *Hinson* v. *Lott, supra,* 152; *Sonneborn Bros.* v. *Cureton, supra,* 513, 514, 521; *Wiloil Corp.* v. *Pennsylvania, supra,* 174; cf. *Brown* v. *Houston, supra; Henneford* v. *Silas Mason Co., supra,* 583.[10]

[10] In all of these cases, except *Henneford* v. *Silas Mason Co., supra,* the taxed sale was of merchandise in the "original package," although the original package doctrine had been thought to be a "positive and absolute" limitation on the exercise of state power. *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 521. The doctrine originated in *Brown* v. *Maryland,* 12 Wheat. 419, where a discriminatory tax on imports was involved. It was overthrown as to interstate commerce when the court found that it would be unjust to permit the merchant who engaged in interstate commerce to escape a tax which the state had levied on the sale of goods after their interstate shipment, but with equal justice on all merchants. *Woodruff* v. *Parham,* 8 Wall. 123; *Hinson* v. *Lott,* 8 Wall. 148. After its supposed recrudescence in *Leisy* v. *Hardin,* 135 U. S. 100, the opinions of Justice Miller in *Woodruff* v. *Parham, supra,* and of Justice Bradley in *Brown* v. *Houston,* 114 U. S. 622, were explained by Chief Justice (then Justice) White in *American Steel & Wire Co.* v. *Speed, supra,* at 521, as the recognition by the court that the question was not whether "interstate commerce was to be considered as having completely terminated," but

Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. *Brown* v. *Houston, supra; Coe* v. *Errol,* 116 U. S. 517; *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *American Steel & Wire Co.* v. *Speed, supra,* 520; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra,* 267, 268; *Henneford* v. *Silas Mason Co., supra,* 582; cf. *Bromley* v. *McCaughn,*

whether a particular exertion of taxing power by a state "so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." He pointed out that the Court in these cases "conceded that the goods which were taxed had not completely lost their character as interstate commerce since they had not been sold in the original package. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." Cf. Cardozo, J., in *Baldwin* v. *Seelig,* 294 U. S. 511, 526.

"The test of the 'original package,' which came into our law with *Brown* v. *Maryland,* 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. *Woodruff* v. *Parham, supra; Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218, 226. There are purposes for which merchandise, transported from another

280 U. S. 124, 136–138. If coal situated as that in the present case was, before its delivery, subject to a state property tax, see *Brown* v. *Houston, supra; Pittsburgh & Southern Coal Co.* v. *Bates, supra,* transfer of possession of the coal upon a sale is equally taxable, see *Wiloil Corp.* v. *Pennsylvania, supra,* 175, just as was the storage or use of the property in similar circumstances held taxable in *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra; Henneford* v. *Silas Mason Co., supra.*

Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing

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state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Texas Co.* v. *Brown,* 258 U. S. 466, 475; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. . . . 'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.' *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. Cf. *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 491; . . . In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 225 N. Y. 397, 403; 122 N. E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."

state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other.

True, the distinction has the support of a statement *obiter* in *Sonneborn Bros.* v. *Cureton, supra,* 515, and seems to have been tacitly recognized in *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412, and *Banker Bros.*

Co. v. *Pennsylvania, supra,* although in each case a tax on the sale of goods brought into the state for sale was upheld. But we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfilment of the contract. *Wiloil Corporation* v. *Pennsylvania, supra,* 173; *Graybar Electric Co.* v. *Curry, supra.* In the same circumstances the Court has upheld a property tax on the merchandise transported, *American Steel & Wire Co.* v. *Speed, supra; General Oil Co.* v. *Crain, supra;* see *Bacon* v. *Illinois, supra,* 515, 516; upon its use, *Monamotor Oil Co. v. Johnson, supra; Felt & Tarrant Co.* v. *Gallagher, supra,* and upon its storage; cf. *Gregg Dyeing Co.* v. *Query, supra; Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.* Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. *Coe* v. *Errol, supra; Bacon* v. *Illinois, supra; Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into.

It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins* v. *Shelby County*

Taxing District, supra, 498; *Caldwell* v. *North Carolina,* 187 U. S. 622, 632.[11] In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, *Magnano Co.* v. *Hamilton,* 292 U. S. 40, with *Schollenberger* v. *Pennsylvania,* 171 U. S. 1; *Robbins* v. *Shelby County Taxing District, supra; Sprout* v. *South Bend,* 277 U. S. 163. It is enough for present pur-

[11] When the *Robbins* case was decided, sixteen states required the payment of license taxes by some kinds of drummers. For citations of the statutes, see, Lockhart, Sales Tax in Interstate Commerce, 52 Harv. L. Rev. 617, 621. More recently it has been estimated that almost 800 municipal ordinances directed at drummers were adopted for the purpose of embarrassing this competition with local merchants. Hemphill, the House to House Canvasser in Interstate Commerce, 60 Am. L. Rev. 641. The court was cognizant of this trend, see *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 498. Following this decision 19 such taxes were declared invalid. *Carson* v. *Maryland,* 120 U. S. 502; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburgh* v. *Hennick,* 129 U. S. 141; *Brennan* v. *Titusville,* 153 U. S. 289; *Stockard* v. *Morgan,* 185 U. S. 27; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Rogers* v. *Arkansas,* 227 U. S. 401; *Stewart* v. *Michigan,* 232 U. S. 665; *Davis* v. *Virginia,* 236 U. S. 697; *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325. Read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used "as an instrument of discrimination against interstate or foreign commerce," see *DiSanto* v. *Pennsylvania,* 273 U. S. 34, 39.

poses that the rule of *Robbins* v. *Shelby County Taxing District, supra,* has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, compare *Robbins* v. *Shelby County Taxing District, supra,* with *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1; see *Howe Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case.

Finally, it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state. *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford, supra;* cf. *Western Live Stock* v. *Bureau, supra,* 260. It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock* v. *Bureau, supra,* 255; *Gwin, White & Prince* v. *Henneford, supra,* 439.

In *Adams Manufacturing Co.* v. *Storen, supra,* 311, 312, a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out,

pages 310, 311 and 312, that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce, since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods. Compare *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459, with *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292. See *Western Live Stock* v. *Bureau, supra,* 257–259; cf. *Bass, Ratcliff & Gretton* v. *State Tax Commission,* 266 U. S. 271, 280; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387-8; *Pacific Co.* v. *Johnson,* 285 U. S. 480.

The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce.

In two instances already noted, respondent's contracts with Austin, Nichols & Co. and with the New England Steamship Company call for delivery of the coal at points outside of New York, in the one case f. o. b. at the mines in Pennsylvania, and in the other at the pier in Jersey City, New Jersey, and deliveries were made accordingly.

Respondent asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon "any transaction originating and/or consummated outside the territorial limits of the City." See *Matter of Gunther's Sons* v. *McGoldrick,*

279 N. Y. 148; 18 N. E. 2d 12. This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.

Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable.

Reversed.

MR. CHIEF JUSTICE HUGHES, dissenting.

The pressure of mounting outlays has led the States to seek new sources of revenue, and we have gone far in sustaining state power to tax property and transactions subject to their jurisdiction despite incidental or indirect effects upon interstate commerce. But hitherto we have also maintained the principle that the States cannot lay a direct tax upon that commerce. In the instant case, the Court of Appeals of New York has decided unanimously that the tax as here applied is such a tax and goes beyond the limit of state power. 281 N. Y. 610. See, also, *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208; 11 N. E. 2d 881. I think that the judgment should be affirmed.

The case is one of interstate commerce in its most obvious form. The Berwind-White Company is a Pennsylvania corporation engaged in mining coal in that State. It has a sales office in New York. Its coal is mined from two veins known as "B Seam" and "C Prime Seam." The coal is sold to New York consumers for plants and steamships. The contracts of sale call for coal from the seller's mines in Pennsylvania, most of it being of the "B Seam" sort. The contracts are generally for a specified period, orders being given as coal is needed. The pur-

chasers notify the mining company of their requests, whereupon the coal is mined to meet the orders, two days being allowed for mining and five for transportation. The coal is transported from the mines by railroad to a pier in Jersey City where the seller's barges take the coal and bring it alongside the purchasers' plant or steamship where delivery is made, the purchasers doing the unloading. There were two purchasers who took delivery outside New York.

The tax is two per cent of the entire purchase price. The Court of Appeals has described the tax as "two per cent upon receipts from every sale of tangible personal property sold within the City." *Matter of Sears, Roebuck & Co.* v. *McGoldrick,* 279 N. Y. 184, 187; 18 N. E. 2d 25. There can be no doubt as to the incidence of the tax in this instance. The Comptroller of the City has assessed the tax against the seller, the Berwind-White Company. The statute requires the seller, under penalty, to file a return of its sales and to pay the tax. To enforce the payment, the property of the seller may be levied upon under a Comptroller's warrant. It is the tax so laid that the City now demands. In the *Matter of Atlas Television Co.,* 273 N. Y. 51, 57, 58; 6 N. E. 2d 94, the Court of Appeals held that the contention that the seller was required only to collect the tax as the agent of the City could not be sustained and hence it was decided that in case of the seller's insolvency the City was entitled to priority of payment. The court said: "The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own." This statement was repeated in *Matter of Merchants Refrigerating Co.* v. *Taylor,* 275 N. Y. 113, 118; 9 N. E. 2d 799, and while it was there said that the

Atlas case did not hold that the sales tax was "imposed" on the vendor, still the court again ruled that the vendor "is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser." *Id.*, p. 124. If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser. From any point of view, the tax now contested is laid upon interstate sales.

In confiding to Congress the power to regulate interstate commerce, the aim was to provide a free national market,—to pull down and prevent the re-erection of state barriers to the free intercourse between the people of the States. That free intercourse was deemed, and has proved, to be essential to our national economy. It should not be impaired. As we recently said in *Baldwin* v. *Seelig*, 294 U. S. 511, 522: "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'."

Undoubtedly the problem of maintaining the proper balance between state and national power has been a most difficult one. We have recognized the power of the State to meet local exigencies in protecting health and safety and preventing fraud, as, for example, in the case of quarantine, pilotage and inspection laws, although interstate or foreign commerce is involved; that is, until Congress in the exercise of its paramount authority displaces such local requirements.[1] We have also recognized the

[1] See cases collected in *Minnesota Rate Cases*, 230 U. S. 352, 403–411.

power of the State to tax property subject to its jurisdiction although the property has come from another State, when it is found that interstate commerce has ended and that the property has become a part of the common mass within the State. We have sustained the authority of the State to impose occupation taxes when they were deemed to be so measured or apportioned as to relate appropriately to the privilege of transacting an intrastate business. The application of these principles has led to close distinctions.[2] But that fact would seem to present no good reason for sweeping away the protection of interstate commerce where the State lays a direct tax upon that commerce as in this case.

We have said in a long line of decisions, that the State cannot tax interstate commerce either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.[3] The same principle has been declared in recent cases. In *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655, we said: "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which

[2] See *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254–257.

[3] *Minnesota Rate Cases,* 230 U. S. 352, 400; *State Freight Tax Case,* 15 Wall. 232; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489; *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Leloup* v. *Mobile,* 127 U. S. 640; *McCall* v. *California,* 136 U. S. 104; *Brennan* v. *Titusville,* 153 U. S. 289; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Crew-Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 515; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655; *Puget Sound Co.* v. *State Tax Commission,* 302 U. S. 90; *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, 311; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 439.

has long been held to be an unconstitutional burden on interstate commerce." There, a state occupation tax upon the gross receipts of the owner of a radio station from broadcasting programs to listeners within and beyond the State was held invalid. It was said to be enough that the tax was levied on gross receipts from the proprietor's "entire operations, which include interstate commerce." *Id.*, p. 656. In *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, a tax on the gross receipts from the sale of advertising by a trade journal was sustained because in the last analysis the tax, like that upon the privilege of manufacturing within the State, was upon the carrying on of a local business in the preparing, printing and publishing a magazine. *Id.*, p. 258. Soon after, we held in *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307, 311, that a state tax could not be constitutionally applied to the gross receipts derived by an Indiana corporation in interstate commerce through the sale of its products manufactured in Indiana to customers in other States. And, but a year ago, in *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 435, 436, 438, we held invalid a state tax measured by the gross receipts from the business of marketing fruit shipped in interstate commerce from the State of production to places in other States where the sales and deliveries were made and the proceeds collected. If the question now before us is controlled by precedent, the result would seem to be clear.

In relation to the present transaction, it would hardly be contended that New York could tax the transportation of the coal from Pennsylvania to New York or a contract for that transportation. But the movement of the coal from the one State to the other was definitely required by the contracts of sale and these sales must be regarded as an essential part of the commercial inter-

course contemplated by the commerce clause. *Gibbons* v. *Ogden,* 9 Wheat. 1, 188. The tax on the gross receipts of the seller from these sales was manifestly an imposition upon the sales themselves. Whether the tax be small or large, it is plainly to the extent of it a burden upon interstate commerce; and as it is imposed immediately upon the gross receipts from that commerce, it is a direct burden. And, as we have often said, where what is taxed is subject to the jurisdiction of the State, the size of the tax lies within the discretion of the State, and not of this Court. *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40, 45. See, also, *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48.

How then can the laying of such a burden upon interstate commerce be justified? It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal. But how can that event be deemed to be taxable by the State? The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction. It is said that title to the coal passes to the purchaser on delivery. But the place where the title passes has not been regarded as the test of the interstate character of a sale. We have frequently decided that where a commodity is mined or manufactured in one State and in pursuance of contracts of sale is delivered for transportation to purchasers in another State, the mere fact that the sale is f. o. b. cars in the seller's State and the purchaser pays the freight does not make the sale other than interstate.[4] And when, as here, the buyer in an interstate sale takes delivery in his own

[4] *Savage* v. *Jones,* 225 U. S. 501, 520; *Pennsylvania R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 465, 468; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 320; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 463.

State, that delivery in completion of the sale is as properly immune from state taxation as is the transportation to the purchaser's dock or vessel. Moreover, even if it were possible to sustain a state tax by reason of such delivery within the State, there would still be no ground for sustaining a tax upon the whole of the interstate transaction of which the delivery is only a part, as in the case of a tax upon the entire gross receipts.

Petitioner strongly insists that in substance the tax here should be regarded as the same as a *use* tax the validity of which this Court has sustained. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167. But in the *Henneford* case, Mr. Justice Cardozo, in speaking for the Court, was most careful to show that the use tax was upheld because it was imposed after interstate commerce had come to an end. In making this distinction, the Court clearly recognized that a tax imposed directly upon interstate commerce would be beyond the state's power, and the tax was sustained as one upon property which had come to rest within the State and like other property was subject to its jurisdiction. The Court said: "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. . . . The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Id.*, p. 582. And later, in *Puget Sound Co.* v. *State Tax Commission*, 302 U. S. 90, 92, 94, Mr. Justice Cardozo in delivering the opinion of the Court, after showing that the business of the company, so far as it consisted of the loading and discharge of cargoes by longshoremen subject to its own control, was interstate or foreign commerce, concluded that the State was "not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts." He observed that "De-

cisions to that effect are many and controlling." The fact that a use tax, sustained as a tax upon an attribute of property which is subject to the jurisdiction of the State, may have an incidental or indirect effect upon interstate commerce, and thus in the opinion of commentators may tend to discourage interstate transactions, is certainly no excuse for going further and upholding the action of States which, looking with a jealous eye upon the freedom of interstate commerce, attempt to lay a direct tax upon that commerce.

The point was clearly brought out by Mr. Justice Holmes, speaking for the Court in *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 227, when he referred to the necessity of maintaining the distinction between taxation of property within the State, which had long been upheld, and taxation of interstate business, which had been condemned. He observed that "When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce." Accordingly a state tax upon gross receipts which included receipts from interstate business was held invalid.

The ground most strongly asserted for sustaining the tax in the present case is that it is non-discriminatory. Undoubtedly a state tax may be bad because it is so laid as to involve a hostile discrimination against interstate commerce. But does it follow that a State may lay a direct tax upon interstate commerce because it is free to tax its own commerce in a similar way? Thus, a State may tax intrastate transportation, but it may not tax interstate transportation. The State may tax intrastate sales,[5] but can the State tax interstate sales in order to promote its local business? It would seem to be extra-

[5] *Woodruff* v. *Parham,* 8 Wall. 123; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 515, 516; *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 175.

ordinary if a State could escape the restriction against direct impositions upon interstate commerce by first laying exactions upon its own trade and then insisting that in order to make its local policy completely effective it must be allowed to lay similar exactions upon interstate trade. That would apparently afford a simple method for extending state power into what has hitherto been regarded as a forbidden field. Moreover, it may or may not be in the interest of the State to promote domestic trade in a given commodity. The State may seek by its taxing scheme to restrict such trade and the mere equivalency of a tax upon domestic business would not prevent the injurious effect upon interstate transactions. See *A. Magnano Co.* v. *Hamilton, supra.*

So, while recognizing that a tax discriminating against interstate commerce is necessarily invalid, it has long been held by this Court in the interest of the constitutional freedom of that commerce that a direct tax upon it is not saved because the same or a similar tax is laid also upon intrastate commerce. The Court dealt specifically with that question in *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 497, saying: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." See, also, *Cooney* v. *Mountain States Telephone Co.,* 294 U. S. 384, 393, 394. And very recently, in *Adams Manufacturing Co.* v. *Storen, supra,* p. 312, where a tax on the gross receipts derived from interstate sales was held invalid, we said explicitly: "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

We have directed attention to a vice in imposing direct taxes upon interstate commerce in that such taxes might

be imposed with equal right by every State which the commerce touches. This has been observed with respect to taxes upon gross receipts from interstate transactions. In *Western Live Stock* v. *Bureau of Revenue, supra,* p. 256, we said: "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." See, also, *Gwin, White & Prince* v. *Henneford, supra.* But petitioner has insisted that in the present case there is no danger of multiple taxation in that New York puts its tax upon an event which cannot occur in any other State. Of course the delivery of the coal in New York is an event which cannot occur in another State. Just as New York cannot tax the shipment of coal from the mines in Pennsylvania or the transshipment of the coal in New Jersey, so neither Pennsylvania nor New Jersey can tax the delivery in New York. Petitioner's argument misses the point as to the danger of multiple taxation in relation to interstate commerce. The shipment, the transshipment and the delivery of the coal are but parts of a unitary interstate transaction. They are integral parts of an interstate sale. If, because of the delivery in New York, that State can tax the gross receipts from the sale, why cannot Pennsylvania by reason of the shipment of the coal in that State tax the gross receipts there? That would not be difficult, as the seller is a Pennsylvania corporation and, in fact, in many, if not in most, instances, the purchase price of the goods shipped to New York is there received. The point is not that the delivery in New York is an event which cannot be taxed by other States, but that the authority of New York to impose a tax on that delivery cannot properly be recognized without also recognizing the authority of other States to tax

the parts of the interstate transaction which take place within their borders. If New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment. And the latter States, respectively, would be as much entitled to tax the gross receipts from the sales as would New York. Even if it were assumed that the gross receipts from the interstate sales could be apportioned so that each State could tax such portion of the receipts as could be deemed to relate to the part of the transaction within its territory, still this would not help New York here, as there has been no attempt at apportionment. The taxation of the gross receipts in New York, on any appropriate view of what pertains to the interstate sales, would seem clearly to involve the danger of multiple taxation to which we have adverted in recent decisions.

Doubtless much can be said as to the desirability of a comprehensive system of taxation through the coöperation of the Union and the States so as to avoid the differentiations which beset the application of the commerce clause and thus to protect both state and national governments by a just and general scheme for raising revenues. However important such a policy may be, it is not a matter for this Court. We have the duty of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union; and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern of the national economy.

The tax as here applied is open to the same objection as a tariff upon the entrance of the coal into the State of New York, or a state tax upon the privilege of doing an interstate business, and in my view it cannot be sus-

tained without abandoning principles long established and a host of precedents soundly based.

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

McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* FELT & TARRANT MFG. CO.*

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 45. Argued January 2, 1940.—Decided January 29, 1940.

Sales of merchandise for which orders were taken within the City of New York, subject to approval by the vendors in other States, and delivery of which, following such approval, was made to purchasers in that city, either by direct interstate shipment, or by interstate shipment to the vendor's New York City agency and delivery by the agent to the purchaser after inspection, tests, and adjustments,—*held* constitutionally subject to the New York City sales tax, on the authority of *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33. P. 76.

279 N. Y. 678, 280 *id.* 688; 281 *id.* 608, 669, reversed.

CERTIORARI, 307 U. S. 620, to review judgments setting aside tax levies. See also, 254 App. Div. 246; 255 *id.* 961; 4 N. Y. S. 2d 615; 8 N. Y. S. 2d 667.

Mr. William C. Chanler, with whom *Messrs. Sol Charles Levine, Edmund B. Hennefeld,* and *Jerome R. Hellerstein* were on the briefs, for petitioner.

A state tax is void under the commerce clause only if in some way it interferes with the power of Congress to regulate commerce among the several States. That is a question of fact. Each statute must be judged upon its own facts. *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290,

* Together with No. 474, *McGoldrick, Comptroller of the City of New York,* v. *A. H. DuGrenier, Inc., et al.,* also on writ of certiorari, 308 U. S. 545, to the Supreme Court of New York.

295; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 481; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 259. Cf. *Graves v. N. Y. ex rel. O'Keefe,* 306 U. S. 466.

This Court has recently sustained a state tax in a case involving one of these respondents, under circumstances identical in every respect with those here presented. *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62, 64–66. Cf. *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167.

It is apparent that both the California and the New York taxes are upon the consumer, based upon his acquisition of property for consumption. The New York tax is as much a "use" tax as the California tax, and the California tax is as much a "sales" tax as the New York tax. Both are taxes on the consumer, both require collection by the vendor, and both are otherwise identical in substance and procedure.

Upon the facts, this case is indistinguishable from the recent case of *Graybar Electric Co.* v. *Curry,* 308 U. S. 513.

The fact that the orders for the goods in these two cases may have been accepted at the home office of the sellers in other States, does not subject the transactions to the danger of a greater burden than that borne by the local transactions.

The order is made in one State and the acceptance takes place in another. Neither activity has any realistic physical relationship to any locality. The purchaser might send his order by mail directly to Illinois or Massachusetts instead of delivering it to the seller's local agent in New York; or the seller might send the order back to its agent in New York, with its approval, to be accepted in New York by its agent. All of these are common business practices. No part of the making of the contract has any inherently local attributes.

By administrative interpretation and by decision of the state court, mere contracts of sale or the transfer of title without transfer of possession are not taxed. *Matter*

of Gunther's Sons v. *McGoldrick,* 279 N. Y. 148. The tax is imposed only upon local transfers of title and possession to purchasers.

The rule against multiple taxation has application only where the validation of a particular tax would necessarily compel the validation of an identical tax upon the identical counterpart of the identical transaction when imposed by another State. The fact that some different tax might be imposed upon a different taxpayer and upon a different phase of the same transaction by another State, does not subject interstate commerce to the danger of a burden of multiple taxation not borne by local commerce. The reason is that if such tax is valid its burden exists independently of the imposition of the tax at bar, and is a burden which will be equally borne by local commerce.

An apportioned tax on the making of contracts would be identical in effect with an apportioned gross receipts tax. Each State where some part of the activity took place could impose an apportioned tax upon the transaction, and local transactions would bear the same burden as interstate transactions.

Mr. Newton K. Fox for respondent in No. 45.

The sales were not local and are therefore not intended to be taxed by the New York Law. *Matter of National Cash Register Co.* v. *Taylor,* 276 N. Y. 208, 213–214, cert. den., *sub nom. McGoldrick* v. *National Cash Register Co.,* 303 U. S. 656.

Taxation of the sales is prohibited by the commerce clause. Cases *supra.*

See: *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Stewart* v. *Michigan,* 232 U. S. 665; *Dozier* v. *Alabama,* 218 U. S. 124; *Brennan* v. *Titusville,* 153 U. S. 289; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Caldwell* v. *North Carolina,* 187

U. S. 622; *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203.

The commerce clause protects all contracts, negotiations and sales of goods shipped in interstate commerce. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52, 64; *Real Silk Mills* v. *Portland,* 268 U. S. 325, 333; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Stewart* v. *Michigan,* 232 U. S. 665.

Where goods are purchased in one State for transportation to another, the "commerce" includes the purchase quite as much as it does the transportation. *Currin* v. *Wallace,* 306 U. S. 1, 10.

Where commodities are bought for use beyond state lines, the sale is a part of interstate commerce and both the buying and selling are interstate commerce and are not subject to state regulation. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 569; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291; *Lemke* v. *Farmer's Grain Co.,* 258 U. S. 50, 54–55; *Shafer* v. *Farmer's Grain Co.,* 268 U. S. 189, 198–199; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52, 64; *Kidd* v. *Pearson,* 128 U. S. 1, 20; *Sonneborn* v. *Cureton,* 262 U. S. 506; *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 615.

A State can not lay a tax on interstate commerce in any form. *Cooney* v. *Mountain States T. & T. Co.,* 294 U. S. 384, 392; *Helson* v. *Kentucky,* 279 U. S. 245, 249; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 437; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10.

The New York City tax, by erroneous administration, becomes a burden on interstate commerce. It must be borne in mind that the tax in this case was imposed upon

and collected from a foreign manufacturer and not from a local purchaser in New York City. The amount of tax payable by the manufacturer to the City depends entirely upon the amount of interstate business done, namely, 2% on all gross sales made in New York City. It is therefore a direct charge on interstate business and a burden on such commerce. *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 311–312; *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218.

There is also the risk of multiple taxation. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 439–440.

When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, and to incur substantial additional costs and expenses, the City is attempting to exercise its sovereign powers beyond its jurisdiction. That it can not do without burdening interstate commerce.

Invalidation of this tax would not cause discrimination against New York manufacturers and merchants.

The orders for the machines were directed to the manufacturer in Illinois, and there accepted or rejected. A machine by serial number was appropriated to each order in Illinois and shipped to the purchaser in New York. The purchaser was billed from Chicago and remitted directly to Chicago. Thus the elements of local sales are lacking.

Testing of the machines before delivery to customers was in furtherance of interstate commerce. *Dozier* v. *Alabama,* 218 U. S. 124; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Caldwell* v. *North Carolina,* 187 U. S. 622; and *Crenshaw* v. *Arkansas,* 227 U. S. 289.

Mr. John H. Jackson, with whom *Mr. Haig H. Davidian* was on the brief, for respondents in No. 474.

The tax is violative of the commerce clause because it imposes a direct and immediate burden upon transactions constituting interstate commerce. Where the subject matter of the tax is some integral part of the process of interstate commerce, the state tax is bad without regard to discrimination. Upon this point the decisions of this Court have been consistent from *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, to the recent decisions in *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, and *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434. *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, 328; *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, 568 (dissent); *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 267; *Coverdale v. Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Spalding & Bros.* v. *Edwards,* 262 U. S. 66, 69; *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384, 393.

The tax is violative of the commerce clause because it exposes the manufacturer to the danger of double taxation on the same transaction. The contract of sale was made in Massachusetts and it is beyond the possibility of dispute that it would be taxable there.

As an economic fact the tax is discriminatory as against residents of other States and tends substantially to discourage the sale of vending machines in interstate commerce.

If a State were free to tax the sale of goods in interstate commerce, provided only that it taxed its own identical goods at the same rate, the power could easily be used to exclude goods of a type not locally manufactured in order to give an advantage to local manufacturers of goods which could be substituted for them.

Felt & Tarrant Mfg. Co. v. *Gallagher,* 306 U. S. 62, is not analogous.

MR. JUSTICE STONE delivered the opinion of the Court.

These are companion cases to *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33. As in that case the question for decision is whether the New York City tax laid upon sales of goods for consumption as applied to respondents infringes the commerce clause of the Federal Constitution.

Upon certiorari to review determinations by the Comptroller of the City of New York, that each of the respondents was subject to the tax, the Appellate Division of the New York Supreme Court set the levy aside. *Matter of Felt & Tarrant Mfg. Co.* v. *Taylor,* 254 App. Div. 246; 4 N. Y. S. 2d 615; *Matter of A. H. DuGrenier, Inc.,* 255 App. Div. 961; 8 N. Y. S. 2d 667. The New York Court of Appeals, without opinion, affirmed the judgment in each case, 279 N. Y. 678; 18 N. E. 2d 311; 281 N. Y. 608; 22 N. E. 2d 172, but by its amended remittitur declared that the affirmance was upon the sole ground that the tax infringed the commerce clause of the Federal Constitution, 280 N. Y. 688; 281 N. Y. 669. The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Company* case and need not be repeated here.

Respondent, Felt & Tarrant Mfg. Co., an Illinois corporation, with its factory and principal place of business in that state, manufactures and sells adding and calculating machines known as comptometers. It maintains an office in New York City, from which its agents solicit in the city orders for comptometers, which are forwarded to the Illinois office for approval. If accepted each order is filled by allocating to it the purchased comptometer designated by its serial number. It is invoiced to the purchaser and shipped to the New York City office of respondent's sales agent, where it is inspected, tested and adjusted, and then delivered to the purchaser. Remit-

tances are made by the purchaser direct to the Illinois office. The course of business in soliciting and filling orders so far as now material is that of the same company, described in *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62.

Respondent, DuGrenier, Inc., a Massachusetts corporation with its factory and principal office in that state, is engaged in the manufacture and sale of automatic vending machines. They are sold throughout the United States by an exclusive sales agent, the respondent Stewart & McGuire, Inc., having an office in New York City. The sales in the city, when not of machines located at the New York office, are effected through solicitations of orders by the agent, which takes from the prospective purchaser a signed order or a contract for a conditional sale on partial payment, which is forwarded by the agent to the Massachusetts office. If accepted there the order is filled by shipping the purchased machine by rail or truck direct to the purchaser in New York City, who pays the freight.

In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case. For reasons stated at length in the opinion in that case the tax so laid does not infringe the commerce clause. The judgments will be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Reversed.

The Chief Justice, Mr. Justice McReynolds, and Mr. Justice Roberts dissent from the judgments in these cases upon the grounds stated in the dissenting opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 59.

MORGAN, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 210. Argued January 4, 5, 1940.—Decided January 29, 1940.

A decedent in Wisconsin exercised a power of appointment over property held in trusts created under the law of that State. The trusts empowered the trustees to withhold from any beneficiary, property which in their judgment would be dissipated or be improvidently handled, and gave directions for disposition, in such event, of what was withheld. *Held:*

1. That the power exercised was a "general power of appointment" within § 302 (f) of the Revenue Act of 1926, whatever its characterization—whether "general" or "special"—by the Wisconsin law. P. 80.

State law creates legal interests and rights. The federal Revenue Acts designate what interests or rights, so created, shall be taxed.

2. The term "general power of appointment," as used in the federal Revenue Acts, applies where the donee may appoint to any person he chooses, including his own estate or his creditors. P. 81.

This accords with common acceptation and with administrative construction approved by Congressional re-enactments of the provisions construed.

3. Assuming that the trustees could withhold the appointed property from an appointee, the power must still be held general. The important consideration is the breadth of the control in the donee of the power, whatever the nature or extent of the appointee's interest. P. 82.

103 F. 2d 636, affirmed.

CERTIORARI, 308 U. S. 534, to review an affirmance by the court below of a decision of the Board of Tax Appeals (36 B. T. A. 588), approving a deficiency assessment.

Mr. Brode B. Davis, with whom *Mr. Arthur M. Kracke* was on the brief, for petitioner.

Mr. Richard H. Demuth, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

We took this case because it raises an important question as to the construction of the Revenue Act of 1926, § 302 (f), amended by the Revenue Act of 1932, § 803 (b).[1]

The question is to what extent and in what sense the law of the decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of the statute.

The petitioner is the executor of Elizabeth S. Morgan who was the donee of two powers of appointment over property held in two trusts created by her father by will and by deed. The persons named are, or were, at death, citizens of Wisconsin. It is unnecessary to recite the terms of the trusts. Suffice it to say that under each, property remaining in the trustees' hands for Elizabeth S. Morgan was given at her death, to the appointee or appointees named in her will, with gifts over in case she failed to appoint. Under both trusts, if in the judgment

[1] 44 Stat. 9, 71, 47 Stat. 169, 279; 26 U. S. C. § 411.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . . except in case of a bona fide sale for an adequate and full consideration in money or money's worth; . . ."

of the trustees, property going to any beneficiary would be dissipated for any reason, or improvidently handled, the trustees were to withhold any part of such property; with directions for disposition, in such event, of what was withheld. The decedent appointed in favor of her husband.

The Commissioner ruled that the value of the appointed property should be included in the gross estate and determined a tax deficiency. The Board of Tax Appeals approved his action.[2] The Circuit Court of Appeals affirmed the Board's decision.[3]

Although, under the law of Wisconsin, the decedent could have appointed anyone to receive the trust property, including her estate and her creditors, the petitioner urges that, by statute and decision, Wisconsin has defined as special a power such as she held.[4] The respondent urges that this is not a correct interpretation of the state law. We find it unnecessary to resolve the issue, since we hold that the powers are general within the intent of the Revenue Act, notwithstanding they may be classified as special by the law of Wisconsin.

State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the

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[2] 36 B. T. A. 588.

[3] 103 F. 2d 636.

[4] "Sec. 232.05: *General Power.* A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

"232.06. *Special Power.* A power is special: (1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

See *Will of Zweifel,* 194 Wis. 428; 216 N. W. 840; *Cawker* v. *Dreutzer,* 197 Wis. 98; 221 N. W. 401.

meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.[5]

None of the revenue acts has defined the phrase "general power of appointment." The distinction usually made between a general and a special power lies in the circumstance that, under the former, the donee may appoint to anyone, including his own estate or his creditors, thus having as full dominion over the property as if he owned it; whereas, under the latter, the donee may appoint only amongst a restricted or designated class of persons other than himself.[6]

We should expect, therefore, that Congress had this distinction in mind when it used the adjective "general." The legislative history indicates that this is so.[7] The Treasury regulations have provided that a power is within the purview of the statute, if the donee may appoint to any person.[8]

With these regulations outstanding Congress has several times reënacted § 302 (f), and has thus adopted the administrative construction. That construction is in accord with the opinion of several federal courts.[9]

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[5] *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308, 310; *Palmer* v. *Bender,* 287 U. S. 551, 555; *Thomas* v. *Perkins,* 301 U. S. 655, 659; *Heiner* v. *Mellon,* 304 U. S. 271, 279; *Lyeth* v. *Hoey,* 305 U. S. 188, 193.

[6] Sugden on Powers (8th Ed.), p. 394; Farwell on Powers (2d Ed.), p. 7.

[7] House Rep. No. 767, 65th Cong., 2nd Sess., pp. 21–22.

[8] Regulations 63 (1922 Ed.), Art. 25; Regulations 68 (1924 Ed.), Art. 24; Regulations 70 (1926 and 1929 Eds.), Art. 24; Regulations 80 (1934 Ed.), Art. 24.

[9] *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. 2d 600; *Stratton* v. *United States,* 50 F. 2d 48; *Old Colony Trust Co.* v. *Commissioner,* 73 F. 2d 970; *Johnstone* v. *Commissioner,* 76 F. 2d 55.

The petitioner claims, however, that the decision below is in conflict with two by other Circuit Courts of Appeal.[10] The contention is based on certain phrases found in the opinions. We think it clear that, in both cases, the courts examined the local law to ascertain whether a power would be construed by the state court to permit the appointment of the donee, his estate or his creditors, and on the basis of the answer to that question determined whether the power was general within the intent of the federal act.

As the decedent in this case could have appointed to her estate, or to her creditors, we hold that she had a general power within the meaning of § 302 (f). This conclusion is not inconsistent with authorities on which the petitioner relies,[11] holding that, in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income sought to be reached by the statute.

The petitioner's second position is that, inasmuch as the trustees had an unfettered discretion to withhold principal or income from any beneficiary, they could exercise their discretion as respects any appointee of the decedent. This fact, they say, renders the power a special one. Assuming that the trustees could withhold the appointed property from an appointee, we think the power must still be held general. The quantum or character of the interest appointed, or the conditions imposed by the terms of the trust upon its enjoyment, do not render the powers in question special within the purport

[10] *Whitlock-Rose* v. *McCaughn*, 21 F. 2d 164; *Leser* v. *Burnet*, 46 F. 2d 756.

[11] *Poe* v. *Seaborn*, 282 U. S. 101; *Freuler* v. *Helvering*, 291 U. S. 35; *Blair* v. *Commissioner*, 300 U. S. 5; *Lang* v. *Commissioner*, 304 U. S. 264.

of § 302 (f). The important consideration is the breadth of the control the decedent could exercise over the property, whatever the nature or extent of the appointee's interest.

The judgment is

Affirmed.

MADDEN, EXECUTOR, *v.* KENTUCKY, BY REEVES, COMMISSIONER OF REVENUE.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 92. Argued December 14, 1939.—Decided January 29, 1940.

1. A statute by which a State taxed deposits in banks outside of the State at fifty cents per hundred dollars and deposits in banks within the State at ten cents per hundred dollars, *held* consistent with the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment. P. 86.
2. In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. P. 87.
3. The treatment accorded the two kinds of deposits in this case may have resulted from the differences in the difficulties and expenses of tax collection. P. 89.
4. The right to carry out an incident to a trade, business or calling, such as the deposit of money in banks, is not a privilege of national citizenship, protected by the privileges and immunities clause of the Fourteenth Amendment. *Hague* v. *C. I. O.*, 307 U. S. 496, expounded; *Colgate* v. *Harvey*, 296 U. S. 404, in part overruled. P. 90.

277 Ky. 343; 126 S. W. 2d 463, affirmed.

APPEAL from a judgment sustaining the assessment and taxation of a decedent's bank deposits, in a suit against the executor of his will in the name of the Commonwealth of Kentucky.

Mr. Leo T. Wolford, with whom *Mr. Wm. Marshall Bullitt* was on the brief, for appellant.

The privileges and immunities of a citizen of the United States are abridged by this statute. *Colgate* v. *Harvey,* 296 U. S. 404; *Pendleton* v. *Commonwealth,* 110 Va. 229; *Campbell* v. *Watson,* 62 N. J. Eq. 396; cf. *Thompson* v. *Riggs,* 5 Wall. 663, 680.

If convenience in collection justifies a more burdensome tax upon business done or property held outside the State, then the State may (1) require its citizens to pay a higher rate of income tax on business done outside the State; (2) require higher inheritance taxes to be paid on property owned by its citizens and situated outside the State; (3) require the payment of taxes at a higher rate on bonds of corporations organized under the laws of other States, on the ground that it could require reports to be made by corporations organized under its own laws; and (4) require higher taxes to be paid upon indebtedness owing to its citizens by non-resident debtors. The vice of such discrimination is that it penalizes the citizen for engaging in business in other States.

State legislation which undertakes to localize modern banking, destroys its national function and utility.

The tax can not (consistently with the Fourteenth Amendment) be justified on the ground that the legislature may have hoped thereby to increase the business of local banks or to stimulate business within the State. *Colgate* case, *supra.*

In *Great A. & P. Tea Co.* v. *Kentucky Tax Comm'r,* 278 Ky. 367, the Kentucky court said that the Act must be considered strictly as a revenue measure.

The statute denies to the executor the equal protection of the laws and deprives him of his liberty and property without due process of law.

For purposes of taxation, the situs of the deposits in banks outside the State is at the residence of the tax-

payer, as in the case of deposits in banks within the State. Thus, there is no difference in the location of the taxable property.

The only difference between the two is the residence of the debtor banks. The situation is the same as if Kentucky required its citizens to pay taxes of a grossly discriminatory rate upon all obligations owing to its citizens by non-resident debtors.

The difference (five fold) is so great as to manifest an intention absolutely to prohibit all deposits in banks outside the State. Cf. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415.

But if the discrimination can be justified upon the ground of convenience, then there is no constitutional inhibition against a state tax at a discriminatory or prohibitive rate on deposits in national banks within that State, or a tax on deposits in city banks at a higher rate than that applied to deposits in country banks, or a tax at a lower rate on intangible property owned by domestic corporations than on that owned by foreign corporations. See *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Royster Guano Co.* v. *Virginia, supra; Allgeyer* v. *Louisiana,* 165 U. S. 578.

Mr. Samuel M. Rosenstein, with whom *Messrs. Clifford E. Smith, Joseph J. Leary,* and *Harry D. Kremer* were on the brief, for appellee.

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal [1] brought here under § 237 (a) of the Judicial Code from a judgment of the Court of Appeals of Kentucky sustaining the validity of a statute of that state against an attack by the appellant on the ground of its being repugnant to the due process, equal protec-

[1] See Act of January 31, 1928, 45 Stat. 54.

tion, and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States.

The issue is whether a state statute which imposes on its citizens an annual ad valorem tax on their deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposes on their deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars is obnoxious to the stated clauses of the Fourteenth Amendment. The relevant provisions of the Kentucky statutes for the period in question appear in the note below.[2]

The opinion of the Court of Appeals of Kentucky in this case construes the exception in § 4019, limiting the tax on bank deposits to one-tenth of one per cent, as applicable only to depositors in local financial institutions organized under the laws of Kentucky or under the na-

[2] Carroll's Kentucky Statutes, Baldwin's Revision, 1930, § 4019a–10, p. 2052 (Ky. Acts, 1924, Ch. 116, § 3) provides:

"All property subject to taxation for state purposes shall be subject also to taxation in the county, city, school, or other taxing district in which same has a taxable situs, except the following classes of property which shall be subject to taxation for state purposes only:

. . . . . .

"(4) Money in hand, notes, bonds, accounts and other credits, whether secured by mortgage, pledge, or otherwise, or unsecured, and shares of stock; . . ."

Carroll's Kentucky Statutes, Baldwin's Revision 1930, § 4019, p. 2048 (Ky. Acts 1924, Ch. 116, § 1, p. 402, as reënacted in Ky. Acts 1926, Ch. 164, p. 739), provides as follows:

"An annual ad valorem tax for state purposes of thirty cents (30¢) upon each one hundred dollars ($100.00) of value of all real estate directed to be assessed for taxation, as provided by law and fifty cents (50¢) upon each one hundred dollars ($100.00) of value of all other property directed to be assessed for taxation, as provided by law, shall be paid by the owner, person or corporation assessed; except a tax at the rate of one-tenth of one percent (0.1%) [i. e., 10

tional banking laws. This interpretation of the state laws is of course accepted by us.[3]

John E. Madden died in November, 1929, a citizen and resident of Fayette County, Kentucky. On several prior assessment dates, July 1 in Kentucky, Mr. Madden had on deposit in New York banks a considerable amount of funds. These deposits had not been reported for the purposes of taxation in Kentucky. That state brought suit against Mr. Madden's executor to have these deposits assessed as omitted property and to recover an ad valorem tax of 50 cents per hundred dollars as of July 1 of each year, together with interest and penalties. The executor used as one defense against this claim the contention that a tax on deposits in banks outside of Kentucky at a higher rate than the tax upon bank deposits within Kentucky would abridge decedent's privileges and immunities as a citizen of the United States, deprive him of his property right and the liberty to keep money on deposit outside of Kentucky without due process of law, and deny to him equal protection of the law in violation of the Fourteenth Amendment. The Court of Appeals passed upon the constitutional questions submitted because of the difference in taxing rate between Kentucky deposits and out-of-state deposits. It approved the classification as permissible under the due process and equal protection clauses and refused to accept the argument that its interpretation of the statutes violated the privileges and immunities clause.

I. *Classification.*—The broad discretion as to classification possessed by a legislature in the field of taxation

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cents upon each $100] shall be paid annually upon the amount of deposits in any bank, trust company, or combined bank and trust company, organized under the laws of this State, or in any national bank of this State as now provided by law; . . ."

[3] *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Storaasli* v. *Minnesota,* 283 U. S. 57, 62.

has long been recognized.[4] This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation," [5] and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.[6] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.[7] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[8]

Paying proper regard to the scope of a legislature's powers in these matters, the insubstantiality of appellant's claim that he has been denied equal protection or due process of law by the classification is at once apparent. When these statutes were adopted in 1917 during a general revision of Kentucky's tax laws, the chief problem facing the legislature was the formulation of an

[4] *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, and cases there cited.

[5] *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237.

[6] *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329.

[7] See the opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42, 46–47.

[8] *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79.

enforceable system of intangible taxation.[9] By placing the duty of collection on local banks, the tax on local deposits was made almost self-enforcing. The tax on deposits outside the state, however, still resembled that on investments in *Watson* v. *State Comptroller*, the collection of which was said to depend "either upon [the taxpayer's] will or upon the vigilance and discretion of the local assessors." [10] Here as in the *Watson* case the classification may have been "founded in 'the purposes

[9] Because of a prohibition in the Kentucky Constitution of 1891 against classification in taxation, the state and its political subdivisions taxed intangibles at the same rate as other property. This resulted in a total tax of about $2.65 per hundred dollars on intangibles, a tax which in the case of bank deposits almost equaled the interest on deposits. The high rate led to widespread evasion of the tax by concealment of intangibles; with bank deposits this took the form of withdrawals for deposits outside the state. The unequal burden which this evasion placed on other forms of property led to agitation for reform as early as 1908. Two special tax commissions reported on the need for a constitutional amendment and a general tax reform. After an amendment permitting classification was adopted in 1916, a third committee made specific proposals for revision, and most of the recommendations were adopted at a special legislative session in 1917. See the message of Governor Stanley to the General Assembly of 1917, Kentucky Senate Journal of 1917, p. 13. In general the revision took the form of a drastic lowering of the rates on intangibles. An even lower rate was placed on bank deposits and almost complete collection assured by placing the duty of collection on the banks.

The studies which led to the general revision of 1917 may be found in Report of the Kentucky Tax Commission for 1909; Report of the Special Tax Commission of Kentucky for 1912–14; Report of the Kentucky Tax Commission for 1916. A careful examination of the workings of the revised system has been made by Dr. Simeon E. Leland. The Taxation of Intangibles in Kentucky, Bulletin of the Bureau of Business Research, College of Commerce, University of Kentucky, vol. 1, no. 1 (1929).

[10] 254 U. S. 122, 124.

and policy of taxation.'" The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection.[11]

II. *Privileges and Immunities.*—The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States[12] forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the State. The privilege or immunity which appellant contends is abridged is the right to carry on business beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in *Hague* v. *C. I. O.*[13] The appellant purports to accept as sound the position stated as the view of all the justices concurring in the *Hague* decision. This position is that the privileges and immunities clause protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or

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[11] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511.

[12] The 14th Amendment, § 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

[13] 307 U. S. 496. The prior cases are collected in Note 2 of the dissenting opinion in *Colgate* v. *Harvey* (296 U. S. 404, 445) and Note 1 of Mr. Justice Stone's opinion in the *Hague* case (307 U. S. 496, 520).

natural rights inherent in state citizenship.[14] This Court declared in the *Slaughter-House Cases*[15] that the Fourteenth Amendment as well as the Thirteenth and Fifteenth were adopted to protect the negroes in their freedom. This almost contemporaneous interpretation extended the benefits of the privileges and immunities clause to other rights which are inherent in national citizenship but denied it to those which spring from

[14] Mr. Justice Roberts' opinion, at p. 512: "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."

Mr. Justice Stone's opinion, at p. 519–21: "Hence there is no occasion . . . to revive the contention, rejected by this Court in the *Slaughter-House Cases*, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow out of the relationship of United States citizens to the national government.

"That such is the limited application of the privileges and immunities clause seems now to be conceded by my brethren."

[15] 16 Wall. 36, at 71–72:

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .

". . . And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be

state citizenship.[16] In applying this constitutional principle this Court has determined that the right to operate an independent slaughter-house,[17] to sell wine on terms of equality with grape growers[18] and to operate businesses free of state regulation[19] were not privileges and immunities protected by the Fourteenth Amendment. And a state inheritance tax statute which limited exemptions to charitable corporations within the state was held not to infringe any right protected by the privileges and immunities clause.[20] The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected.[21] We think it quite clear that the right to carry out an incident to a trade, business or calling[22] such as the deposit

understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

[16] *Idem*, 78–79.

[17] *Slaughter-House Cases, supra.*

[18] *Cox* v. *Texas*, 202 U. S. 446; cf. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Crowley* v. *Christensen*, 137 U. S. 86; *Giozza* v. *Tiernan*, 148 U. S. 657; *Crane* v. *Campbell*, 245 U. S. 304.

[19] *Holden* v. *Hardy*, 169 U. S. 366; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406; *Rosenthal* v. *New York*, 226 U. S. 260; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530.

[20] *Board of Education* v. *Illinois*, 203 U. S. 553; cf. *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314.

[21] They have been described as "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." *In re Kemmler*, 136 U. S. 436, 448. See also *Slaughter-House Cases, supra*, at 79–80; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Williams* v. *Fears*, 179 U. S. 270, 274; *Twining* v. *New Jersey*, 211 U. S. 78, 97.

[22] Cf. *Twining* v. *New Jersey*, 211 U. S. 78, 94.

of money in banks is not a privilege of national citizenship.

In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[23] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

Appellant relies upon *Colgate* v. *Harvey* [24] as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, *Colgate* v. *Harvey* must be and is overruled.

Affirmed.

MR. CHIEF JUSTICE HUGHES concurs in the result upon the ground, as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis.

MR. JUSTICE ROBERTS:

I think that the judgment should be reversed. Four years ago in *Colgate* v. *Harvey,* 296 U. S. 404, this court held that the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to the views expressed in

[23] *Twining* v. *New Jersey, supra,* 92.

[24] 296 U. S. 404.

the opinion of the court in that case, and think it should be followed in this.

MR. JUSTICE MCREYNOLDS joins in this opinion.

JAMES STEWART & CO. *v.* SADRAKULA, ADMINISTRATRIX.

APPEAL FROM THE SUPREME COURT OF NEW YORK.

No. 251. Argued January 12, 1940.—Decided January 29, 1940.

1. Under Jud. Code § 237 (a) and the Act of January 31, 1928, this Court has jurisdiction over an appeal from a judgment of a state court of last resort, sustaining a recovery of damages for accidental death, which necessarily upholds a state statute under which the damages were awarded against the contention that, in its application to the *locus in quo*—a post-office site—it violated the provisions of the Constitution as to authority of the United States in such places. P. 97.
2. Upon the transfer from a State to the United States of exclusive jurisdiction of a site for a postoffice, the state laws in effect at the time continue in force as federal laws, save as they may be inappropriate to the changed situation or inconsistent with the national purpose, and save as Congress may have provided otherwise. P. 99.
3. Section 241 (4) of the New York Labor Law, which requires the planking-over of floor beams on which iron or steel work is being erected in building construction, remained in force as to the post-office site in New York City after the acquisition of the site by the United States, and was applicable to a contractor engaged in constructing the post office under a contract with the Government. P. 100.

   The fact that the Labor Law contains numerous administrative and other provisions inapplicable in the changed situation does not render § 241 (4) inapplicable.
4. The possibility that the safety requirement of boarding-over the steel tiers may slightly increase the cost of construction to the Government does not make the requirement inapplicable to the postoffice site. P. 104.

5. While the government building contract is in a sense the means by which the United States secures the construction of its post office, the contractor in carrying out the contract has not the immunity of a government instrumentality. P. 105.
6. A contract for the building of a post-office in the City of New York provided that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines," the sentence quoted being in a section of the contract relating to "licenses, permits, etc." *Held* that the intention was to relieve the contractor from provisions of the city building code relating to types of material, fire hazards and the like. P. 105.

254 App. Div. 892; 5 N. Y. S. 2d 260, affirmed.

APPEAL from a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, 280 N. Y. 651, 730; 20 N. E. 2d 1015; 21 N. E. 2d 217, and sustaining an award of damages for accidental death.

Mr. Clarence E. Mellen for appellant.

Upon transfer of jurisdiction, certain state laws, termed municipal, governing the personal and property rights of the inhabitants in their relations with one another, remain effective, unless they conflict with the political character, institutions or Constitution of the United States. That rule, borrowed from international law, results from the necessity of avoiding the alternative that, until action by Congress, there would be no law there for the protection of such rights. *American Ins. Co.* v. *Canter,* 1 Pet. 511, 541; *Chicago, R. I. & P. R. Co.* v. *McGlinn,* 114 U. S. 542, 546, 547; *Western Union Telegraph Co.* v. *Chiles,* 214 U. S. 274, 277, 278; *Vilas* v. *Manila,* 220 U. S. 345; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439; Halleck, International Law, c. 34, § 14; 38 Col. L. Rev., p. 133.

Implicit in such rule is the assumption that laws which thus continue in force have been adopted by the new government as its own. Such adoption should be only presumed of laws which are clearly within the purpose of

the rule and which, when applied, will not interfere with the activities of the Government.

The New York Labor Law is a comprehensive code of regulations designed to promote the health, welfare and personal safety of those engaged in many different occupations. Article 10, of which § 241 is part, relates to the construction of buildings. In New York City, its enforcement is entrusted to the superintendent of buildings, a municipal official, who is also charged with the enforcement of the city Building Code, a municipal ordinance which has the force of a statute. That official is empowered to enter upon all premises in which such work is being conducted, require compliance with both the Labor Law and the Building Code, and, if he deem it necessary, stop all work meanwhile.

Those provisions for its executive administration and enforcement clearly distinguish this statute from those which have been classified as "municipal." *Crook* v. *Old Point Comfort,* 54 F. 2d 669; *McCarthy* v. *Packard Co.,* 105 App. Div. 436; 182 N. Y. 555.

Exercise of such executive authority in federal territory would clearly infringe upon federal sovereignty. *Arizona* v. *California,* 283 U. S. 423, 451, 452; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 388, 389; *Oklahoma City* v. *Sanders,* 94 F. 2d 323, 326; *United States* v. *San Francisco Bridge Co.,* 88 F. 891, 894, 895.

May it then be reasonably inferred that the Federal Government intended that this statute should be even partially effective in its territory? Cf. *Murray* v. *Joe Gerrick & Co.,* 291 U. S. 315, 319.

Even though its executive provisions be deemed eliminated, the mandates of the statute, as applied herein, are not "municipal," but "political."

The only building to which the statute could apply was to be constructed pursuant to a contract with the

United States. Complete control of its construction was vested in the Secretary of the Treasury by Congress. 40 U. S. C. §§ 285, 341, 342.

The statute is such that it could not be effective in its entirety in federal territory, and its mandates are such that their adoption therein should not be presumed. Such presumption would seem contrary to the intent of Congress, as evidenced by its failure to enact several bills for the adoption of state safety laws in all federal projects.

Appellant's contract was an instrumentality of the Federal Government and, as applied herein, the state statute conflicted and interfered with that contract and its performance.

Mr. Leo Fixler for appellee.

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from a final judgment of the Supreme Court of New York awarding damages for accidental death. As a statute of the state necessarily was sustained against a contention that its application to these circumstances violated the provisions of the Constitution as to the exclusive authority of the United States over a post-office site purchased with the consent of New York,[1] this Court has jurisdiction under § 237 (a) of the Judicial Code and the Act of January 31, 1928.

The issue of law involved is whether an existing provision of a state statute requiring the protection of places of work in the manner specified in the statute[2] remains

[1] Constitution, Art. I, § 8, Cl. 17:

"The Congress shall have Power . . . To exercise exclusive Legislation . . . over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . ."

[2] New York Labor Law § 241 reads as follows:

"Sec. 241. Protection of Employees on Building Construction or

effective as a statute of the United States applicable to the particular parcel after the federal government acquires exclusive jurisdiction of a parcel of realty on which work is being done.

The decedent, an employee of a rigging company, a sub-contractor engaged in the construction of the New York post office, fell from an unplanked tier of steel beams down a bay and was killed. In an action of tort against the general contractor, his administratrix narrowed the scope of the charges of negligence until violation of the quoted sub-section of the Labor Law only was alleged. The trial court found that the proximate cause of the accident was the negligent failure to plank the beams as required by the statute. The Appellate Division affirmed [3] on the ground that the Labor Law provision continued effective over the post-office site after the transfer of sovereignty, and the Court of Appeals by an order of remittitur, 21 N.E. 2d 217, also affirmed on the same ground with a statement that in its affirmance it necessarily passed upon the validity and applicability of § 241 (4) of the Labor Law under Article I, § 8 of the Constitution. 280 N.Y. 651, 730; 20 N.E. 2d 1015; 21 N.E. 2d 217.

The language of the Court of Appeals and the record show indubitably that a determinative federal question

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Demolition Work. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:

. . . . . .

"4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications."

[3] 254 App. Div. 892.

was decided.[4] The conclusion as to the continued vitality of existing state statutory regulations in the protection of workmen in ceded federal areas makes it substantial.[5] The motions to dismiss or affirm the appeal are denied.[6]

If the quoted provision of the Labor Law is operative even though exclusive jurisdiction had already vested in the United States, it is unnecessary to determine whether exclusive jurisdiction had actually passed to the United States. The state courts assumed that federal sovereignty was complete through consent by the state and we make the same assumption. Does the acceptance of sovereignty by the United States have the effect of displacing this sub-section of the New York Labor Law? We think it did not. The sub-section continues as a part of the laws of the federal territory.

It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments.[7] The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory trans-

[4] *Honeyman* v. *Hanan*, 300 U. S. 14, 19; *Whitfield* v. *Ohio*, 297 U. S. 431, 435; cf. *McGoldrick* v. *Gulf Oil Corp.*, *ante*, p. 2.

[5] *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716.

[6] Cf. *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 197; *Murray* v. *Gerrick & Co.*, 291 U. S. 315-16.

[7] *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 529–30; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 147–49.

ferred.[8] This assures that no area however small will be left without a developed legal system for private rights. In *Chicago, R. I. & P. R. Co.* v. *McGlinn, supra,* a Kansas statute relating to recovery against a railroad for the injury to livestock on its right of way existed at the time of the cession to the United States of exclusive jurisdiction over Fort Leavenworth Military Reservation. It was held that the statute was carried over into the law covering the Reservation. Conversely, in *Arlington Hotel Co.* v. *Fant, supra,* an Arkansas statute relieving innkeepers, passed after cession of Hot Springs Reservation, was held unavailing as a defense to a Reservation innkeeper's common-law liability in accordance with Arkansas law before the cession. Such holdings assimilate the laws of the federal territory, where the Congress has not legislated otherwise, to the laws of the surrounding state.

The Congress has recognized in certain instances the desirability of such similarity between the municipal laws of the state and those of the federal parcel. Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current. Consequently as defects become apparent legislation is enacted covering certain phases. This occurred as to rights of action for accidental death by negligence or wrongful act.[9] After this statute was held inapplicable to claims under state workmen's compensation acts further legis-

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[8] *Murray* v. *Gerrick & Co.,* 291 U. S. 315, 318; *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, 445, 446, 454; *Chicago, R. I. & P. R. Co.* v. *McGlinn,* 114 U. S. 542, 546–47.

[9] 45 Stat. 54, 16 U. S. C. § 457 (1928); see *Murray* v. *Gerrick & Co.,* 291 U. S. 315, 319; H. R. Rep. No. 369, 70th Cong., 1st Sess.; 69 Cong. Rec. 1486.

lation undertook to extend the provisions of those acts to the places under federal sovereignty.[10] With growing frequency the federal government leaves largely unimpaired the civil and criminal authority of the state over national reservations or properties.[11] While exclusive federal jurisdiction attaches, state courts are without power to punish for crimes committed on federal property.[12] This has made necessary the legislation which gives federal courts jurisdiction over these crimes.[13] The tendency toward a uniformity between the federal and surrounding state territory has caused a series of congressional acts adopting the state criminal laws.[14] Through these concessions our dual system of government works coöperatively towards harmonious adjustment.

It is urged that the provisions of the Labor Law contain numerous administrative and other provisions which cannot be relevant to the federal territory. The Labor Law does have a number of articles.[15] Obviously much

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[10] 49 Stat. 1938, 40 U. S. C. § 290 (1936); see H. R. Rep. No. 2656, 74th Cong., 2d Sess.

[11] 30 Stat. 668 (1898) (jurisdiction receded to states over places purchased for branches of soldiers' homes); 49 Stat. 668, 16 U. S. C. § 465 (1935) (waiver of federal jurisdiction for historic sites); 49 Stat. 2025, 40 U. S. C. § 421 (1936) (same for slum-clearance and low-cost housing projects); 49 Stat. 2035 (1936) (same for resettlement and rural rehabilitation); 50 Stat. 888, § 13 (b), 42 U. S. C. § 1413 (b) (1937) (same for acquisitions of U. S. Housing Authority).

[12] *Bowen* v. *Johnston,* 306 U. S. 19, 29; *United States* v. *Unzeuta,* 281 U. S. 138; *United States* v. *Cornell,* Fed. Cas. No. 14,867; *Commonwealth* v. *Clary,* 8 Mass. 72; *People* v. *Hillman,* 246 N. Y. 467; 159 N. E. 400.

[13] Judicial Code §§ 24, 27.

[14] R. S. 5391; 30 Stat. 717 (1898); 35 Stat. 1145 (1909); 48 Stat. 152 (1933); 49 Stat. 394 (1935).

[15] Article (1) Short title; definitions; (2) The department of labor; (3) Review by industrial board and court; (4) Employment of chil-

of their language is directed at situations that cannot arise in the territory. With the domestication in the excised area of the entire applicable body of state municipal law much of the state law must necessarily be inappropriate. Some sections authorize quasi-judicial proceedings or administrative action and may well have no validity in the federal area. It is not a question here of the exercise of state administrative authority in federal territory.[16] We do not agree, however, that because the

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dren and females; (5) Hours of labor; (6) Payment of wages; (7) General provisions; (8) Public work; (8-a) Grade crossing elimination work; hours and wages; (9) Immigrant lodging houses; (10) Building construction, demolition and repair work; (11) Factories; (12) Bakeries and manufacture of food products; (13) Manufacture in tenement houses; (14) Mercantile and other establishments; (15) Mines and tunnels; quarries; compressed air; (16) Explosives; (17) Public safety; (18) Miscellaneous provisions; laws repealed; when to take effect.

[16] We do not therefore need to consider the authority of the state administrative officers. New York Labor Law § 242. Cf. *Oklahoma City* v. *Sanders*, 94 F. 2d 323 (C. C. A. 10). In this case an injunction was obtained in the federal district court enjoining a city and certain of its officers from enforcing ordinances relating to licenses, bonds and inspections by daily arrests on account of violations of these ordinances by a contractor doing construction work on a low-cost housing project. The decree was affirmed by the circuit court of appeals after consideration of the Act of June 29, 1936 which reads that "The acquisition by the United States of any real property . . . in connection with any low-cost housing . . . project . . . shall not be held to deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property . . ." Except as affected by the act just quoted in part, the area was federal territory through a consent statute. The court, speaking of the recession, said:

"It was not the purpose that the state should have the right to exert police power there through application of municipal ordinances relating to licenses, bonds, and inspections in the course of construction

Labor Law is not applicable as a whole, it follows that none of its sections are. We have held in *Collins* v. *Yosemite Park Company*[17] that the sections of a California statute which levied excises on sales of liquor in Yosemite National Park were enforceable in the Park, while sections of the same statute providing regulation of the Park liquor traffic through licenses were unenforceable.[18]

But the authority of state laws or their administration may not interfere with the carrying out of a national purpose.[19] Where enforcement of the state law would

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thereon of buildings by the United States government, no such legislative intent or desire being indicated by the act."

It also quoted with approval an excerpt from an opinion of the Director, Legal Division, Federal Emergency Administration of Public Works:

"I am, therefore, of the opinion that the state or local government may not supervise the work of a contractor performing work on property owned by the United States of a contract with the United States."

[17] 304 U. S. 518, 532.

[18] We do not overlook the language in *Murray* v. *Gerrick & Co.*, 291 U. S. 315, 319, called to our attention by appellant:

"If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the incongruous situation that this law is in part effective and in part ineffective within the area under the jurisdiction of the federal government."

That quotation had reference to a contention that the dependents of an employee, killed on federal territory within a state, might claim compensation as beneficiaries under a state compensation act. The compensation fund, collected and administered by state officers, was not effective in federal territory. Cf. *Atkinson* v. *Tax Commission*, 303 U. S. 20, 25. As the fund was not augmented by assessments against the federal contractor, the Court held the procedural provisions of the state compensation act did not apply.

[19] *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21; *Atkinson* v. *Tax Commission*, 303 U. S. 20, 23; *James* v. *Dravo Contracting Co.*, 302

handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.[20]

May it be said that the continued application of § 241 (4) of the Labor Law [21] will interfere with the construction of the building upon this site? This is like other squares in the city. There are, of course, differentiations because of its ownership, but ownership as such has nothing to do with the safety requirements. It is true that it is possible that the safety requirement of boarding over the steel tiers may slightly increase the cost of construction to the government, but such an increase is not significant in the determination of the applicability of the New York statute. In answer to the argument that a similar increased cost from taxation would "make it difficult or impossible" for the government to obtain the service it needs, we said in *James* v. *Dravo Contracting Co.*[22] that such a contention "ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action." Such a safety requirement is akin to the safety provisions of Maryland law which in *Baltimore & Annapolis Railroad Co.* v. *Lichtenberg* [23] were held applicable to trucks of an independent contractor transporting government employees under a contract with the United States.

U. S. 134, 147, 161; *United States* v. *Unzeuta,* 281 U. S. 138, 142; *Ohio* v. *Thomas,* 173 U. S. 276, 283; *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 531; *Kohl* v. *United States,* 91 U. S. 367, 371–72; *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 591.

[20] *Anderson* v. *Chicago & N. W. Ry. Co.,* 102 Neb. 578, as commented upon in *United States* v. *Unzeuta,* 281 U. S. 138, 144.

[21] Note 2, *supra.*

[22] 302 U. S. 134, 160, 161.

[23] 176 Md. 383; 4 A. 2d 734, appeal dismissed for want of a substantial federal question, *sub nom. United States* v. *Baltimore & Annapolis R. Co.,* 308 U. S. 525.

Finally the point is made that a provision requiring boarding over of open steel tiers is a direct interference with the government. This is said to follow from the fact that the contract for the construction of the post office is an instrumentality of the federal government. As a corollary to this argument, error is assigned to the refusal of the trial court to admit in evidence a clause of the contract between the United States and the appellant reading, "State or Municipal Building Regulations do not apply to work inside the Government's lot lines." [24] While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity.[25] Nor do we think there was error in refusing to admit the clause of the contract as to building regulations. The quoted sentence is in a section of the contract relating to "licenses, permits, etc." We are of the opinion that it is intended to relieve the contractor from provisions as to types of material, fire hazards and the like, which are covered by the New York City Building Code.

Such a safety regulation as § 241 (4) of the New York Labor Law provides is effective in the federal area, until such time as the Congress may otherwise provide.[26]

Affirmed.

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[24] The entire section reads:

"22. Permits. The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

[25] *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 152; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 385.

[26] 38 Opinions of the Attorney General, 341, 348, 349, is not to the contrary. It declared that § 2 of a Nevada consent statute was

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HALLOCK ET AL., TRUSTEES.*

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

No. 110. Argued December 13, 1939.—Decided January 29, 1940.

1. Decedent in his lifetime created a trust providing that the income from the trust property should be paid to his wife during her lifetime, that upon his death, if she survived him, the corpus of the trust should go to her or to other named beneficiaries, but that upon her death, if he survived, the property should revert to himself. The wife survived. *Held,* that the value of the remainder interest

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clearly incompatible with exclusive jurisdiction. The section read:

"In the erection of such federal building by contract or otherwise, or in case of any subsequent reconstruction or alteration of such building, it is hereby reserved and provided that the state labor laws, the state labor safety laws and the state health laws, shall apply to all persons, firms, associations or corporations having contracts for such construction or reconstruction as to all provisions contained therein, and no contractor having any such contract shall have the right to claim to be or to declare himself to be a government instrumentality."

The opinion however further stated:

"It is to be observed that there is nothing in what has been said concerning Sections 2 and 3 of the Nevada Statute inconsistent with the doctrine that state laws regulating private civil rights (as distinguished from state criminal laws . . .) continue in force, as laws of the United States, on lands ceded by consent of the state to the United States, if not in conflict with the laws of the new sovereignty or the purpose for which the land is acquired, until superseded by laws enacted by the United States. . . . The difficulty with Sections 2 and 3 of the Nevada Act is that they do not merely occupy a vacant field until filled by the Federal Government—they withhold and reserve jurisdiction, present and future, over the matters specified in them, howsoever inconsistent with existing or future laws of the United States. That precludes exclusive jurisdiction from vesting in the United States."

*Together with No. 111, *Helvering, Commissioner of Internal Revenue,* v. *Hallock, Executrix,* and No. 112, *Helvering, Commissioner*

should be included in the decedent's gross estate under § 302 (c) of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after the grantor's death. *Klein* v. *United States*, 283 U. S. 231, followed; *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, *ibid.* 48, overruled. Pp. 110–115.

2. The testator by trust deed established a fund in trust to pay the income to his wife during her life and to himself should he survive her; and upon the death of the survivor, if the trust had not then been modified or revoked, to pay the principal to the settlor's estate. There was a further provision giving to the settlor and his wife jointly during their lives, and to either of them after the death of the other, power to modify, alter or revoke the trust, which was not exercised. The wife survived the husband. *Held*, that the value of the interest which the husband had reserved to himself was properly included in his gross estate under § 302 (c) of the Revenue Act of 1926. P. 116.
3. Section 302 (c) deals not with property technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment. P. 110.
4. The statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are closely akin to testamentary dispositions. P. 112.
5. The governing principle in the application of this legislation (§ 302 (c), *supra*) is the intention of Congress to include in the gross estate *inter vivos* gifts which may be resorted to as a substitute for a will, in making dispositions of property operative at death. To effectuate this purpose practical considerations applicable to

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of Internal Revenue, v. *Squire, Superintendent of Banks of Ohio*, also on writs of certiorari, 308 U. S. 532, to the Circuit Court of Appeals for the Sixth Circuit,—argued December 13, 1939; No. 183, *Rothensies, Collector of Internal Revenue*, v. *Huston, Administrator*, on writ of certiorari, 308 U. S. 538, to the Circuit Court of Appeals for the Third Circuit,—argued December 13, 14, 1939; and No. 399, *Bryant et al., Executors*, v. *Helvering, Commissioner of Internal Revenue*, on writ of certiorari, 308 U. S. 543, to the Circuit Court of Appeals for the Second Circuit,—argued December 14, 1939.

taxation prevail, and not the niceties of the art of conveyancing. P. 114.

6. *Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. P. 118.
7. In the case at bar the decisions now relied upon by the taxpayers but overruled by the court, were made after the making of the settlements, and after the death of the settlors, out of which the taxes accrued. P. 119.
8. The right and duty of this Court to re-examine an untenable or undesirable construction placed by itself upon a revenue provision are not impeded by the failure of Congress and of the Treasury to take steps to avoid such construction through legislative amendment. P. 119.

102 F. 2d 1; 103 *id.* 834, reversed.

104 F. 2d 1011, affirmed.

CERTIORARI, 308 U. S. 532, to review decisions of the Circuit Courts of Appeals involving federal estate taxes.

In Nos. 110–112, the judgments below affirmed decisions of the Board of Tax Appeals, 34 B. T. A. 575, which had set aside deficiency assessments.

In No. 183, the taxpayer had paid under protest and had recovered by suit, from the Collector, a judgment which was affirmed by the Circuit Court of Appeals.

In No. 399, the judgment of the Circuit Court of Appeals affirmed a decision of the Board of Tax Appeals, 36 B. T. A. 669, affirming a deficiency assessment.

Mr. Arnold Raum, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* were on the brief, for petitioners in Nos. 110–112, 183, and respondent in No. 399.

Messrs. Walker H. Nye and *Ashley M. Van Duzer,* with whom *Mr. W. B. Stewart* was on the brief, for respondents in Nos. 110 and 111. *Mr. W. H. Annat* submitted for respondent in No. 112. *Mr. William R. Spofford,* with

whom *Mr. George V. Strong* was on the brief (*Mr. Harold D. Saylor* entered an appearance), for respondent in No. 183.

Messrs. J. Gilmer Körner, Jr. and *David S. Day* for petitioners in No. 399.

By leave of Court, *Mr. Blatchford Downing,* as *amicus curiae,* filed a brief in Nos. 111 and 183, urging affirmance.

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases raise the same question, namely, whether transfers of property *inter vivos* made in trust, the particulars of which will later appear, are within the provisions of § 302 (c) of the Revenue Act of 1926.[1] They

[1] c. 27, 44 Stat. 9, as amended by § 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

were heard in succession and may be decided together. In each case the Commissioner of Internal Revenue included the trust property in the decedent's gross estate. In Nos. 110, 111 and 112 his determination was reversed by the Board of Tax Appeals, 34 B. T. A. 575, and the Board was affirmed by the Circuit Court of Appeals for the Sixth Circuit, 102 F. 2d 1. In No. 183, the taxpayer paid under protest, successfully sued for recovery in the District Court for the Eastern District of Pennsylvania, and his judgment was sustained by the Circuit Court of Appeals for the Third Circuit, 103 F. 2d 834. In No. 399, the Commissioner was in part successful before the Board of Tax Appeals, 36 B. T. A. 669, and the Circuit Court of Appeals for the Second Circuit affirmed the Board, 104 F. 2d 1011.

Neither here nor below does the issue turn on the unglossed text of § 302 (c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, *Klein* v. *United States,* 283 U. S. 231, *Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39, and *Becker* v. *St. Louis Trust Co., Ibid.* 48. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is "intended to take effect in possession or enjoyment at or after his death" by reason of that which he retained, is the crux of the problem. We must put to one side questions that arise under sections of the estate tax law other than § 302 (c)—sections, that is, relating to transfers taking place at death. Section 302 (c) deals with

property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos.* But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.

We turn to the cases which beget the difficulties. In *Klein* v. *United States, supra,* decided in 1931, the decedent during his lifetime had conveyed land to his wife for her lifetime, "and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, . . ." The instrument further provided, "Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, . . ." The taxpayer contended that the decedent had reserved a mere "possibility of reverter" and that such a "remote interest," [2] extinguishable upon the grantor's death, was not sufficient to bring the conveyance within the reckoning of the taxable estate. This Court held otherwise. It rejected formal distinctions pertaining to the law of real property as irrelevant criteria in this field of taxation. "Nothing is to be gained," it was said, "by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." *Klein* v. *United States, supra,* at 234.

[2] Petitioner's Brief, *Klein* v. *United States,* pp. 11–13.

The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law. Surely the *Klein* decision was not intended to encourage the belief that a change merely in the phrasing of a grant would serve to create a judicially cognizable difference in the scope of § 302 (c), although the grantor retained in himself the possibility of regaining the transferred property upon precisely the same contingency. The teaching of the *Klein* case is exactly the opposite.[3]

In 1935 the *St. Louis Trust* cases came here. A rational application of the principles of the *Klein* case to the situations now before us calls for scrutiny of the particulars in the *St. Louis* cases in order to extract their relation to the doctrine of the earlier decision.

In *Helvering* v. *St. Louis Trust Co., supra,* the decedent had conveyed property in trust, the income of which was to be paid to his daughter during her life, but at her death "If the grantor still be living, the Trustee shall forthwith . . . transfer, pay, and deliver the entire estate to the grantor, to be his absolutely." But "If the grantor be then not living" then the income was to be

[3] Some indication of the influence of *Klein* v. *United States* upon the lower courts may be found in *Sargent* v. *White,* 50 F. 2d 410 and *Union Trust Co.* v. *United States,* 54 F. 2d 152, cert. denied, 286 U. S. 547. Cf. *Commissioner* v. *Schwarz,* 74 F. 2d 712.

devoted to the settlor's wife if she were living, and upon the death of both daughter and wife, if he were not living, the trust property was to go to the daughter's children, or if she left none, to the grantor's next of kin.

In *Becker* v. *St. Louis Trust Co., supra,* the decedent had declared himself trustee of property with the income to be accumulated or, at his discretion, to be paid over to his daughter during her life. The instrument further provided that "If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or . . . if I should die before her death, then this property shall thereupon become hers immediately and absolutely . . ."

On the authority of the *Klein* case the Commissioner had included in the taxable estates the gifts to which, in the *St. Louis Trust* cases, the grantor's death had given definitive measure. If the wife had predeceased the settlor in the *Klein* case, he would have been repossessed of his property. His wife's interests were freed from this contingency by the husband's prior death, and because of the effect of his death this Court swept the gift into the gross estate. So in *Helvering* v. *St. Louis Trust Co.,* the grantor would have become repossessed of the granted corpus had his daughter predeceased him. But he predeceased her and by that event her interest ripened to full dominion. The same analysis applies to the *Becker* case. In all three situations the result and effect were the same. The event which gave to the beneficiaries a dominion over property which they did not have prior to the donor's death was an act of nature outside the grantor's "control, design or volition." 296 U. S. 39, 43. But it was no more and no less "fortuitous," so far as the grantor's "control, design or volition" was concerned, in the *St.*

Louis Trust cases than it was in the *Klein* case. In none of the three cases did the dominion over property which finally came to the beneficiary fall by virtue of the grantor's will, except by his provision that his own death should establish such final and complete dominion. And yet a mere difference in phrasing the circumstance by which identic interests in property were brought into being—varying forms of words in the creation of the same worldly interests—was found sufficient to exclude the *St. Louis Trust* settlements from the application of the *Klein* doctrine.

Four members of the Court saw no difference. They relied on the governing principle of § 302 (c) that Congress meant to include in the gross estate *inter vivos* gifts "which may be resorted to, as a substitute for a will, in making dispositions of property operative at death." 296 U. S. at 46. To effectuate this purpose practical considerations applicable to taxation and not the "niceties of the art of conveyancing" were their touchstone. "Having in mind," said the dissenters, "the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form . . . However we label the device it is but a means by which the gift is rendered incomplete until the donor's death." 296 U. S. at 47. For the majority in the *St. Louis Trust Company* cases, these practicalities had less significance than the formal categories of property law. The grantor's death, the majority said, in *Helvering* v. *St. Louis Trust Co.*, "simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." 296 U. S.

39, 43. This was precisely the mode of argument which had been rejected in *Klein* v. *United States, supra.*

We are now asked to accept all three decisions as constituting a coherent body of law, and to apply their distinctions to the trusts before us.

In Nos. 110, 111 and 112 (*Helvering* v. *Hallock*) the decedent in 1919 created a trust under a separation agreement, giving the income to his wife for life, with this further provision:

"If and when Anne Lamson Hallock shall die then and in such event . . . the within trust shall terminate and said Trustee shall . . . pay Party of the First Part if he then be living any accrued income then remaining in said trust fund and shall . . . deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part share and share alike . . ."

When the settlor died in 1932, his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals held that the trust instrument had conveyed the "whole interest" of the decedent, subject only to a "condition subsequent," which left him nothing "except a mere possibility of reverter." *Commissioner* v. *Hallock,* 102 F. 2d 1, 3–4.

In No. 183 (*Rothensies* v. *Huston*) the decedent by an ante-nuptial agreement in 1925 conveyed property in trust, the income to be paid to his prospective wife during her life, subject to the following disposition of the principal:

"In trust if the said Rae Spektor shall die during the lifetime of said George F. Uber to pay over the principal and all accumulated income thereof unto the said George F. Uber in fee, free and clear of any trust.

"In trust if the said Rae Spektor after the marriage shall survive the said George F. Uber to pay over the principal and all accumulated income unto the said Rae Spektor—then Rae Uber—in fee, free and clear of any trust."

Mrs. Uber outlived her husband, who died in 1934. The Circuit Court of Appeals deemed *Becker* v. *St. Louis Trust Co.* controlling against the inclusion of the trust corpus in the gross estate.

Finally, in No. 399 (*Bryant* v. *Helvering*), the testator provided for the payment of trust income to his wife during her life and upon her death to the settlor himself if he should survive her. The instrument, which was executed in 1917, continued:

"Upon the death of the survivor of said Ida Bryant and the party of the first part, unless this trust shall have been modified or revoked as hereinafter provided, to convey, transfer, and pay over the principal of the trust fund to the executors or administrators of the estate of the party hereto of the first part."

There was a further provision giving to the decedent and his wife jointly during their lives, and to either of them after the death of the other, power to modify, alter or revoke the instrument. The wife survived the husband, who died in 1930. The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a "vested reversionary interest" which the Board held the grantor had reserved to himself. On appeal by the tax-payer, the Circuit Court of Appeals sustained this determination.

The terms of these grants differ in detail from one another, as all three differ from the formulas of conveyance used in the Klein and St. Louis Trust cases. It therefore becomes important to inquire whether the technical forms in which interests contingent upon death

are cast should control our decision. If so, it becomes necessary to determine whether the differing terms of conveyance now in issue approximate more closely those used in the Klein case and are therefore governed by it, or have a greater verbal resemblance to those that saved the tax in the St. Louis Trust cases. Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. Attempts by the Board of Tax Appeals and the Circuit Courts of Appeal to administer § 302 (c) by reference to these distinctions abundantly illustrate the inevitable confusion.[4] One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the "niceties of the art of conveyancing." In connection with the ascertainment of its own death duties, the Supreme Court of Errors of Connecticut defined the nature of the interest which the decedent in that case retained after his *inter vivos* transfer. *Bryant* v. *Hackett,* 118 Conn. 233; 171 A. 664. And yet the nature of that interest under Connecticut law and the scope of the Connecticut court's adjudication of that interest were made the subject of lively controversy be-

[4] See, for example, the attempts by the Board of Tax Appeals to deal with the peculiarities of New York law in the field of vested and contingent remainders. Elizabeth B. Wallace, 27 B. T. A. 902; Louis C. Raegner, Jr., 29 B. T. A. 1243. In both of these cases limitations which would probably have been "contingent" at "common law" were held to be "vested" under the New York statutory rule. Cf. *Commissioner* v. *Schwarz,* 74 F. 2d 712; Flora M. Bonney, 29 B. T. A. 45.

fore us. The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes.[5] These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin.[6] Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of § 302 (c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle. Does, then, the doctrine of *stare decisis* compel us to accept the distinc-

[5] Cf. *Lyeth* v. *Hoey,* 305 U. S. 188, 194. See Paul, The Effect on Federal Taxation of Local Rules of Property in Selected Studies in Federal Taxation (2nd Series), pp. 23–28; Developments in the Law—Taxation, 47 Harv. L. Rev. 1209, 1238–41; Note, 49 Harv. L. Rev. 462.

[6] See, for example, Fearne, Contingent Remainders, (4th Am. Ed.), pp. 3–241; Gray, Rule Against Perpetuities (2nd Ed.), pp. 99–118; VII Holdsworth, History of English Law, 81 *et seq.;* 1 Simes, Future Interests, §§ 64–96. The confusion apt to be engendered by judicial forays into this field is well illustrated by the use of the term "possibility of reverter" by the majority in *Helvering* v. *St. Louis Union Trust Co.* "A possibility of reverter" is traditionally defined as the interest remaining in a grantor who has conveyed a determinable fee. The definition has not been thought to have any relation to the reversionary interest of a grantor who has transferred either a vested or contingent remainder in fee. See Gray, Rule Against Perpetuities (2nd Ed.), §§ 13–51.

tions made in the *St. Louis Trust* cases as starting points for still finer distinctions spun out of the tenuosities of surviving feudal law? We think not. We think the *Klein* case rejected the presupposition of such distinctions for the fiscal judgments which § 302 (c) demands.

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.

Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of

non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.[7] Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through

[7] We are not unmindful of amendments to the estate tax law to which other decisions of this Court gave rise. Thus by § 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Congress undid the construction which this Court gave the estate tax law in another connection by a decision rendered on the same day as were the *St. Louis Trust* cases. Cf. *White* v. *Poor*, 296 U. S. 98. This case arose under § 302 (d) and not § 302 (c). But, in any event, the fact of Congressional action in dealing with one problem while silent on the different problems created by the *St. Louis Trust* cases, does not imply controlling acceptance by Congress of those cases.

By the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, Congress displaced the construction which this Court put upon § 302 (c) in those cases wherein it was held that the reservation by a decedent of a life estate in property conveyed *inter vivos*, did not constitute a sufficient postponement of the remainder to bring it into the grantor's gross estate. *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784. The speculative arguments that may be drawn from *ad hoc* legislation affecting one set of decisions and the want of such legislation to modify another set of decisions dealing with a somewhat different though cognate problem are well illustrated by this remedial amendment. For it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the *St. Louis Trust* cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded *May* v. *Heiner* doctrine.

Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present

acquiescence, tantamount to an estoppel barring reëxamination by this Court of distinctions which it had drawn.[8] Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

This Court, unlike the House of Lords,[9] has from the beginning rejected a doctrine of disability at self-correction. Whatever else may be said about want of Congressional action to modify by legislation the result in the *St. Louis Trust* cases, it will hardly be urged that the rea-

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problem. Since the decisions in the *St. Louis Trust* cases, Congress has not re-enacted § 302 (c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302 (c). Nor has Congress, under any rational canons of legislative significance, by its compilation of internal revenue laws to form the Internal Revenue Code of 1939, 53 Stat. 1, impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal revenue legislation.

Here, unlike the situation in such cases as *National Lead Co.* v. *United States,* 252 U. S. 140, 146–47, and *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302–3, we have no conjunction of long, uniform administrative construction and subsequent re-enactments of an ambiguous statute to give ground for implying legislative adoption of such construction. See Preface, Internal Revenue Code, 53 Stat. III; compare *Smiley* v. *Holm,* 285 U. S. 355, 373, and *Warner* v. *Goltra,* 293 U. S. 155, 161.

[8] Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the *St. Louis Trust* cases, it cannot be deemed to have bound itself by this change. Art. 17, Reg. 80 (1937 Ed.), p. 42. Cf. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39.

[9] *London Street Tramways Co.* v. *London County Council,* [1898] A. C. 375. But the rule is otherwise in the Privy Council. *Read* v. *Bishop of Lincoln,* [1892] A. C. 644, 655. For the rôle of precedent

son was Congressional approval of those distinctions between the *St. Louis Trust* and the *Klein* cases to which four members of this Court could not give assent. By imputing to Congress a hypothetical recognition of coherence between the *Klein* and the *St. Louis Trust* cases, we cannot evade our own responsibility for reconsidering in the light of further experience, the validity of distinctions which this Court has itself created. Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the *St. Louis Trust* cases in applying the *Klein* doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere.

In Nos. 110, 111, 112 and 183, the judgments are

Reversed.

In No. 399, the judgment is

Affirmed.

The CHIEF JUSTICE concurs in the result upon the ground that each of these cases is controlled by our decision in *Klein* v. *United States,* 283 U. S. 231.

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in English law, see, *inter alia,* 2 Yorke, Life of Lord Chancellor Hardwicke, pp. 425, 498; Goodhart, Precedent in English and Continental Law, 50 L. Q. Rev. 40; Holdsworth, Case Law, *ibid.* 180; Lord Wright in *Westminster Council* v. *Southern Ry. Co.,* [1936] A. C. 511, 562–63; Allen, Law in the Making, 3rd ed., pp. 224 *et seq.*

MR. JUSTICE ROBERTS, dissenting.

There is certainly a distinction in fact between the transaction considered in *Klein* v. *United States,* 283 U. S. 231, and those under review in *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48. The courts, the Board of Tax Appeals, and the Treasury have found no difficulty in observing the distinction in specific cases. I believe it is one of substance, not merely of terminology, and not dependent on the niceties of conveyancing or recondite doctrines of ancient property law.

But if I am wrong in this, I still think the judgments in Nos. 110–112, and 183 should be affirmed and that in 399 should be reversed. The rule of interpretation adopted in the *St. Louis Union Trust Company* cases should now be followed for two reasons: *First,* that rule was indicated by decisions of this court as the one applicable in the circumstances here disclosed, as early as 1927; was progressively developed and applied by the Board of Tax Appeals, the lower federal courts, and this court, up to the decision of *McCormick* v. *Burnet,* 283 U. S. 784, in 1931; and has since been followed by those tribunals in not less than fifty cases. It ought not to be set aside after such a history. *Secondly.* The rule was not contrary to any treasury regulation; was, indeed, in accord with such regulations as there were on the subject; was subsequently embodied in a specific regulation, and, with this background, Congress has three times reënacted the law without amending § 302 (c) in respect of the matter here in issue. The settled doctrine, that reënactment of a statute so construed, without alteration, renders such construction a part of the statute itself, should not be ignored but observed.

1. The Revenue Act of 1926 lays a tax upon the transfer of the net estate of a decedent. That estate is defined to embrace the value of all his property, real or personal, tangible or intangible (less certain deductions), at the time of his death.[1] As the Treasury Department stated in its earliest regulations: "The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate." [2] In all the treasury regulations, from the earliest to the one now in force, applicable to the relevant sections of the successive Revenue Acts defining the "gross estate" of a decedent the Treasury has used this language:[3]

"The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where [in the case] the contingency does not happen in the lifetime of the decedent, *and the interest consequently lapses at his death.*" [Italics supplied.]

The next sentence: "Nor should anything be included on account of a life estate in the decedent," has been repeated in substance in the corresponding article of all subsequent regulations.

If by the will of his grandmother, A is given a life estate, with remainder to another, his executor is not bound to return anything on account of the life estate because, in respect of it, nothing passes on A's death. The estate simply ceases. The Treasury has never contended the contrary. If, however, A's grandmother gave a life estate to B, and the remainder to A, A has something which, at his death, will pass to someone else under his will, or under the intestate laws. The statute plainly taxes the value of the interest thus transferred at A's death.

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[1] §§ 300–303, 44 Stat. 69–72.

[2] Regulations 37, Art. 12 (1917).

[3] Regulations 37, Art. 12; Regulations 63, Art. 11; Regulations 68, Art. 11; Regulations 80, Art. 11.

If A's grandmother, by her will, gave interests in succession to specific persons and then provided that if A should outlive all these persons the property should pass to him, A would have a chance to receive and enjoy the property. If he did so receive it, it would pass as part of his estate. If he died before the other beneficiaries named by his grandmother his death would deprive him of that chance. The chance would not pass to anyone else. No tax would be laid on the supposed value of his contingent interest or chance, because the chance cannot, at his death, pass by his will, or the intestate laws, to another. I do not understand the Government has ever denied this.

Subsection (c) of § 302 lays down no different rule respecting similar interests created by irrevocable deed or agreement of the decedent. The subsection directs that there shall be included in the gross estate the value, at the time of the decedent's death, of any interest in property of which the decedent has at any time made a *transfer* "intended *to take effect* in possession or enjoyment *at* or after his *death*" (excluding sales for adequate consideration).

A transfer can only take effect, within the meaning of the statute, by the shifting of possession or enjoyment from the decedent to living persons. The fact that the terms of the gift bring about some other effect at the decedent's death is immaterial. The fact that something may happen in respect of the beneficial enjoyment of the property conditioned upon the decedent's death is irrelevant so long as that something is not the shifting of possession or beneficial enjoyment from the decedent. This is made clear by *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347.

If A makes a present irrevocable transfer in trust, conditioned that he shall receive the income for life and, at his death, the principal shall go to B, B is at once legally

invested with the principal. A's life estate ceases at his death. Nothing then passes. There is no tax imposed by the statute because there is no transfer any more than there would be in the case of a similar life estate given A by his grandmother. (This is *May* v. *Heiner*, 281 U. S. 238.) If, on the other hand, A creates an estate for years or for life in B, retaining the remaining beneficial interest in the property for himself, and, whether by the terms of the grant, or by the terms of A's will, or under the intestate law, that remainder passes to someone else at his death, such passage renders the transfer taxable. (This is *Klein* v. *United States, supra.*) If what A does is to transfer his property irrevocably, with provision that it shall be enjoyed successively by various persons for life and then go absolutely to a named person, but that if he, A, shall outlive that person, the property shall come back to him, and A dies in the lifetime of the person in question, A has merely lost the chance that the beneficial ownership of the property may revert to him. That chance cannot pass under his will or under the intestate laws. As there is no transfer which can become effective at his death by the shifting of any interest from him, no tax is imposed. (This is *McCormick* v. *Burnet, supra,* and *Helvering* v. *St. Louis Union Trust Company, supra.*)

2. These governing principles were indicated as early as 1927 [4] and were thereafter developed, in application to specific cases, in a consistent line of authorities.

In *May* v. *Heiner, supra,* it was held that a transfer in trust under which the income was payable to the transferor's husband for his life and, after his death, to the transferor during her life, with remainder to her children, was not subject to tax as a transfer intended to take effect

[4] *Shukert* v. *Allen*, 273 U. S. 545.

in possession or enjoyment at or after death. This court said (p. 243):

". . . At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death *was obliterated by that event.*" [Italics supplied.]

It will be noted that this is the equivalent of the Treasury's statement, *supra,* that such an interest lapses at death.

That decision is indistinguishable in principle from the *St. Louis Union Trust Company* cases and the instant cases; and what was there said serves to distinguish the *Klein* case.

McCormick v. *Burnet* followed *May* v. *Heiner.* The court there held that neither a reservation by the grantor of a life estate with remainders over, nor a provision for a reverter in case all the beneficiaries should die in the lifetime of the grantor, made the gifts transfers intended to take effect in possession or enjoyment at or after the grantor's death. In the Circuit Court of Appeals the Commissioner urged that the provision for payment of the trust estate to the settlor in case she survived all the beneficiaries rendered the transfer taxable. That court dealt at length with the point and sustained his view. (43 F. 2d 277, 279.) The Commissioner made the same contention in this court, but it was overruled upon the authority of *May* v. *Heiner.*

Then came the two *St. Louis Union Trust Company* cases, decided upon the authority of *May* v. *Heiner* and *McCormick* v. *Burnet.* Finally, the *McCormick* case was followed in *Bingham* v. *United States,* 296 U. S. 211.

Since the opinion of the court appears to treat the *St. Louis* cases as the origin of the principle there announced,

it is important to emphasize the fact that the rule had been settled by this court as early as 1930; and to note other decisions rendered prior to the *St. Louis* cases. In seven, intervening between *May* v. *Heiner* and the *St. Louis* cases, the Board of Tax Appeals reached the same conclusion as that announced in the *St. Louis* cases.[5] The Board's action was affirmed in four of them.[6] Four other decisions by Circuit Courts of Appeals were to the same effect.[7] In practically all, reliance was placed upon *Shukert* v. *Allen, Reinecke* v. *Northern Trust Company, May* v. *Heiner,* and *McCormick* v. *Burnet,* or some of them. Thus, when the question came before this court again in the *St. Louis* cases, there was a substantial body of authority following and applying the *Heiner* and *McCormick* cases.

Since the *St. Louis* cases were decided, the principle on which they went has been repeatedly applied by the Board of Tax Appeals and the courts. The Board has followed the cases in no less than seventeen instances.[8]

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[5] Wheeler *v.* Commissioner, 20 B. T. A. 695; Duke *v.* Commissioner, 23 B. T. A. 1104; Peabody *v.* Commissioner, 24 B. T. A. 787; Dunham *v.* Commissioner, 26 B. T. A. 286; Taylor *v.* Commissioner, 27 B. T. A. 220; Wallace *v.* Commissioner, 27 B. T. A. 902; Bonney *v.* Commissioner, 29 B. T. A. 45.

[6] *Commissioner* v. *Duke,* 62 F. 2d 1057 (affirmed by an equally divided court, 290 U. S. 591); *Commissioner* v. *Wallace,* 71 F. 2d 1002; *Commissioner* v. *Dunham,* 73 F. 2d 752; *Commissioner* v. *Bonney,* 75 F. 2d 1008.

[7] *Commissioner* v. *Austin,* 73 F. 2d 758; *Tait* v. *Safe Deposit & Trust Co.,* 74 F. 2d 851; *Tait* v. *Safe Deposit & Trust Co.,* 78 F. 2d 534; *Helvering* v. *Helmholz,* 64 App. D. C. 114; 75 F. 2d 245. I have been able to find only one case decided *contra: Commissioner* v. *Schwarz,* 74 F. 2d 712.

[8] Taft *v.* Commissioner, 33 B. T. A. 671; Guaranty Trust Co. *v.* Commissioner, 33 B. T. A. 1225; Kneeland *v.* Commissioner, 34 B. T. A. 816; Kienbusch *v.* Commissioner, 34 B. T. A. 1248; Schneider *v.* Commissioner, 35 B. T. A. 183; Van Sicklen *v.* Commissioner, 35

The record is the same in the courts. The *St. Louis* cases have been followed in fourteen cases.[9] In some of these the Government has sought review in this court but in none, except those now presented, has it asked the court to overrule those decisions.

If there ever was an instance in which the doctrine of *stare decisis* should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals; and that, to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts and make it impossible for inferior tribunals to adjudicate controversies in reliance on the decisions of this court. To nullify more than fifty decisions, five of them by this

B. T. A. 306; Patterson *v.* Commissioner, 36 B. T. A. 407; Rushmore *v.* Commissioner, 36 B. T. A. 480; Bryant *v.* Commissioner, 36 B. T. A. 669; Wetherill *v.* Commissioner, 36 B. T. A. 1259; Mitchell *v.* Commissioner, 37 B. T. A. 1; Stone *v.* Commissioner, 38 B. T. A. 51; The George D. Harter Bank *v.* Commissioner, 38 B. T. A. 387; White *v.* Commissioner, 38 B. T. A. 593; Donnelly *v.* Commissioner, 38 B. T. A. 1234; Pyeatt *v.* Commissioner, 39 B. T. A. 774; Dravo *v.* Commissioner, 40 B. T. A. 309.

[9] *Old Colony Trust Co.* v. *United States,* 15 F. Supp. 417; *Myers* v. *Magruder,* 15 F. Supp. 488; *Chase National Bank* v. *United States,* 28 F. Supp. 947; *Commissioner* v. *Brooks,* 87 F. 2d 1000; *Bullard* v. *Commissioner,* 90 F. 2d 144; *Welch* v. *Hassett,* 90 F. 2d 833; *United States* v. *Nichols,* 92 F. 2d 704; *Mackay* v. *Commissioner,* 94 F. 2d 558; *Commissioner* v. *Grosse,* 100 F. 2d 37; *Commissioner* v. *Hallock,* 102 F. 2d 1; *Commissioner* v. *Kaplan,* 102 F. 2d 329; *Rothensies* v. *Cassell,* 103 F. 2d 834; *Corning* v. *Commissioner,* 104 F. 2d 329; *Rheinstrom* v. *Commissioner,* 105 F. 2d 642.

court, some of which have stood for a decade, in order to change a mere rule of statutory construction, seems to me an altogether unwise and unjustified exertion of power. As I shall point out, there is no necessity for such action because it has been, and still is open to Congress to change the rule by amendment of the statute, if it deems such action necessary in the public interest.

3. Section 301 of the Revenue Act of 1926 imposes a tax upon the value of the net estate of a decedent. Section 302 provides the method for determining the value of the gross estate. Subsections (c) (d) (e) (f) and (g) require inclusion in the gross estate of interests which otherwise might be held not to form a part of the decedent's estate or not to pass from him to others at his death. These subsections sweep such interests into the gross estate in order to forestall tax avoidance. Section 302 (c) was the successor of analogous sections in earlier acts and the predecessor of similar sections in later acts.[10] The subsection has been amended in successive Revenue Acts. As a result of the Treasury's experience in the enforcement of the law, Congress has from time to time thought it necessary to extend the scope of the subsection in the interest of more efficient administration. Within constitutional limits such extension is a matter of legislative policy for Congress alone.[11]

It is familiar practice for Congress to amend a statute to obviate a construction given it by the courts. The legislative history of § 302 (c) demonstrates that Congress has elected not to make such an amendment to

[10] Revenue Act of 1916, § 202 (b), 39 Stat. 756, 777; Revenue Act of 1918, § 402 (c), 40 Stat 1057, 1097; Revenue Act of 1924, § 302 (c), 43 Stat. 253, 304; Revenue Act of 1932, § 803 (a), 47 Stat. 169, 279; Internal Revenue Code of 1939, § 811 (c), 53 Stat., Part 1, 1, 121.

[11] *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

meet the construction placed upon it by this court in the *St. Louis* cases.

May v. *Heiner* was decided in 1930. The Treasury was dissatisfied with the decision and in three later cases attacked the ruling, amongst them *McCormick* v. *Burnet*. The court announced its judgments in these cases on March 2, 1931, reaffirming *May* v. *Heiner*. On the following day Congress adopted a joint resolution amending § 302 (c) to tax a transfer with reservation of a life estate to the grantor, but, in so doing, it omitted to deal with a contingent interest reserved to the grantor or the possibility of reverter remaining in him, involved in both *Heiner* and *McCormick*. See *Hassett* v. *Welch*, 303 U. S. 303, 308–9. The omission is significant.

It may be argued that in the haste of preparing and passing the amendment the point was overlooked. But the joint resolution was reënacted by § 803 of the Revenue Act of 1932,[12] without any alteration to cover the point. The Revenue Act of 1934[13] amended § 302 (d) of the Revenue Act of 1926 but did not change § 302 (c) as it then stood.

The day the *St. Louis* cases were decided, this court announced its opinion in *White* v. *Poor*, 296 U. S. 98, construing § 302 (d) of the Act of 1926. In order to make the section apply to such a situation as was disclosed in that case[14] the Congress, on June 22, 1936, by the Act of 1936,[15] amended it to preclude the construction the court had given it. Again Congress let § 302 (c) stand as before and as construed in the *St. Louis* cases.

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[12] 47 Stat. 169, 279.

[13] 48 Stat. 680, 752.

[14] House Report on H. R. 12793.

[15] 49 Stat. 1648, 1744.

Three revenue acts have since been adopted,[16] in none of which has the wording of § 302 (c) been altered. If there is any life in the doctrine often announced that reënactment of a statute as uniformly construed by the courts is an adoption by Congress of the construction given it, this legislative history ought to be conclusive that the statute, as it now stands, means what this court has said it means.

Little weight can be given to the argument of the Government that the Treasury has not applied to Congress for alteration of the section because of the difficulty of wording a satisfactory amendment. A moment's reflection will show that it would be easy to phrase such an amendment. Whatever the reason for the failure to amend § 302 (c), whether hesitancy on the part of the Treasury to recommend such action, or the satisfaction of Congress with the construction put upon the section by this court, or mere inadvertence, the fact remains that the section has been reënacted again and again with the courts' construction plain for all to read.

4. As shown by the matter above quoted from the Treasury Regulations affecting the estate tax,[17] a contingent interest is not to be included in the taxable estate. In the light of this construction, estate tax provisions were reënacted or amended in 1921, 1924, 1926, 1928, 1931, 1932, 1934, 1935, 1936 and 1937.

At the bar, counsel for the Government stated that it had always been the view of the Treasury that the article in question applied only to § 302 (a) and had no application to § 302 (c). But we are not concerned with what the Treasury thought about the matter. The regulations were issued to guide taxpayers in complying with the Act. Section 302 is an entirety. Subsections (a) and (c) were

[16] Revenue Act of 1937, 50 Stat. 813; Revenue Act of 1938, 52 Stat. 447; Internal Revenue Code, 53 Stat., Part 1, p. 1.

[17] See Note 3, *supra*.

not intended to contradict each other, but the latter was to supplement the former. The gross estate was to be computed according to the section as a whole. It is hard to understand how the taxpayer was expected to discriminate between a contingent interest of a decedent under the will of his grandmother and a similar interest under an absolute deed executed by him *inter vivos*. If the one did not pass from the decedent at death neither did the other.

After the decisions in the *St. Louis* cases, the Treasury rendered its regulations even more explicit. In Regulations 80 (Revised), promulgated October 26, 1937, a new Article 17 was inserted which is:

"The statutory phrase, 'a transfer . . . intended to take effect in possession or enjoyment at or after his death,' includes a transfer by the decedent . . . whereby and to the extent that the beneficial title to the property . . . or the legal title thereto . . . remained in the decedent at the time of his death and the passing thereof was subject to the condition precedent of his death. . . .

"On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

If theretofore doubt could have been entertained, it then must have vanished. And with this regulation in force, Congress reënacted § 302 (c) as so interpreted.

What, then, is to be said of the principle that reënactment of a statute which the Treasury, by its regulations, has interpreted in a given sense is an embodiment of the interpretation in the law as reënacted? Surely the principle cannot be avoided, as the Government argues, be-

cause the Treasury felt bound so to interpret § 302 (c) by reason of this court's decisions. That fact should make application of the principle the more urgent.

MR. JUSTICE MCREYNOLDS joins in this opinion.

FEDERAL COMMUNICATIONS COMMISSION *v.* POTTSVILLE BROADCASTING CO.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 265. Argued January 11, 1940.—Decided January 29, 1940.

1. A lower court's interpretation of its own mandate does not bind this Court. P. 141.
2. The opinion discusses the differences of origin and function between the judicial and the administrative processes, and the relation of the one to the other in matters of substance and procedure where administrative rulings are subject to judicial review on errors of law. P. 141.
3. Under the Federal Communications Act of 1934, the Communications Commission, in passing upon an application for a permit to construct a broadcasting station, must judge by the standard of public convenience, interest, and necessity. Pp. 137, 145.
4. The Act empowers the Commission to adopt rules of procedure applicable in ascertaining whether the granting of an application for a permit to erect a broadcasting station would be in the public interest. P. 138.
5. Under this Act, upon review by the Court of Appeals for the District of Columbia of a decision of the Commission denying an application for such a permit, the court has authority to correct errors of law and upon remand the Commission is bound to accept such correction. P. 145.
6. But where the Commission denied an application for such a permit and upon appeal to the Court of Appeals for the District of Columbia the ruling was reversed because of error of law and the case sent back for further proceedings, the Commission was free to reconsider the application together with other applications, filed subsequently, to determine which, on a comparative basis, would best serve the public interest; and the Court

of Appeals was without authority by its mandate and by writ of mandamus to forbid this and to require a rehearing of the first application on the record as originally made. P. 145.

70 App. D. C. 157; 105 F. 2d 36, reversed.

CERTIORARI, 308 U. S. 535, to review an order which granted a writ of mandamus requiring the above-named Commission and its members (a) to set aside its order denying an application of the present respondent and assigning it for rehearing, with other applications for the same broadcasting facilities; and (b) to hear and reconsider the respondent's application on the basis of the record as originally made up when its application was first decided adversely by the Commission and brought before that court on appeal. See 98 F. 2d 288.

Solicitor General Jackson, with whom *Messrs. Warner W. Gardner, Robert M. Cooper, William J. Dempsey, William C. Koplovitz,* and *Benedict P. Cottone* were on the brief, for petitioner.

Messrs. Charles D. Drayton and *Eliot C. Lovett* for respondent.

The procedural framework within which applications for construction permits are considered is such that, if a permit should be issued to the respondent, the facilities could not later be taken away by the Commission and given to another applicant without a hearing held for the purpose of determining whether such action would be proper. *Richmond Development Corp.* v. *Commission,* 35 F. 2d 883.

The applicant who, under the Commission's rules, becomes entitled to be heard first and who proceeds to meet the statutory requirements is entitled to a grant without waiting for later applicants to be heard and considered. *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 285; *Courier Post Publishing Co.* v. *Commission,* 104 F. 2d 213, 218; *Heitmeyer* v. *Commis-*

sion, 95 F. 2d 91, 100; *Rio Grande Irrigation & C. Co.* v. *Gildersleeve,* 174 U. S. 603, 609; *Weil* v. *Neary,* 278 U. S. 161, 169; *Colonial Broadcasters, Inc.* v. *Federal Communications Comm'n,* 105 F. 2d 781, 783; *Florida* v. *United States,* 282 U. S. 194, 215; *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74; Commission Rule 106.4.

The Commission may not oust the jurisdiction of the court having statutory power of review by setting up, subsequently to the decision of the court on questions of law, a new procedure involving a new record, other issues and other parties. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 368, 372; *In re Sanford Fork & Tool Co.,* 160 U. S. 247; *Delaware, L. & W. R. Co.* v. *Rellstab,* 276 U. S. 1; *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781; *Sibbald* v. *United States,* 12 Pet. 488, 492; *Barber Asphalt Paving Co.* v. *Morris,* 132 F. 945, 954; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 136; *In re Potts,* 166 U. S. 263, 267; *American Telephone & Tel. Co.* v. *United States,* 299 U. S. 232; Communications Act, 1934.

The Court of Appeals has the same power to issue mandamus to protect its jurisdiction in this case as it does in cases on appeal from the District Court.

The respondent exhausted its administrative remedy before resorting to the court below, and it has no plain, speedy and adequate remedy at law.

Mr. Justice Frankfurter delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U. S. 535. We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regula-

tion of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. § 151.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.[1] The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307 (d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.*, § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public

[1] For the legislative history of the Act of 1927, see H. Rep. No. 464, S. Rep. No. 772, 69th Cong., 1st Sess.; 67 Cong. Rec. 5473–5504, 5555–86; 5645–47; 12335–59; 12480, 12497–12508, 12614–18; 68 Cong. Rec. 2556–80, 2750–51, 2869–82, 3025–39, 3117–34, 3257–62, 3329–36, 3569–71, 4109–55. A summary of the operation of previous regulatory laws may be found in Herring and Gross, Telecommunications, pp. 239–45.

convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. *Ibid.*, Title I, § 4 (j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.[2]

[2] Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 *Ibid.*, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." *Pottsville Broadcasting Co.* v.

"public convenience, interest, or necessity" laid down by the law. ". . . the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." Second Annual Report, Federal Radio Commission, 1928, pp. 169–70.

Federal Communications Commission, 69 App. D. C. 7; 98 F. 2d 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (69 App. D. C. 7; 98 F. 2d 288), and in the mandamus proceedings. *Pottsville Broadcasting Co.* v. *Federal Communications Commission,* 70 App. D. C. 157; 105 F. 2d 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255–56. That proposition is indisputable, but it does not tell us

what issues were laid at rest. Compare *Sprague* v. *Ticonic Bank,* 307 U. S. 161. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Compare *United States* v. *Morgan,* 307 U. S. 183. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.[3] To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law.[4] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry,

[3] See Maitland, The Constitutional History of England, pp. 415–18; Landis, The Administrative Process, *passim*.

[4] See, for instance, the address of Elihu Root as President of the American Bar Association:

"There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A. B. A. Rep. 355, 368–69.

or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.[5] These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.[6] Compare *New England Divisions Case,* 261 U. S. 184. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that inter-

[5] See *United States* v. *Lowden,* 308 U. S. 225; Herring, Public Administration and the Public Interest, *passim.*

[6] The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. *A. T. & T. Co.* v. *United States,* 299 U. S. 232.

ested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464, 467. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court could not be invoked. *Federal Radio Comm'n* v. *General Electric Co., supra.* To lay the basis for review here, Congress amended § 16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate

questions for judicial decision." *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n* v. *Pacific Co.,* 307 U. S. 156. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Cf. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest,

would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May,* 194 U. S. 267, 270. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

MR. JUSTICE MCREYNOLDS concurs in the result.

FLY ET AL. *v.* HEITMEYER.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 316. Argued January 11, 1940.—Decided January 29, 1940.

Decided upon the authority of the case last preceding.
70 App. D. C. 162; 105 F. 2d 41, reversed.

Solicitor General Jackson, with whom *Messrs. Warner W. Gardner, Robert M. Cooper, William J. Dempsey,* and *William C. Koplovitz* were on the brief, for petitioners.

Mr. Clarence C. Dill, with whom *Mr. James W. Gum* was on the brief, for respondent.

Citing *Morgan* v. *United States,* 304 U. S. 1; *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255; *Federal Laboratories* v. *Federal Radio Comm'n,* 36 F. 2d 111; *Chicago Federation of Labor* v. *Federal Radio Comm'n,* 41 F. 2d 422; *Federal Radio Comm'n* v. *Nelson Bros.,* 289 U. S. 266; *Salzman* v. *Stromberg Carlson Co.,* 46 F. 2d 612.

Mr. Justice Frankfurter delivered the opinion of the Court.

On March 25, 1935, Heitmeyer, respondent here, applied for a permit from the Federal Communications Commission under § 319 of the Communications Act of 1934, c. 652, 48 Stat. 1089, 47 U. S. C. 319, to construct a broadcasting station at Cheyenne, Wyoming. His application and a competing one were heard by an examiner. The Commission, on May 1, 1936, denied respondent's application on the sole ground that he was financially disqualified. He appealed to the United States Court of Appeals for the District of Columbia and the Commission's decision was reversed. *Heitmeyer* v. *Federal Communications Commission,* 68 App. D. C. 180; 95 F. 2d 91. To proceed in conformity with this opinion, the case was remanded to the Commission.

After Heitmeyer's appeal two other applications for the same facilities were filed with the Commission. Following intermediate litigation, needless here to recount, the Commission directed that respondent's case be reopened in conjunction with the pending rival applica-

tions. Before this hearing could be had, respondent obtained from the Court of Appeals a writ of mandamus directing the Commission to restrict consideration of his application to the record originally before it. *McNinch* v. *Heitmeyer,* 70 App. D. C. 162; 105 F. 2d 41. Because important questions of administrative law were involved, we granted certiorari. 308 U. S. 540.

This case is controlled by our decision in *Federal Communications Commission* v. *Pottsville Broadcasting Co., ante,* p. 134.

The only relevant difference between the two cases is that here the Commission proposed on remand not only to reconsider respondent's application on oral argument with subsequently filed rival applications, but to reopen the record and take new evidence on the comparative ability of the various applicants to satisfy "public convenience, interest, or necessity." But the Commission's duty was to apply the statutory standard in deciding which of the applicants was to receive a permit after it fell into legal error as well as before. If, in the Commission's judgment, new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the *Pottsville* case, *ante,* bar it from access to the necessary evidence for correct judgment.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

Mr. Justice McReynolds concurs in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FITCH.

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

No. 243. Argued January 5, 8, 1940.—Decided January 29, 1940.

1. A husband, creating a trust for the support of his wife, from whom he was separated, and in settlement of a suit brought by her for maintenance, transferred to a trustee in Iowa certain premises and a lease thereon. A stipulated amount of the income was to be paid monthly to the wife, and the trust was irrevocable. The husband reserved no interest in the trust estate (other than a life interest in the excess of income over the amount payable to the wife), and did not undertake to make good any deficiencies in payments to the wife. The arrangement was subsequently confirmed by an Iowa court in a decree of divorce. *Held,* a distribution of such trust income to the wife (in 1933) was includible as income of the husband for the purpose of the federal income tax. Pp. 150, 156.
2. The general rule is that amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation of the husband to support, which is made specific by the decree. *Douglas* v. *Willcuts,* 296 U. S. 1. P. 151.
3. The burden of establishing that the present case was not within the general rule could be sustained only by clear and convincing proof, here lacking, that the effect of the Iowa law, the trust, and the divorce decree was a full and complete discharge of the obligation of the taxpayer for the support of his wife. P. 156.
4. Query whether under the Iowa divorce law the court retained power to modify its decree by reallocating the income from the trust property as between the husband and wife. P. 155.

103 F. 2d 702, reversed.

CERTIORARI, 308 U. S. 535, to review the reversal of a decision of the Board of Tax Appeals, 37 B. T. A. 1330, sustaining a determination of a deficiency in income tax.

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

Messrs. William D. Mitchell and *Arnold F. Schaetzle,* with whom *Mr. Rollin Browne* was on the brief, for respondent.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner claimed that an amount of $7,128 distributed in 1933 under a so-called alimony trust to respondent's divorced wife should have been included in respondent's taxable income for that year. The Board of Tax Appeals agreed and found a deficiency, 37 B. T. A. 1330. The Circuit Court of Appeals reversed, one judge dissenting, 103 F. 2d 702. We granted certiorari because of the asserted failure of that court correctly to apply the principle involved in *Douglas* v. *Willcuts,* 296 U. S. 1.

The so-called alimony trust in question was created a few years before the divorce, while respondent and his wife were separated, and in settlement of a suit brought by her for separate maintenance. Certain premises (a hair tonic factory and a long term lease thereon) were transferred to a trustee to hold title, collect rents and after deduction of expenses to pay the wife $600 a month during her life and the balance to respondent for his life.[1] On the death of either respondent or his wife the de-

[1] Respondent and his wife separated in 1917. In 1919 respondent purchased a home for his wife, furnished it for her, and gave her an automobile. In the same year F. W. Fitch Co. was incorporated and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1860 were issued to respondent and 10 to his wife. She was also an officer and director of the company, with a monthly salary of $300.

When the separate maintenance suit was settled in 1923, respond-

ceased's share of the income was to be paid to their children.[2] The trust was to continue at least fifteen years. On the death of both respondent and his wife the principal was to be paid over to their children. The trust was irrevocable. And while respondent covenanted to pay off certain encumbrances on the trust property, he did not underwrite in whole or in part the $600 monthly payments to his wife.

In 1925 she filed suit for a divorce in an Iowa court. A property settlement was agreed upon which included the trust agreement and, in addition, provided for a transfer to her by respondent of certain shares of stock and cash.[3] The divorce decree confirmed the property and alimony settlement.[4]

The general rule is clear. "Amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree." *Douglas* v. *Willcuts, supra,* p. 8. It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obli-

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ent leased certain premises, owned by him, to the F. W. Fitch Co. for 99 years, at an annual rental of $12,000. These premises and that lease were transferred to the trustee. Upon creation of the trust the wife ceased to be an officer and director of F. W. Fitch Co. and received no further salary from it.

[2] No question of minor children is here involved, the youngest of the four children having become of age in 1927.

[3] 600 shares of stock of F. W. Fitch Co. and $23,500.

[4] "It is, Therefore, Ordered, Adjudged and Decreed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; . . . that the trust agreement which is referred to in the defendant's answer as having been entered into between these parties on or about the 23rd day of April 1923 . . . be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

gation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer. Respondent insists that in the instant case there is no continuing obligation to which the income of the alimony trust is applied but rather that the property and alimony settlement approved by the Iowa court effected an absolute discharge of any duty or obligation on his part to support his divorced wife. It is true that there is no covenant or guarantee to make up any deficiency in the monthly payment to his divorced wife, as there was in the *Douglas* case. And unlike that alimony trust, the instant one, though granting the taxpayer a participation in the income, irrevocably alienates the corpus. Other indicia of the use of this alimony trust as a security device for any continuing obligation of respondent are alleged to be absent by reason of the lack of power in the Iowa court to modify the decree confirming the property and alimony settlement.

The Iowa statute provides: "When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects when circumstances render them expedient." [5]

Admittedly the court under that statute has the power to modify provisions in the original decree for the con-

[5] § 10481, Iowa Code.

tinued support and maintenance of the wife.[6] And it likewise seems well settled by a long line of Iowa cases that where the original decree makes no provision for alimony, there is no power subsequently to modify the decree so as to provide it.[7] And, respondent contends, where alimony is allowed in a lump sum or a property settlement is ratified by the decree, the court retains no power to modify.

Spain v. *Spain,* 177 Iowa 249; 158 N. W. 529, and *McCoy* v. *McCoy,* 191 Iowa 973; 183 N. W. 377, on which respondent and the Circuit Court of Appeals place reliance are not in point since those divorce decrees, unlike the instant one, made no provision for alimony. In *Spain* v. *Spain, supra,* the Supreme Court of Iowa specifically reserved the question of the power to modify a divorce decree involving a property settlement. As to that it said (pp. 260–261): "As to an award in gross, or a division of the property, based upon an equitable apportionment of the property of either of the parties at the time the divorce is granted, we have no occasion to speak, for that matter is not in the case."

Likewise *Barish* v. *Barish,* 190 Iowa 493; 180 N. W. 724, cited below and urged here in support of respondent's contention, is of little aid, for in spite of a strong concurring opinion that the court had no power to modify an allowance of "gross" or "permanent" alimony, the majority applied the statute and concluded (p. 501) "Whatever the extent of the power of the court may be to make such increase, it is always slow to exercise such

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[6] See *Corl* v. *Corl,* 217 Iowa 812; 253 N. W. 125; *Junger* v. *Junger,* 215 Iowa 636; 246 N. W. 659; *Boquette* v. *Boquette,* 215 Iowa 990; 247 N. W. 255; *Toney* v. *Toney,* 213 Iowa 398; 239 N. W. 21; *Morrison* v. *Morrison,* 208 Iowa 1384; 227 N. W. 330.

[7] *Spain* v. *Spain,* 177 Iowa 249; 158 N. W. 529; *McCoy* v. *McCoy,* 191 Iowa 973; 183 N. W. 377; *Handsaker* v. *Handsaker,* 223 Iowa 462; 272 N. W. 609; *Duvall* v. *Duvall,* 215 Iowa 24; 244 N. W. 718; *Doekson* v. *Doekson,* 202 Iowa 489; 210 N. W. 545.

power, except in the presence of extraordinary circumstances, such as are not present here." To be sure, there is the following strong statement in *Kraft* v. *Kraft,* 193 Iowa 602, 607; 187 N. W. 449: "We are inclined to the view that, where alimony is allowed in a lump sum, as permanent alimony, or where there is a division of the real property of the parties, as permanent alimony, the statute does not authorize a change therein, except for such reasons which would justify the setting aside or changing of a decree in any other case; that the party awarded permanent alimony is not entitled to permanent alimony and support both . . ." And in *Carr* v. *Carr,* 185 Iowa 1205; 171 N. W. 785, 787, that court stated, p. 1211: "Alimony is allowed in lieu of dower and the prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree." In that case the divorce decree required the husband, *inter alia,* to convey certain real estate to a trustee for the exclusive benefit of the wife to be held in trust for five years, during which time the income was to be paid over to the wife and at the end thereof the trustee, on demand, was to convey the property to her. Meanwhile, the trustee had the power to sell the property at not less than $100 an acre. Shortly before the expiration of the five-year period, the divorced husband filed a cross-petition in the divorce suit asking for a modification of the trust in order to protect his former wife from her own extravagance and her inexperience in business affairs. Apparently the relief asked was not based on the Iowa statute giving the court power to make subsequent changes in the divorce decree "when circumstances render them expedient." For the court stated that the modification of the decree was sought on the grounds (1) that the donor of the trust was entitled to have it carried out

in accordance with its terms and the real purpose for which it was created; and (2) that, in the alternative, he was entitled to have a guardian of the property appointed.

However that may be, much of the weight which respondent accords *Kraft* v. *Kraft* and *Carr* v. *Carr, supra,* seems to have been dissipated by *McNary* v. *McNary,* 206 Iowa 942; 221 N. W. 580. In that case the Supreme Court of Iowa had squarely before it the question of whether or not under the foregoing statute a decree of permanent alimony awarding personal and real property to the wife could be altered. The court after stating that it knew of no case where such a decree had been subsequently modified, added (p. 946): "This question is not argued by the parties, and we find it unnecessary to make a pronouncement thereon." And, significantly, it proceeded to apply the statute and finding that its conditions had not been satisfied, it denied the relief asked by the divorced husband.

On this state of the Iowa authorities we can only speculate as to the power of the Iowa court to modify alimony awarded in a lump sum or a property settlement ratified by a divorce decree. To be sure, *Kraft* v. *Kraft, supra,* involved some features common to the instant case, since the wife was to receive the income of $4,000 to be placed in trust by the husband or, until he placed it in trust, 5 per cent on that amount. But the refusal to modify that decree was not placed squarely, or even largely, on the lack of power to do so but on other circumstances. Furthermore, the uncertainty created by *McNary* v. *McNary, supra,* makes perhaps for even greater uncertainty where an alimony trust of the kind here involved is concerned. At least respondent has not established a necessary identity in treatment of transfers of personal or real property on the one hand and allow-

ance of income out of this kind of alimony trust on the other. Even on the authority of *Kraft* v. *Kraft, supra,* respondent has not clearly shown that in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income.[8] If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the pre-existing duty of the husband a particular and specified sanction. In that event, the case would be little different from one where the husband was directed to make specified payments to the divorced wife. And we see no reason why the rule of *Douglas* v. *Willcuts, supra,* should not then apply.

Enough has been said to show that respondent has not sustained the burden of establishing that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra.* If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. That we cannot do. For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of

[8] Cf. *Shaw* v. *Shaw,* 59 Ill. App. 268.

his obligation—unless of course Congress decides otherwise.

The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE REED concurs in the result.

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment below should be affirmed.

ILLINOIS CENTRAL RAILROAD CO. *v.* MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 222. Argued January 8, 1940.—Decided January 29, 1940.

1. Minnesota imposed on railroads a property tax measured by gross earnings from operations within the State. In the absence of adequate records, earnings from interchange of freight cars were apportioned to Minnesota according to a formula. The reporting road was charged with that proportion of the balance owing from each user of its cars which the user's Minnesota revenue freight-car mileage was of the user's system car mileage; and was permitted to deduct that proportion of the balance owing to other roads for use of their cars which its Minnesota freight-car mileage was of its system car mileage. The net credits were ascertained annually and the tax imposed thereon. As applied to a railroad whose Minnesota mileage was small compared to its system mileage, and whose deductions were small compared with roads having extensive mileages within the State, *held* that the tax formula was consistent with equal protection and due process under the Fourteenth Amendment and with the Commerce Clause of the Constitution. Pp. 161, 164.
2. The ratio of Minnesota revenue freight-car mileage to system car mileage is consistent with the statutory scheme of ascertaining what payments represent use in Minnesota. P. 161.
3. That the apportionment may not result in mathematical exactitude is not a constitutional defect. P. 161.

4. Objections of the complainant railroad to the validity of the tax, that by the formula it is permitted to deduct only a small fraction of its debit balances compared with other roads having extensive mileage in the State, and that though it has only 30 miles of track in the State it must pay a tax while others with hundreds of miles may pay none—examined and rejected. Pp. 162–163.
5. The fact that the railroads not owning or operating lines within the State are not taxed on their income from the use of their cars within the State by other railroads does not produce unconstitutional discrimination against roads which have subjected themselves to the state's jurisdiction and enjoy the privilege of engaging in business there. P. 163.
6. Double taxation, short of confiscation or proceedings unconstitutional on other grounds, is not forbidden by the Fourteenth Amendment. P. 164.
7. The tax has a fair relation to property employed within the State, although the property be used in interstate commerce. P. 164.
8. A recomputation by the State of taxes payable under a statute which was in force throughout the whole period in question is not such retroactivity as deprives of due process of law. P. 164.
9. Whether the credits here taxed are includible as "gross earnings" within the meaning of the state statute is a question of local law, in respect of which this Court defers to the state court's interpretation. P. 165.

205 Minn. 621; 286 N. W. 359, affirmed.

APPEAL from the affirmance of a judgment against the railroad company in a suit brought by the State to recover additional taxes.

Mr. Chas. A. Helsell, with whom *Messrs. M. J. Doherty, R. C. Beckett, V. W. Foster,* and *E. C. Craig* were on the brief, for appellant.

Mr. John A. Weeks, Assistant Attorney General of Minnesota, with whom *Mr. J. A. A. Burnquist,* Attorney General, was on the brief, for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Minnesota imposes on every railroad company owning or operating lines within its borders a five per cent tax on gross earnings derived from its operation within the state. This tax, payable in lieu of all other taxes,[1] has been sustained by this Court, in various applications, as a property tax.[2] In this case, which is here on appeal (28 U. S. C. § 344a) from a judgment of the Supreme Court of Minnesota (205 Minn. 1, 621; 284 N. W. 360; 286 N. W. 359), appellant contends that the statute as construed and applied to it violates the Fourteenth Amendment and the commerce clause of the federal Constitution.

Appellant, an Illinois railroad corporation, owns no lines in Minnesota but operates leased lines with 30.15

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[1] Sec. 2246, Mason's Minn. Stats. 1927, provides in part:

"Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

Sec. 2247 defines "gross earnings" as follows:

"The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state."

[2] *Great Northern Ry. Co.* v. *Minnesota,* 278 U. S. 503; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *United States Express Co.* v. *Minnesota,* 223 U. S. 335.

miles of trackage in that state.[3] It owns or operates about 5,000 miles in other states. The item of gross earnings which the state seeks here to tax arises out of debts and credits for exchange of freight cars which appellant makes with other railroads, the using road being charged $1 per day per car. During the years here involved appellant had credits in its favor for such use of its cars by other roads operating in Minnesota of $17,427,862; and debits owing such roads of $14,924,508, leaving a net credit balance in favor of appellant of $2,503,353. These debits and credits represented use of cars in other states as well as in Minnesota. In absence of adequate and accurate records their use was apportioned to Minnesota pursuant to the following formula:

Each reporting road was charged with such percentage of the credit balance owing from each using railroad as was determined by ascertaining the ratio of each using railroad's Minnesota revenue freight car miles to its system car miles.

Each reporting road was given credit for such percentage of the debit balance owing each other road as was determined by ascertaining the ratio of the reporting railroad's Minnesota revenue freight car miles to its system car miles.

The credit and debit balances were computed and apportioned annually; and the net credits were then ascertained, to which the statutory tax of 5 per cent was applied.

Thus for the year 1922 appellant had credit balances of $691,433.97 owing from 13 other roads. Their Minnesota revenue freight car miles varied from 2.3% to 100% of their system car miles, making Minnesota's proportion of the credit balances $95,359.49. For the same year appellant had debit balances from freight car hire owing to 8 other roads of $215,863.05. Appellant's Minnesota revenue freight car miles were only 0.11% of its system car

[3] These are operated under a 47 year lease beginning July 1, 1904, from the Dubuque & Sioux City Railroad Co.

miles for that year. Hence, it was permitted to deduct only 0.11% of $215,863.05 or $237.43, leaving $95,122.06 to which the tax was applicable. On similar computations for each of the following seven years the tax for which the state brought suit totalled $26,414.59.

Appellant's contention under the Fourteenth Amendment is that the statute as applied in the foregoing formula denies it equal protection of the law and due process. We do not think that contention is tenable.

First as to the credit balances. These represent payments to appellant for use of its freight cars by other roads which operate in Minnesota. Minnesota does not seek to reach all of those receipts. As the statute reaches only revenues derived from operations in the state, the formula effects an apportionment. Certainly the ratio of Minnesota revenue freight car miles to system car miles is consistent with the statutory scheme of ascertaining what payments represent use in Minnesota. That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect.[4] Rough approximation rather than precision is, as a practical matter, the norm in any such tax system.[5]

Second as to the debit balances. As we have said, appellant is not taxed on all of its credit balances but only on that portion which accrues as a result of the use of its cars by others in Minnesota. Hence it is not permitted under the formula to deduct all of its debit balances but only the portion thereof which it pays others for the use of their cars in Minnesota. Certainly if appellant receives $50,000 from one road for use of appellant's cars in Minnesota and pays another road $50,000 for appellant's use of that road's cars outside of Minnesota, it cannot realistically be said that no part of the

[4] Cf. *Rowley* v. *Chicago & Northwestern Ry. Co.*, 293 U. S. 102, 109.

[5] Cf. *Dane* v. *Jackson*, 256 U. S. 589, 598–599.

$50,000 received by appellant has a Minnesota origin. On the contrary, the whole $50,000 paid appellant derives from use of its cars in Minnesota. For Minnesota then to lay a tax on the whole amount (as it does under this formula) is to exercise a jurisdiction which constitutionally is hers. Similarly to permit under the formula a deduction of only those debit balances owing by virtue of the use by appellant in Minnesota of cars of other roads results in determining a net credit balance for its Minnesota activity of renting out and borrowing freight cars. To hold that that net cannot constitutionally be taxed by Minnesota but must be reduced by the amount of payments made by appellant for its use of cars in other states would be to deprive Minnesota of her jurisdiction over property within her borders.[6] For as appellant's cars move over tracks of other roads in Minnesota and as cars of other roads move over its tracks in Minnesota, certain credits and debits accrue. To say that the resultant net credit balance does not derive wholly from operations within Minnesota is to deny the fact.

But the nub of appellant's objection seems to rest on the equal protection clause of the Fourteenth Amendment. Most of its contentions come back to the point that it has only 30 odd miles of tracks in the state. On this phase, appellant makes two points. First, as compared with other roads having extensive mileage in Minnesota, it is permitted to deduct only a small fraction (between 0.1% and 0.13%) of its debit balances. Second, it is penalized for having nominal trackage in Minnesota, for roads with no trackage in the state pay no tax on these items though they may have substantial revenues from rentals of cars for use in Minnesota.

[6] See *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696.

We have in substance already dealt with the first of these contentions. All roads operating in Minnesota are taxed on precisely the same, not on different bases. So far as the present incidence of the statute is concerned, the tax is laid on the net credit balances from the business of renting and borrowing cars used in Minnesota. The fact that appellant receives a larger net than others from its Minnesota activity of renting and borrowing cars and hence must pay a larger tax does not mean that Minnesota has overstepped her constitutional bounds. Appellant is not singled out for special treatment.[7] It is not taxed on one formula; the others, on another. They are all taxed pursuant to the same formula; and the formula is adapted to ascertainment of value of property situated in Minnesota. And appellant's contention that the tax is discriminatory because it has only 30 miles of track yet must pay a tax, while others with hundreds of miles may pay none, is beside the point. The business taxed is not adequately measured by trackage alone. Though appellant has but few miles of track in the state, nevertheless its cars are constantly moving over other lines in Minnesota. That produces revenue. A tax on that revenue certainly bears a close relationship to appellant's property in the state which no computation based on trackage can alter.

As to appellant's second objection under this head, little need be said. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do, are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state, as are domestic companies engaged in that business. The fact that that

[7] See *Southern Railway Co.* v. *Watts,* 260 U. S. 519; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89.

entails burdens is a part of the price for enjoyment of the privileges which Minnesota extends.[8]

Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the "Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds." [9]

Appellant's constitutional objection based on the commerce clause has been adequately answered in the prior decisions of this Court sustaining other taxes levied under this statute.[10] The right of a state to tax property, although it is used in interstate commerce, is well settled. And certainly if such tax has a fair relation to the property employed in the state (as this tax clearly does) it cannot be said to run afoul of the prohibition against state taxation on interstate commerce. As Chief Justice Fuller once said on that point, ". . . by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." [11]

As to appellant's claim of retroactivity, little need be said. We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law, lack of adequate machinery, have never been constitutional barriers to a state reaching backward for

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[8] See *Atlantic Refining Co.* v. *Virginia,* 302 U. S. 22, 31.

[9] *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533.

[10] *Great Northern Ry. Co.* v. *Minnesota; Cudahy Packing Co.* v. *Minnesota;* and *United States Express Co.* v. *Minnesota, supra,* note 2.

[11] *Postal Telegraph Cable Co.* v. *Adams, supra* note 6, p. 697.

taxes.[12] Hence the case falls far short of types of retroactive tax legislation which have repeatedly been sustained by this Court,[13] in recognition of the principle that liability for retroactive taxes is "one of the notorious incidents of social life." [14] Certainly where opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law.[15]

In conclusion, appellant contends that the Supreme Court of Minnesota erred in holding that the credits here taxed are "gross earnings" within the meaning of the statute. But on such matters of construction we defer to the state court's interpretation.[16]

Affirmed.

UNITED STATES FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE CO. *v.* NATIONAL SURETY CORP. ET AL.

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

No. 236. Argued January 9, 10, 1940.—Decided February 5, 1940.

A private user of the mails may not, without the express or implied consent of the United States, bring suit on the bond of a postmaster (in which the United States is the sole obligee) for consequential damages resulting from misdelivery of mail. P. 169.
103 F. 2d 450, affirmed.

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[12] *Florida Central & Peninsular R. R. Co.* v. *Reynolds,* 183 U. S. 471; *White River Lumber Co.* v. *Arkansas,* 279 U. S. 692.

[13] *Seattle* v. *Kelleher,* 195 U. S. 351; *Wagner* v. *Baltimore,* 239 U. S. 207.

[14] *Seattle* v. *Kelleher, supra* note 13, p. 360; *League* v. *Texas,* 184 U. S. 156.

[15] *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 154.

[16] *Chicago Theological Seminary* v. *Illinois,* 188 U. S. 662, 674; *Storaasli* v. *Minnesota,* 283 U. S. 57, 62.

CERTIORARI, 308 U. S. 534, to review the affirmance of a judgment of the District Court, 23 F. Supp. 411, dismissing the complaint in an action on a postmaster's bond.

Mr. Benedict Deinard for petitioner.

If a postmaster stands in a relationship toward private mail-users akin to that of clerks of the District Courts towards private suitors, the right to recover is established by *Howard* v. *United States,* 184 U. S. 676.

The language of the bond statute, 39 U. S. C. § 34, confers benefits upon users of the mails, as well as upon the Government.

That the United States was the sole obligee is not controlling. *Howard* v. *United States,* 184 U. S. 676, 687; *United States* v. *Globe Indemnity Co.,* 26 F. 2d 191; *United States* v. *Bell,* 135 F. 336; *In re Walker Grain Co.,* 3 F. 2d 872, 874; dist'g *District of Columbia* v. *Fidelity & Deposit Co.,* 271 F. 383.

The statute permits a bond normally sufficient to cover both the Government and the mail-users. There is no limit on the penalty. The Government may exact a new bond if a recovery on an existing bond diminishes security for the future. Postal Laws and Regs., 1932, § 414.

Liability on an official bond is co-extensive with the liability of the officer himself. *National Surety Co.* v. *United States,* 129 F. 70; *Gibson* v. *United States,* 208 F. 534; *American Surety Co.* v. *United States,* 133 F. 1019.

If the Government, as bailee, may sue a third person who wrongfully deals with the subject of bailment, or his surety, then the sender of a letter, as bailor, is entitled to the same remedy. *New Jersey Steam Nav. Co.* v. *Boston Merchants Bank,* 6 How. 344.

Plaintiff's right to sue in the name of the United States derives from the fact that Congress intended mail-users

should be beneficiaries of the bond, and prescribed no other remedy. *Howard* v. *United States, supra.*

Mr. George T. Havel, with whom *Mr. Henry N. Benson* was on the brief, for Patrick J. Malone; and *Mr. Pierce Butler, Jr.,* with whom *Messrs. M. J. Doherty* and *R. O. Sullivan* were on the brief, for National Surety Corporation, respondents.

By leave of Court, *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Robert K. McConnaughey,* and *Oscar H. Davis* filed a brief on behalf of the United States, as *amicus curiae,* urging affirmance.

Mr. Justice Reed delivered the opinion of the Court.

The question presented is whether petitioner, a private user of the mails, may without the consent of any officer of the United States bring suit on the bond of an acting postmaster for consequential damages resulting from misdelivery of mail. The Circuit Court of Appeals for the Eighth Circuit affirmed a judgment of the District Court for the District of Minnesota dismissing petitioner's complaint.[1] We granted certiorari [2] because of an alleged conflict with a decision of this Court [3] and because an important question in the administration of the postal laws was involved.

The complaint alleged that petitioner was engaged in the business of automobile financing in Minneapolis, in the course of which it purchased from automobile dealers the installment notes of buyers secured by their sales contracts. A dealer living at Montgomery, Minnesota,

[1] 103 F. 2d 450, affirming 23 F. Supp 411.

[2] 308 U. S. 534.

[3] *Howard* v. *United States,* 184 U. S. 676.

where the respondent Malone was acting postmaster, is alleged to have put into operation a scheme to defraud petitioner by selling it forged notes and contracts, which he sent petitioner along with a fictitious list of credit references. Petitioner, before purchasing, followed its usual practice of mailing letters of inquiry to the references, and after purchasing mailed payment books, insurance certificates, and receipts to the purported makers of the notes. The dealer persuaded the acting postmaster Malone, allegedly in violation of the Postal Regulations,[4] to turn over to him all letters that arrived in Montgomery in petitioner's envelopes. Then he sent forged replies to petitioner's letters and made installment payments out of the money which petitioner had paid him in buying the notes. The dealer thus defrauded the Finance Company of some $34,000. The respondent Malone, on taking office as acting postmaster, had executed a bond for $16,000 to the United States as sole obligee with the respondent Surety Corporation as surety. The condition of the bond was:

"That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with

[4] Postal Laws and Regulations (1932), § 777. "Mail matter should be delivered to the person addressed or in accordance with his written order . . ."

"2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. . . ."

the Postal Savings System, then this obligation shall be void; otherwise, of force."

In its complaint, without alleging specific authorization from the United States to sue, petitioner asked judgment on the bond for the defaults of Malone as postmaster. At the close of the testimony at the trial motions to dismiss the complaint were made by respondents and the district judge reserved judgment. After a jury verdict for petitioner the motions were granted. The Court of Appeals affirmed on the ground that a private user of the mails cannot maintain such an action as is here alleged without the consent of the United States, the obligee in the bond, and that no consent was given either by the statutes, expressly or by implication, or by any appropriate officer of the United States.

The respondent gave a statutory bond in compliance with an enactment of the Congress for the purposes specified in the statute.[5] As the bond is part of an integrated system of postal regulations, the determination of the parties authorized to sue upon it is a federal question governed by federal law.[6]

We agree with the Court of Appeals that there was no consent and that such consent is necessary. Consequently there is no occasion to determine whether the bond was intended to protect private users of the mail from all loss or damage, however consequential, occasioned by the postmaster.

The record shows the only effort made to secure consent of an officer was a request to the Attorney General for

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[5] 39 U. S. C. § 34, Postal Laws and Regulations § 410:

"Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

[6] *James Stewart & Co.* v. *Sadrakula, ante,* p. 94.

authority to sue. This was refused. Whether as a matter of right a third party may sue on the instrument for loss covered by an official bond running only to the statutory obligee depends upon the intention of the legislative body which required the bond. This intention may be evidenced by express statutory language or by implication. This was the rule announced in *Corporation of Washington* v. *Young*.[7] There a bond had been given to the Corporation of Washington, a municipality, by the manager of a lottery "truly and impartially to execute" his duties. Without the city's consent, the holder of a winning ticket sued on the bond. This Court said:

"No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment."

In *Howard* v. *United States*[8] this comment was made upon the *Young* decision:

"That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent."[9] Such official bonds are often part of a general statutory plan for the operation of governmental activities. While all the activities of a government of course confer benefits on its citizens, frequently the benefits are incidental

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[7] 10 Wheat. 406, 409.

[8] 184 U. S. 676, 691.

[9] Cf. *United States* v. *United States Lines Co.*, 24 F. Supp. 427; *Moody* v. *Megee*, 31 F. 2d 117; *United States ex rel. Brumberg Bros.* v. *Globe Indemnity Co.*, 26 F. 2d 191, 193; *Idaho Gold Reduction Co.* v. *Croghan*, 6 Idaho 471, 473; 56 P. 164; *United States* v. *Griswold*, 8 Ariz. 453, 456; 76 P. 596.

and unenforceable.[10] In the case of an official bond, even if its benefits are not incidental, it may well be that the legislative body is of the opinion that actions on the bond should be limited to the government in order to secure unified administration of claims.

We have recognized a similar need for a single control in regard to a sale bond required by a district court in an equity receivership. This Court in *Munroe* v. *Raphael* [11] had before it an injunction granted by a federal district court upon the motion of its receiver to rescind a consent to sue and forbid further proceedings in a suit in a state court in the name of the United States upon a sale bond of the estate in receivership. The sale bond had been given for assets purchased from the receiver. It ran to the United States only and guaranteed the payment of a certain percentage of indebtedness to all creditors of the estate. The suit had been instituted in the state court by one creditor, with permission of the district court obtained prior to the receiver's motion for injunction. This Court upheld the injunction on the theory that the bond, a part of the estate, remained within the control of the court and that to ensure ratable payments to all creditors one should not be permitted to carry on the litigation. In the opinion, it was declared: "Certainly no creditor could bring a suit in his own name on the bond, for his share of the purchase money. Nor could he institute such an action without leave of the District Court." [12]

Petitioner's attack is pointed at the application of the consent rule rather than at the rule itself. While with

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[10] *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 231.

[11] 288 U. S. 485.

[12] *Ibid.* at 488; see *District of Columbia to Use of Langellotti* v. *Fidelity & Deposit Co.*, 50 App. D. C. 309; 271 F. 383.

some other official bonds consent is given by express provision,[13] none is given in the postmaster bond statute. Petitioner urges that consent by implication is given. Attention is called to the words "legal intendment" in the quotation from *Corporation of Washington* v. *Young* and to a comment upon the *Young* case in the *Howard* case that these words show that "consent may, under some circumstances, be assumed to have been given . . ." [14] These expressions are used to base an argument that the statutes and regulations of the postal service establish consent by intendment. The precedent chiefly relied upon for this position is the *Howard* case. This was a suit, without express consent of the United States, on a bond of a clerk of the district court, alleging breach by failure to pay over money deposited with the clerk in settlement of prior litigation. The bond was a statutory bond naming the United States as sole obligee and assuring that the clerk would faithfully discharge the duties of his office. This Court analyzed the statutory requirements and the "peculiar relation" of the clerk to the court to determine the intendment of the Congress as to the standing of the private litigant to sue on clerks' bonds. Consideration was given to the fact that "the great mass of litigation . . . has always been between individuals," [15] that "the practice of a century" required a ruling that the bond covered them and that it could

[13] 40 U. S. C. § 270a–d (laborers and materialmen may sue on bond of contractor for government building); 22 U. S. C. § 103 ("any person injured" may sue on bond of consul); 22 U. S. C. § 78 (same as to bonds of consular officers acting as administrators in foreign countries); 22 U. S. C. §§ 170, 171 (same as to bonds of marshals of consular courts); 28 U. S. C. §§ 496, 500 (same as to bonds of U. S. marshals); 11 U. S. C. § 78 (h) (same as to bonds of referees, trustees and designated depositories in bankruptcy); 7 U. S. C. §§ 247, 249 (same as to bonds of warehousemen under the Warehouse Act).

[14] 184 U. S. 676, 691.

[15] *Id.*, p. 687.

not be said of the clerk's bond, as it was said of the lottery bond, that it was given primarily for the governmental authority. This Court concluded that even though "generally speaking . . . in the absence of a statute" the obligation cannot be put in suit in the name of the obligee without his consent, the factors of custom, similarity of governmental and private use of the courts and the surrounding circumstances, in the absence of words declaratory of intention, evidenced an intendment to permit suit without consent on the clerk's bond. "In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions." [16]

We conclude in the present instance, however, that circumstances, practice, statutes and regulations combine to forbid reading into this situation a "legal intendment" to permit suit without the consent of the United States. Assuming the bond declared upon here is intended to cover the users of mail service, its beneficiaries are legion in comparison with the users of a court's depository. Moreover, the United States has a very substantial interest in a postmaster's bond. The statutory duties of a postmaster require him to act as a fiscal officer for the government at his office. He is responsible for postal savings deposits, money orders, stamps, and salary disbursements as well as for the property of the service, buildings, mail bags and other equipment.[17] Such circumstances weigh against a holding that the Congress intended to let a private user of the mails, wronged by the

[16] *Id.*, p. 692.

[17] Postal Laws and Regulations §§ 105–06, 443, 1626, 1408, 1426, 1430 (21), 137, 235, 1866–70.

principal of a postmaster's bond, sue wherever he might find defendants and gain for himself such priority on the bond as vigilance could obtain.[18]

Apparently it is not customary for the United States to consent to suit by mail users upon postmasters' bonds. No case has been called to our attention where such permission has been granted though the requirement for a bond has been in existence since 1825.[19] Rarely has a private individual sought recovery.[20] The contention of petitioner cannot be said to be supported by any continued administrative practice. On the other hand, the United States has undertaken repeatedly and successfully to recover on the bonds for the losses of mail users. Recovery has been allowed on the theory of a suit by a bailee for loss of property in his possession.[21]

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[18] In the absence of express legislation the government is not entitled to priority. See *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35; *Mellon* v. *Michigan Trust Co.,* 271 U. S. 236, 239; *United States* v. *Knott,* 298 U. S. 544, 547.

The first statute permitting private suits on public contractors' bonds to the United States made no provision for government priority. 28 Stat. 278. By a later amendment private suits were forbidden until six months after completion of the contract and settlement of the contractors' accounts and the government was given priority. 33 Stat. 811; see *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214, 217. The present statute requires two bonds, one for the government and a second for laborers and materialmen. 40 U. S. C. § 270a–d.

[19] Act of March 3, 1825, 4 Stat. 103.

[20] Cf. *Wile* v. *United States Fidelity & Guaranty Co.,* 6 Alaska 48; *Idaho Gold Reduction Co.* v. *Croghan,* 6 Idaho 471; 56 P. 164.

[21] *National Surety Co.* v. *United States,* 129 F. 70 (C. C. A. 8); *American Surety Co.* v. *United States,* 133 F. 1019 (C. C. A. 5); *United States* v. *American Surety Co.,* 163 F. 228 (C. C. A. 4); *United States* v. *American Surety Co.,* 155 F. 941 (N. D. Ill.); *Gibson* v. *United States,* 208 F. 534 (C. C. A. 1); *United States Fidelity & Guaranty Co.* v. *United States,* 229 F. 397 (C. C. A. 8); *United States Fidelity & Guaranty Co.* v. *United States,* 246 F. 433 (C. C. A. 9); *United States* v. *United States Fidelity & Guaranty Co.,* 247 F. 16 (C. C. A. 6); *United States* v. *Griswold,* 8 Ariz. 453; 76 P. 596.

There are over 44,000 post offices under the Post Office Department [22] and it is common knowledge that millions of items of mail go through them each year. It is rather obvious that numerous claims, many of them for small amounts, are likely to arise in the course of many transactions.[23] Under the Department's Regulations there is a fairly complete administrative formula for handling these claims from discovery to satisfaction.[24] These facts, along with the substantial interest of the government in the bonds, convince us that the Congress intended that claims on the bonds would be handled through the government rather than through various suits by individuals.

Affirmed.

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[22] Report of the Postmaster General, 1939, p. 126.

[23] Compare the Department's experience with claims on domestic insured mail during the fiscal year ending June 30, 1939. Payments were made in connection with 113,846 claims, and the average payment amounted to only $3.87. Report of the Postmaster General, 1939, p. 120.

[24] Postal Laws and Regulations § 816:

"The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.

"2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.

. . . . . .

"6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.

"7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear."

McCARROLL, COMMISSIONER OF REVENUES OF ARKANSAS, *v.* DIXIE GREYHOUND LINES, INC.

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

No. 138. Argued December 14, 1939.—Decided February 12, 1940.

A state tax allocated to highway purposes and imposed on each gallon of gasoline, above twenty, brought into the State by any motor vehicle for use as fuel in such vehicle, *held* a forbidden burden on interstate commerce as applied to gasoline carried by interstate motor buses through the State for use as fuel in the course of their interstate transportation beyond the state line. P. 180.

In the circumstances, the imposition is not compensation for the privilege of using the state highways.

101 F. 2d 572, affirmed.

APPEAL from a decree which reversed the action of the District Court in denying an injunction and in dismissing the bill in a suit to restrain the enforcement of a state gasoline tax, 22 F. Supp. 985, and which directed that court to enter a decree of injunction.

Messrs. Frank Pace, Jr. and *Amos M. Mathews,* with whom *Mr. Louis Tarlowski* was on the brief, for appellant.

Mr. A. L. Heiskell, with whom *Messrs. Walter Chandler* and *J. H. Shepherd* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

An Arkansas statute [1] prohibits entry into the State of any automobile or truck "carrying over twenty (20) gal-

[1] Act 67 General Assembly Arkansas, approved March 2, 1933—

"Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive

lons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon [six and one-half cents per gallon [2]] has been paid."

Appellee, a Delaware corporation, operates passenger busses propelled by gasoline motors, from Memphis, Tennessee across Arkansas to St. Louis, Missouri, and in reverse. The route between these points approximates 342 miles—3 in Tennessee, 78 in Arkansas, 261 in Missouri. Like busses ply between Memphis and points within and beyond Arkansas, and in reverse. It is only necessary now to consider the facts connected with operation of the Memphis-St. Louis line. They are typical.

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or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

"Section 2. Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

"Section 3. All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained that this Act is necessary to better enforce the gasoline collection laws and said Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage."

[2] Act 11 Extraordinary Sessions Arkansas, approved February 12, 1934—

"Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.'"

Each bus consumes about one gallon of gasoline for every five miles traversed. Sixty-eight gallons are required for the journey from Memphis to St. Louis—under one in Tennessee, sixteen in Arkansas, fifty-one in Missouri. The practice is to place in the bus tank at Memphis the sixty-eight gallons of gasoline commonly required for the trip; also ten more to meet any emergency. Thus upon arrival at the Arkansas line the tank contains some seventy-seven gallons of which sixteen probably will be consumed within that State. As a condition precedent to entry there, appellant—revenue officer of the State—demands that each bus pay six and one-half cents upon every gallon of this gasoline above twenty, and threatens enforcement.

By a bill in the District Court, appellee unsuccessfully sought an injunction against this threatened action. The Circuit Court of Appeals Eighth Circuit took a different view.

After accepting as correct the ruling in *Sparling* v. *Refunding Board,* 189 Ark. 189, 199; 71 S. W. 2d 182, 186, that the tax imposed was not upon property but on the privilege of using the highways, and had been definitely allocated to highway purposes, the latter court said—

"The appellant does not now contend that the tax of which it complains may not be imposed by the State of Arkansas with respect to gasoline consumed or to be consumed upon the highways of Arkansas, as compensation for the use of the highways, but it does contend that that State may not impose a tax upon gasoline which is carried in interstate commerce for use in Missouri or Tennessee, because that would constitute a direct and unreasonable burden upon interstate commerce."

"Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried, for use in other states, in the fuel

tank of a motor vehicle traveling in interstate commerce can be sustained. That the tax is a direct burden on interstate commerce, cannot be controverted."

"If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State."

"While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state." 101 F. 2d 572, 574.

Also, it declared the point in issue is ruled by *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186, which held invalid a tax laid by Tennessee's Legislature on the privilege of operating a bus in interstate commerce because not imposed solely as compensation for the use of highways or to defray the expense of regulating motor traffic.

Finally, it reversed the District Court and directed entry of a decree there enjoining appellant "from enforcing the challenged tax against it [the appellee] with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states."

This action we approve.

The often announced rule is that while generally a state may not directly burden interstate commerce by taxation she may require all who use her roads to make reasonable compensation therefor. *Hendrick* v. *Maryland,* 235 U. S.

610, 622; *Interstate Transit, Inc.* v. *Lindsey, supra,* 185, 186; *Bingaman* v. *Golden Eagle Western Lines,* 297 U. S. 626, 628.

Here, the revenue officer demanded payment of appellee on account of gasoline to be immediately transported over the roads of Arkansas for consumption beyond. If, considering all the circumstances, this imposition reasonably can be regarded as proper compensation for using the roads it is permissible. But the facts disclosed are incompatible with that view. A fair charge could have no reasonable relation to such gasoline. That could not be even roughly computed by considering only the contents of the tank. Moreover, we find no purpose to exact fair compensation only from all who make use of the highways. Twenty gallons of gasoline ordinarily will propel a bus across the State and if only that much is in the tank at the border no charge whatever is made. Evidently large use without compensation is permissible and easy to obtain.

The point here involved has been much discussed. Our opinions above referred to and others there cited define the applicable principles. The present controversy is within those approved by *Interstate Transit, Inc.* v. *Lindsey, supra.* Neither *Hicklin* v. *Coney,* 290 U. S. 169, nor *Bingaman* v. *Golden Eagle Western Lines, supra,* relied upon by appellant's counsel, properly understood, sanctions a different view.

The challenged judgment must be

Affirmed.

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

MR. JUSTICE STONE, concurring:

The CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE REED, and I agree with MR. JUSTICE MCREYNOLDS, but we think a word should be said of appellant's contention

that the tax in its practical operation may be taken as a fair measure of respondent's use of the highways.

Since the subject taxed, gasoline introduced into the state in the tank of a vehicle, for use solely in propelling it in interstate commerce, is immune from state taxation except for a limited state purpose, the exaction of a reasonable charge for the use of its highways, it is not enough that the tax when collected is expended upon the state's highways. It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made. *Sprout* v. *City of South Bend,* 277 U. S. 163, 170; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186; *Bingaman* v. *Golden Eagle Western Lines,* 297 U. S. 626, 628; *Morf* v. *Bingaman,* 298 U. S. 407; *Ingels* v. *Morf,* 300 U. S. 290, 294.

While the present tax, laid on gasoline in the tank in excess of twenty gallons, admittedly has no necessary or apparent relationship to any use of the highways intrastate, appellant argues that, as applied to the reserve gasoline in each of appellee's vehicles, the tax either is, or with a reduction of the reserves would be, substantially equivalent to a tax which the state could lay, but has not, on the gasoline consumed within the state. That could be true only in case the taxed gasoline, said to be reserved for the extrastate journey, were by chance or design of substantially the same amount as that consumed intrastate.

That the relationship between tax and highway use does not in fact exist as the business is now conducted, is demonstrated by appellant's showing that on all of appellee's routes, taken together, the taxed gasoline which is reserved for extrastate use is substantially more than that consumed on those routes within the state. In three the taxed reserve in excess of the twenty gallons exemption is substantially the same as the amount of the intra-

state consumption. But on the fourth route the taxed reserve on busses moving in one direction is more than four times that consumed within the state. In the other it is approximately the same. With the three scheduled trips daily each way on the Memphis-St. Louis route, the excess of the gasoline taxed over that consumed in the state is more than 150 gallons per day. In no case does it appear that the amount of taxed gasoline has any relation to the size or weight of vehicles.

It cannot be said that such a tax whose equivalence to a fair charge for the use of the highways, when not fortuitous, is attained only by appellee's abandonment of some of the commerce which is taxed, has any such fair relationship to the use of the highways by appellee as would serve to relieve the state from the constitutional prohibition against the taxation of property moving in interstate commerce. A tax so variable in its revenue production when compared with the taxpayer's intrastate movement cannot be thought to be "levied only as compensation for the use of the highways." *Interstate Transit, Inc.* v. *Lindsey, supra,* 186. Justification of the tax, as a compensation measure, by treating it as the equivalent of one which could be laid on gasoline consumed within the state must fail because the statute on its face and in its application discriminates against the commerce by measuring the tax by the consumption of gasoline moving and used in interstate commerce which occurs outside the state. See *Fargo* v. *Michigan,* 121 U. S. 230, 241; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 438.

It is no answer to the challenge to the levy to say that by altering the amount of the gasoline brought into the state for extrastate consumption appellee could so moderate the tax that it would bear a fair relation to the use of the highways within the state. In the circumstances of this case the state is without power to regulate the amount

of gasoline carried interstate in appellee's tanks. It cannot be said, if that were material, that the amount carried is not appropriate for the interstate commerce in which appellee is engaged and it can hardly be supposed that the state could compel appellee to purchase there all the gasoline which it uses intrastate upon an interstate journey, because that would be a convenient means of laying and collecting a tax for the use of the highways. There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes. In laying an exaction as a means of collecting compensation for the use of its highways the state must tax the commerce as it is done, and not as it might be done if the state could control it. Appellant cannot justify an unlawful exaction by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the Constitution protects from state interference.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS, dissenting:

We take a different view. Measured by the oft-repeated judicial rule that every enactment of a legislature carries a presumption of constitutional validity, the Arkansas tax has not, in our opinion, been shown to be beyond all reasonable doubt in violation of the constitutional provision that "Congress shall have power to . . . regulate commerce . . . among the States." "In case of real doubt, a law must be sustained." Mr. Justice Holmes in *Interstate Consolidated Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 88.[1] Congress, sole constitutional legislative repository of power over that commerce, has

[1] Cf. *Ogden* v. *Saunders*, 12 Wheat. 213, 270; *Butler* v. *Pennsylvania*, 10 How. 402; *Booth* v. *Illinois*, 184 U. S. 425; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 606, 615; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 195.

enacted no regulation prohibiting Arkansas from levying a tax—on gasoline in excess of twenty gallons brought into the State—in return for the use of its highways. Gasoline taxes are widely utilized for building and maintaining public roads, and the proceeds of this Arkansas tax are pledged to that end. Arkansas can levy a gallonage tax on any gasoline withdrawn from storage within the State and placed in the tanks of this carrier's vehicles "notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce." *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 252. The present tax aims at carriers who would escape such taxation, unless we are to require Arkansas to shape its taxes to the circumstances of each carrier.

The cost entailed by the construction and maintenance of modern highways creates for the forty-eight States one of their largest financial problems. A major phase of this problem is the proper apportionment of the financial burden between those who use a State's highways for transportation within its borders and those who do so in the course of interstate transportation. Striking a fair balance involves incalculable variants and therefore is beset with perplexities. The making of these exacting adjustments is the business of legislation—that of state legislatures and of Congress. This Court has but a limited responsibility in that state legislation may here be challenged if it discriminates against interstate commerce or is hostile to the congressional grant of authority. *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33.

Arkansas' tax hits the big, heavy busses and trucks which, it is well established, entail most serious wear and tear upon roads. Had Arkansas expressly declared the challenged statute to be a means of working out a fair charge upon these heavy vehicles for cost and maintenance of the roads they travel in the State, the relation-

ship between the means employed and these allowable ends—however crude and awkward—would have been rendered more explicit, but not made more evidently a matter of policy and administration, and therefore not for judicial determination. Certainly, the State had power to impose flat fees or taxes graduated according to gasoline used, horsepower, weight and capacity or mileage, and yet those taxes would not measure with exact precision the taxpayers' use of Arkansas highways.[2] It is not for us to measure the refinements of fiscal duties which a State may exact from these heavy motor vehicles.[3]

This case again illustrates the wisdom of the Founders in placing interstate commerce under the protection of Congress. The present problem is not limited to Arkansas, but is of national moment. Maintenance of open channels of trade between the States was not only of paramount importance when our Constitution was framed; it remains today a complex problem calling for national vigilance and regulation.

Our disagreement with the opinions just announced does not arise from a belief that federal action is unnecessary to bring about appropriate uniformity in regulations of interstate commerce. Indeed, state legislation recently before this Court indicates quite the contrary. For instance, we sustained the right of South Carolina—

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[2] *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Carley & Hamilton* v. *Snook,* 281 U. S. 66; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *Hicklin* v. *Coney,* 290 U. S. 169; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285; *Morf* v. *Bingaman,* 298 U. S. 407.

[3] If the State had the power to levy the tax, absent congressional proscription, it likewise had the power to extend the grace of exemption to users of its highways of less tank capacity or gasoline load than appellee. Cf. *Continental Baking Co.* v. *Woodring, supra,* 370–3; *Sproles* v. *Binford,* 286 U. S. 374, 396; *Aero Transit Co.* v. *Georgia Comm'n, supra,* 289, 292–3.

in the absence of congressional prohibition—to regulate the width and weight of interstate trucks using her highways, even though the unassailed findings showed that a substantial amount of interstate commerce would thereby be barred from the State. *South Carolina Highway Dept.* v. *Barnwell Bros.*[4] We did not thereby approve the desirability of such state regulations. It is not for us to approve or disapprove. We did decide that "courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of national commerce." [5] As both the Union and the States are more and more dependent upon the exercise of their taxing powers for carrying on government, it becomes more and more important that potential conflicts between state and national powers should not be found where Congress has not found them, unless conflict is established by demonstrable concreteness. See *Hammond* v. *Schappi Bus Line,* 275 U. S. 164.

Even under the principle enunciated by the majority—that Arkansas may not measure her tax by gasoline carried in appellee's tanks for use in other States—the challenged judgment should not stand.

Arkansas admittedly has power to tax appellee upon gasoline used within her borders, and need not, of course, extend to appellee any exemption for a reserve. The record discloses that appellee's busses travel 1188.8 miles each day over Arkansas highways. The trial judge found, and there is evidence to support the finding, that these busses use about one gallon of gasoline for every five miles traveled. Thus, appellee uses about 237.76 gallons

[4] 303 U. S. 177, 190.

[5] *Id.,* 190.

of gasoline a day in Arkansas, upon which the tax of 6.5 cents per gallon used would amount to $15.45 a day.

Appellee's busses travel four different routes, two from Memphis through Arkansas to Missouri, and two from Memphis to cities in Arkansas. On the trips to Missouri the tax now exacted by Arkansas is greater than would be a tax on the gasoline actually used in Arkansas. But on the trips from Memphis into Arkansas and back, the tax exacted, because of the 20-gallon exemption, is less than would be a tax on the gasoline used in Arkansas.

As appellant points out in his brief, when all the routes are taken together, the daily tax which Arkansas would collect if appellee carried only enough gasoline to complete each trip would only amount to $13.00—actually $2.45 less than a tax on gasoline consumed in Arkansas.

This amount—$2.45—equals the present tax on 37 gallons of gasoline. Appellee's busses enter Arkansas 13 times each day. It follows that appellee may carry a reserve of almost three gallons on each trip and still pay no more than the tax which, as the majority assumes, Arkansas could constitutionally impose on the gasoline actually consumed on her own roads. There is nothing in the record to show that a greater reserve is necessary. An interstate carrier has no absolute right to fix the size and character of its equipment used in interstate commerce, in total disregard of the necessities of the enterprise and the requirements of States through which the carrier operates.[6] Exactions by such States may well be designed to operate upon the quantity of gasoline reserves for considerations analogous to those which have called into being state regulations of the size, weight and number of the vehicles themselves. And a state tax which may induce a reduction in the amount of reserve previously

[6] *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177.

carried is no more to be condemned on that sole ground alone than is a state law actually prohibiting vehicles above a certain size or weight. That this reduction may be attributable to a tax rather than to a regulatory measure expressly passed in the interests of public safety should not be controlling. Particularly is this so when the proceeds of the tax are utilized exclusively for highway purposes and the tax itself is directed to gasoline used, just as other equipment is used, in the course of interstate business and involves no manifestation of hostility to—or levy upon—gasoline carried as a commodity in interstate commerce. It is presumably safe to rely on appellee's self-interest to work out any schedules of refueling at its various storage facilities necessitated by changes in reserves carried. We cannot believe that appellee is able to attack the constitutionality of this tax on the ground that as to others it might operate differently and serve to burden the use of gasoline in other States.[7] It is important to bear in mind that we are not passing upon a statute as such but upon the incidence of this statute in the single concrete situation presented by a specific objector on this specific record. The very fact that such niceties of calculation have to be indulged in as the concurring opinion finds necessary in order to establish the mischief of the statute, makes manifest the "real doubt" of any showing of unconstitutionality and indicates that a burden of calculation and speculation is assumed in the exercise of the judicial function which should be left to the legislatures of the States and the Congress.

Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judi-

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[7] *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 190; *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, 96; see opinion of Mr. Justice Brandeis, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347.

cial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by "the narrow scope of judicial proceedings" [8] Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. See, Comparative Charts of State Statutes illustrating Barriers to Trade between States, Works Progress Administration, May, 1939; Proceedings, The National Conference on Interstate Trade Barriers, The Council of State Governments, 1939. But the remedy, if any is called for, we think is within the ample reach of Congress.

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[8] See Mr. Chief Justice Taney, dissenting, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 592.

DEITRICK, RECEIVER, *v.* GREANEY.

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

No. 246. Argued January 10, 1940.—Decided February 12, 1940.

1. A receiver of a national bank, representing creditors, may compel payment of a promissory note knowingly given to the bank by one of its directors as a substitute for shares of its own stock illegally purchased and retained by the bank, the note having been delivered upon the understanding that it was not to be paid and that the bank was to retain its interest in the stock. P. 196.

   The purpose of the National Bank Act in prohibiting the purchase by a bank of its own stock is to prevent impairment of its capital resources and consequent injury to creditors in the event of insolvency. The provisions requiring periodic examinations and reports are designed to insure prompt discovery of violations of the Act and prompt remedial action by the Comptroller. These purposes would be defeated and the command of the statute nullified if a director or officer, or any other by his connivance, could place in the bank's portfolio his obligation good on its face, as a substitute for its stock illegally acquired, and if he remained free to set up that the obligation was, in effect, fictitious, intended only to aid in the accomplishment of the injury at which the statute is aimed.
2. It is immaterial that the bank's officers were participants in the illegal transaction, and that the receiver has not shown that creditors were deceived or specifically injured as the result of the illegal contract. *Rankin* v. *City National Bank*, 208 U. S. 541 and *Deitrick* v. *Standard Surety Co.*, 303 U. S. 471, distinguished. P. 198.
3. Judicial determination of the legal consequences of acts condemned by the National Bank Act involves decision of a federal question. P. 200.

103 F. 2d 83, reversed.

CERTIORARI, 308 U. S. 535, to review a judgment which reversed in part a judgment recovered in a suit by the Receiver to collect an assessment upon shares of an insolvent national bank, and to collect a promissory note found among its assets.

Mr. George P. Barse, with whom *Messrs. Brenton K. Fisk, Andrew J. Aldridge, James Louis Robertson,* and *David B. Hexter* were on the brief, for petitioner.

Mr. David Stoneman, with whom *Mr. Thomas H. Mahoney* was on the brief, for respondent.

The receiver may not recover from the maker of an accommodation note given to the bank, at its request, and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of law. *Rankin* v. *City National Bank,* 208 U. S. 541; *Deitrick* v. *Standard Surety & Casualty Co.,* 303 U. S. 471; *Yates Center National Bank* v. *Lauber,* 240 F. 237; *Cutler* v. *Fry,* 240 F. 238; *Yates Center National Bank* v. *Schaede,* 240 F. 240; *Andresen* v. *Kaercher,* 38 F. 2d 462. Liability of the maker can not be predicated merely on the fact that he was a director of the bank.

Federal law governs the validity and enforcibility of the note in suit. *Auten* v. *U. S. National Bank,* 174 U. S. 125; *Jennings* v. *U. S. Fidelity & Guaranty Co.,* 294 U. S. 216.

The decision below is also in accord with the Massachusetts decisions. *Salem Trust Co.* v. *Deery,* 289 Mass. 431; *Great Barrington Savings Bank* v. *Day,* 288 Mass. 181; *Quincy Trust Co.* v. *Woodbury,* 13 N. E. 2d 377. Distinguishing *Prudential Trust Co.* v. *Moore,* 245 Mass. 311, and *International Trust Co.* v. *Wattendorf,* 256 Mass. 323.

Mr. Justice Stone delivered the opinion of the Court.

The question to be decided is whether a receiver of a national bank may compel payment of a promissory note knowingly given to the bank by one of its directors as a substitute, among its assets, for shares of its own stock

illegally purchased and retained by the bank but with the understanding that it was to retain its interest in the stock and that the note was not to be paid.

Petitioner, receiver appointed by the Comptroller of the Currency for the Boston-Continental Bank, a national banking association, brought suit against respondent, a director of the bank, and others, in the District Court for Massachusetts to collect an assessment upon shares of stock in the insolvent bank and to recover on respondent's promissory note, found by the receiver among its assets.

The trial court found that the Boston National Bank, predecessor of the insolvent bank, had acquired by purchase, 190 shares of its outstanding capital stock in violation of R. S. § 5201, 12 U. S. C. § 83, which declares that "no association shall . . . be the purchaser or holder of any such shares";[1] that respondent as a means of concealing the illegal acquisition of the stock and of enabling the bank to retain its ownership of the stock, prevailed upon his co-defendant Karnow to execute an accommodation note, payable to the bank, the proceeds of which were deposited in another bank to the credit of respondent who then paid them to the Boston National Bank for the 190 shares of stock which were then transferred to the respondent on the books of the bank.

Following a renewal of the Karnow note respondent transferred the shares to him on the books of the bank

[1] "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four [12 U. S. C. § 192]."

and upon consolidation of the Boston with the Continental National Bank, to form the Boston-Continental National Bank of which petitioner later became receiver, new shares of the consolidated bank were issued in exchange for the old. Part of them were sold and the proceeds used in reduction of the Karnow note. Respondent then gave to the bank his own note for the balance, in substitution for Karnow's note, and caused the remaining shares to be transferred to the name of Mahoney, also a defendant in the suit, without informing him of the transfer.

The court found that the entire transaction was devised and carried out by respondent for the purpose of concealing the bank's ownership of the stock by ostensibly removing the shares of stock from its assets and carrying the successive notes in their stead as receivables on the books of the bank with a secret agreement that the stock should be held for the Boston and later for the Boston-Continental Bank without liability on the part of the maker of the note. The court found liability of respondent for the assessment upon the shares held by Mahoney for his account, concluded that he was estopped to deny liability on the note and decreed accordingly that respondent alone should pay the stock assessment and the amount due on the note, 23 F. Supp. 758.

The Court of Appeals for the First Circuit reversed so much of the decree as allowed recovery on the note. 103 F. 2d 83. It confirmed the findings of the trial court. But it held that the circumstances which they detailed did not preclude the defense of want of consideration to the demand of the receiver, more than to that of the bank itself.

We granted certiorari, 308 U. S. 535, on petition of the receiver because of the public importance of the question in the administration of the National Bank Act and of the conflict of the decision below with that of the

Court of Appeals for the Fourth Circuit, in *Federal Reserve Bank* v. *Crothers,* 289 F. 777, and that of the Fifth Circuit in *Bohning* v. *Caldwell,* 10 F. 2d 298.

The National Bank Act constitutes "by itself a complete system for the establishment and government of National Banks." *Cook County National Bank* v. *United States,* 107 U. S. 445, 448. In addition to the sections of the Act conferring on national banking associations the authority to conduct a public banking business the Act contains numerous provisions designed for the protection of the bank's depositors and other creditors. It establishes minimum requirements for the amount of capital with which a bank may begin business, R. S. § 5138, 12 U. S. C. § 51, and makes special provisions for securing the payment into the bank of the authorized capital, R. S. §§ 5140, 5141, 12 U. S. C. §§ 53, 54. It prohibits the purchase by a bank of its own shares of stock and their retention when purchased, R. S. § 5201, 12 U. S. C. § 83. Impairment of capital of an association through its withdrawal by payment of dividends or otherwise is prohibited, R. S. § 5204, 12 U. S. C. § 56. Any bank whose capital has become impaired is required under direction of the Comptroller to make up the deficiency by assessment of its shareholders and in the event of its failure to do so a receiver may be appointed to wind up its business, R. S. § 5205, 12 U. S. C. § 55.

To insure performance of these duties and as a safeguard to creditors and the public, violation of the provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense, R. S. § 5209, 12 U. S. C. § 592, and in the event of such a violation, the association may be required to forfeit all its rights and privileges, R. S. § 5239, 12 U. S. C. § 93. Further, by R. S. § 5240, 12 U. S. C. §§ 481, 484, the Comptroller of the Currency is required to ap-

point examiners who shall examine the affairs of every bank at least twice in each calendar year with power to administer oaths and examine officers and agents of the bank under oath and who "shall make a full and detailed report" of the bank to him. By R. S. § 5211, 12 U. S. C. § 161, every association is required to make to the Comptroller of the Currency not less than three reports each year exhibiting in detail and under appropriate heads the resources and liabilities of the association, and the Comptroller is given power to call for special reports whenever, in his judgment, the same are necessary in order to obtain a full and complete knowledge of the condition of the reporting bank.

The obvious purpose of prohibiting the purchase by a bank of its own stock is to prevent the impairment of its capital resources and the consequent injury to its creditors in the event of insolvency. The provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the Act and in that event prompt remedial action by the Comptroller. These purposes would be defeated and the command of the statute nullified if a director or officer or any other by his connivance could place in the bank's portfolio his obligation good on its face, as a substitute for its stock illegally acquired, and if he remained free to set up that the obligation was, in effect, fictitious, intended only to aid in the accomplishment of the injury at which the statute is aimed.

Here, respondent, with full knowledge of the unlawful purpose to conceal the presence of the stock among the bank's assets, gave in exchange for it, first another's note and then his own, knowing that it was to be availed of as an apparently valid and lawful asset so as to forestall the remedies available under the statute for the unlawful

purchase. The notes were thus carried as receivables on the books of the bank for a period of more than two years, respondent's own note or renewals of it being lodged with the bank from May 4, 1931 until the bank closed its doors in December, 1931.

If the matter were of importance we could not assume, in the absence of proof, that the bank examiners did not perform their statutory duty or that respondent's note was not as it was intended to be the effective means of concealing the impairment of the bank's capital structure and preventing resort to the remedies for it which the statute affords. But it is enough for present purposes that the respondent, after placing his note among the bank's receivables in substitution for the shares of stock, as the means of avoiding the consequences of violation of the statute, may not now take the benefit of the secret and illegal agreement that his note except for purposes of deceiving the bank examiners was to be regarded as a nullity. If respondent were free to set up the unlawful agreement as a defense and thus cast the loss from the unlawful stock purchase on the creditors of the bank in receivership, he would be enabled to defeat the purpose of the statute by taking advantage of an agreement which it condemns as unlawful. That, we think, the law does not allow.

It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See *United States* v. *Dunn,* 268 U. S. 121, 133; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640, 648. Applied in cases like the present, the rule that the illegal agreement may not be set up to defeat the obligation of the note is sometimes denominated an

equitable estoppel.[2] *Lyons* v. *Westwater,* 181 F. 681; 193 F. 817; *Federal Reserve Bank* v. *Crothers,* 289 F. 777; *Bohning* v. *Caldwell,* 10 F. 2d 298; cert. den., 271 U. S. 663; *Utley* v. *Clarke,* 16 F. Supp. 435; *Iglehart* v. *Todd,* 203 Ind. 427; 178 N. E. 685; *Denny* v. *Fishter,* 238 Ky. 127; 36 S. W. 2d 864; *Prudential Trust Co.* v. *Moore,* 245 Mass. 311; 139 N. E. 645; *Longley* v. *Coons,* 244 App. Div. 391; 280 N. Y. S. 17; aff'd 268 N. Y. 712; 198 N. E. 571; *Bay Parkway Nat. Bank* v. *Shalom,* 270 N. Y. 172; 200 N. E. 685; see *First National Bank* v. *Smith,* 132 Pa. Super. 73; 200 A. 215.

In a strict and technical sense an estoppel arises only when a misrepresentation has prejudiced another who has relied upon it. For that reason courts have sometimes held that one in the position of respondent is not estopped to set up the agreement against the bank or the receiver either because it did not appear that the bank was deceived by the concealment and misrepresentation or because injury to creditors was not shown to have resulted from them, cf. *Peterson* v. *Tillinghast,* 192 F. 287; *Cutler* v. *Fry,* 240 F. 238; *First State Bank* v. *Morton,* 146 Ky. 287, 293; 142 S. W. 694; *Quincy Trust Co.* v. *Woodbury,* 1938 Mass. Adv. Sh. 475; 13 N. E. 2d 377; *Agricultural Credit Corp.* v. *Scandia American Bank,* 184 Minn. 68; 237 N. W. 823.

[2] In a number of cases it has been held that the indirect benefit of the transaction to the obligor as a creditor or shareholder of the bank is sufficient consideration to support recovery. See *New* v. *Page,* 144 Md. 606; 125 A. 403; *Hurd* v. *Kelley,* 78 N. Y. 588; *State ex rel. Lattanner* v. *Hills,* 94 Ohio St. 171; 113 N. E. 1045; *First National Bank* v. *Boxley,* 129 Okla. 159; 264 P. 184; *Arthur* v. *Brown,* 91 S. C. 316; 74 S. E. 652. But whether the liability is sustained on this ground or that of estoppel it is apparent that the statutory policy of protection to creditors underlies both. See Brannan, Negotiable Instruments Law (6th ed.) 459.

But stated more precisely, the doctrine with which we are now concerned is not strictly that of estoppel as thus defined. It is a principle which derives its force from the circumstances that respondent's act, apart from its possible injurious consequences to creditors, is itself a violation of the statute; and that the statute, read in the light of its purposes and policy, precludes resort to the very acts which it condemns, as the means of thwarting those purposes by visiting on the receiver and creditors whom he represents the burden of the bank's unlawful purchase. *Pauly* v. *O'Brien,* 69 F. 460; *Niblack* v. *Farley,* 286 Ill. 536; 122 N. E. 160; *Iglehart* v. *Todd, supra,* 442; 178 N. E. 685; *Cedar State Bank* v. *Olson,* 116 Kan. 320, 323; 226 P. 995; *Denny* v. *Fishter, supra; Parker* v. *Parker,* 287 Mich. 49; 282 N. W. 897; *German-American Finance Corp.* v. *Merchants' & Mfrs. State Bank,* 177 Minn. 529; 225 N. W. 891; *Vallely* v. *Devaney,* 49 N. D. 1107;194 N. W. 903; *Bay Parkway Nat. Bank* v. *Shalom, supra; Mount Vernon Trust Co.* v. *Bergoff,* 272 N. Y. 192, 196; 5 N. E. 2d 196; *Putnam* v. *Chase,* 106 Ore. 440; 212 P. 365. See *Schmid* v. *Haines,* 115 N. J. L. 271; 178 A. 801. Williston on Contracts (Rev. ed.) § 1632; Zollman, Banks and Banking, § 4783.

Since it is by virtue of the statute that respondent's agreement is unlawful and that the benefit of it as a defense to the note is denied; and as the purpose of the statute is to protect creditors of the bank from the hazard of violations of the Act like the present, it is immaterial that the bank's officers were participants in the illegal transaction, *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245; *City of Marion* v. *Sneeden,* 291 U. S. 262; *Awotin* v. *Atlas Exchange National Bank,* 295 U. S. 209, or that the receiver has not shown that the creditors have been deceived or specifically injured as the result of the illegal contract. Cf. *Mount Vernon Trust Co.* v. *Bergoff, supra,* 196. It is the evil tendency of the prohibited acts at

which the statute is aimed, and its aid, in condemnation of them, and in preventing the consequences which the Act was designed to prevent, may be invoked by the receiver representing the creditors for whose benefit the statute was enacted.

Rankin v. *City National Bank,* 208 U. S. 541 and *Deitrick* v. *Standard Surety Co.,* 303 U. S. 471, on which respondent relies, do not call for any different conclusion. Because of certain statements *obiter* in the opinion in the *Rankin* case, it has been taken as controlling in a number of cases resembling the present, by the Court of Appeals for the Eighth Circuit,[3] and in one case in the Sixth Circuit.[4] In cases already cited, Courts of Appeals in other circuits have reached a different conclusion. It was to resolve this conflict that we granted certiorari. The *Rankin* case was tried below and decided here upon the concession of counsel that the transaction involved was not illegal, 208 U. S. 547. Here it is the reach of the statute making respondent's acts illegal and affording protection from them to the creditors which governs our decision.

In the *Deitrick* case, suit was brought against a surety company, on its surety bonds, by a bank's receiver not alleged to represent any innocent creditors who were injured because of their reliance on the bond. The company's agent, as alleged and as found by the two courts below, had, to the knowledge of the bank's president, executed and delivered the bonds to the bank without consideration and without the company's knowledge or authority, all in collusion with the bank's officers in a fraudulent conspiracy to deceive the bank examiner. The

[3] *Yates Center National Bank* v. *Schaede,* 240 F. 240, 241; *Hookway* v. *First National Bank,* 36 F. 2d 166; *Andresen* v. *Kaercher,* 38 F. 2d 462. Cf. *Cutler* v. *Fry,* 240 F. 238; *Keyes* v. *First National Bank of Aberdeen,* 20 F. 2d 678.

[4] *Peterson* v. *Tillinghast,* 192 F. 287.

company insisted that as it was the innocent victim of its agent's unauthorized acts in carrying out the conspiracy it could not be charged with responsibility for them on the theory of estoppel or of its own participation in the illegal transaction. Because of this state of the pleadings and of the record, the court found itself unable to hold that the National Bank Act imposed liability on the surety company. The decision of this Court was rested specifically, as was that of the Circuit Court of Appeals below, on the ground that the pleadings had limited the receiver's demand to the right of the bank to recover upon the bond procured by the fraud of its officers. This was shown, the Court declared, by the failure of the pleadings to allege any wrongful act for which the company was chargeable or which was injurious to creditors. It said, page 480, that the receiver "makes no suggestion of a purpose attributable to the company to mislead creditors or others, makes no allegations of damage except that sustained by the bank. He sets up no facts which could render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank." We did not decide that in an action against one who, like respondent, is alleged and proved to be a participant in the illegal transaction, he can be heard to set up the defense of his illegal action to defeat the statutory policy aimed at the protection of creditors.

A point much discussed in brief and argument, upon the assumption that local law will guide our decision, see *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by

the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see, *Board of County Commissioners of Jackson County* v. *United States,* 308 U. S. 343, and cases cited. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question. *Awotin* v. *Atlas Exchange National Bank, supra.*

Reversed.

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

MR. JUSTICE ROBERTS, dissenting:

I think the judgment should be affirmed on the authority of *Deitrick* v. *Standard Surety & Casualty Co.,* 303 U. S. 471, decided March 28, 1938. That case followed and reaffirmed the principle announced in *Rankin* v. *City National Bank,* 208 U. S. 541, that where the receiver of a national bank sues to recover on a chose in action which was an asset of the bank, his rights rise no higher than those of the bank, even though the obligation was given to deceive creditors or the bank examiner. The doctrine of the *Rankin* case has been applied in suits by receivers of national banks for more than thirty years.[1]

Deitrick v. *Standard Surety & Casualty Company* is on all fours with the present case. There the very argu-

[1] *Peterson* v. *Tillinghast,* 192 F. 287, 289; *Skud* v. *Tillinghast,* 195 F. 1, 5; *Cutler* v. *Fry,* 240 F. 238; *Yates Center National Bank* v. *Schaede,* 240 F. 240; *Keyes* v. *First National Bank,* 20 F. 2d 678, 686; *Hookway* v. *First National Bank,* 36 F. 2d 166, 170; *Kaercher* v. *Citizens' National Bank,* 57 F. 2d 58; *Varden* v. *First Christian Church,* 13 F. Supp. 159, 161; *Drake* v. *Moore,* 14 F. Supp. 89, 90; *Seaborn* v. *Reno National Bank,* 20 F. Supp. 835, 838; *Federal Deposit Ins. Corp.* v. *Pendleton,* 29 F. Supp. 779, 781.

ments and authorities now relied upon and cited on behalf of this petitioner were pressed without avail.

In the earlier case the same receiver brought actions at law to recover on surety bonds as assets of the bank. The facts were that the bank held worthless notes, known to its president to be such. To give a false appearance of worth to these assets he conspired with the agent of a surety company to procure surety bonds guaranteeing payment of the notes, to be used as "window dressing" and to be shown to the bank examiners if they should ask to see the collateral for the notes. The bank was afterwards examined and, as a result of the examiners' report, additional capital was subscribed. We may assume they saw the bonds. The bank remained open for a period and deposits continued to be made. Later the Comptroller determined the bank was insolvent and a receiver was appointed.

In his declaration in each action the receiver alleged his appointment, recited the execution and delivery of the surety bond to the bank and attached a copy of it. He alleged that the note or notes in question in each case was or were in default and that the surety was liable according to the terms of its bond. The surety company answered in each case setting up that no consideration was paid for the giving of the bond and that it was agreed and understood that no liability was to ensue from the execution and delivery.[2]

The District Court entered judgment for the surety company and the Circuit Court of Appeals affirmed.[3] That court, after stating that the knowledge of the president was the knowledge of the bank, held that the receiver

[2] The surety company also filed bills seeking cancellation of each of the bonds and, in his answers, the receiver reiterated his averment that the surety company owed him the amounts stipulated in the bonds, and asked judgment for such amounts.

[3] 90 F. 2d 862.

was not an agent of the bank's creditors; that he stood in no better position than the bank; that all defenses open to the surety company as against the bank were open as against the receiver; that the suit was merely one to recover assets of the bank and that the declarations stated no cause of action other than that arising from the contract of suretyship. The court called attention to the fact that the pleadings contained no allegation that the receiver based his action on any alleged deception of, or injury to, creditors of the bank and no allegation that the receiver was suing on behalf of creditors, and held that, upon the pleadings, it was not open to the receiver to urge that he represented creditors. It refused to decide whether, on different pleadings, the receiver could recover if he alleged and proved injury resulting to creditors from the transaction.

This court affirmed the judgment on the grounds stated by the court below, citing and relying on *Rankin* v. *City National Bank, supra.*

The surety also pleaded that its agent had exceeded his authority in issuing the bonds, as the bank's president knew. The Circuit Court of Appeals did not pass upon this defense, since it held the receiver could not recover even if the surety company had authorized the giving of the bonds. In the opinion of this court, the surety's contention that it was not bound by its agent's unauthorized act was mentioned but was not considered or discussed as a ground of decision. The sole basis of the decision is stated as follows:

"An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts

which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

After so stating the court refers to the *Rankin* case and says: "We adhere to the doctrine there approved and regard it as decisive of the present cause."

Turning to the instant case, the facts are these: The bank had acquired shares of its own stock illegally. Such shares, so held, were inadmissible assets. The bank's president, knowing that such acquisition of its own stock was an illegal dissipation of its capital, worked out an ostensible sale of the stock for a note which it was understood was to be placed amongst the assets of the bank for the purpose of deceiving the examiners. The note was without consideration and the understanding was that it would not be collected. It was, of course, unenforceable by the bank. Subsequently deposits were made in the bank. It does not appear that the examiners saw the note. After the Comptroller had found the bank insolvent and appointed a receiver, that officer filed a bill against the maker of the note, first, to collect an assessment from him as owner of the stock and, second, to recover the face amount of the note, with interest. In this bill he alleged his appointment as receiver, the acquisition of the stock by the bank, and the placing of it in straw names, the giving of the note for the purchase price of the stock; and claimed "the unpaid principal amount of said note . . . together with interest thereon, is due the plaintiff . . ." His prayers were for a decree for the amount of the assessment and for the principal amount, with interest, of the note.

The answer outlined the true transaction, asserted that the defendant's note was an accommodation note, that no

consideration passed for it, and there could, therefore, be no recovery upon it.

The District Court entered a decree for the amount of the assessment and for the principal of the note with interest. The Circuit Court affirmed as to the assessment but reversed the judgment upon the note.

Here, as in the earlier case, there was no allegation that any creditors were deceived; none of any loss to the creditors resulting from the giving of the note; none that the receiver sued on behalf of creditors, and no cause of action asserted save one to recover upon the note as an asset of the bank. Here, as in the earlier case, the receiver has urged upon this court that he does represent creditors; that the public policy evidenced by the National Bank Act disables the defendant, in view of the intended deception, from asserting the lack of consideration for the note. Here, in contrast to the earlier case, the court accepts the view which was there rejected because not within the issues tendered.

In *Deitrick* v. *Standard Surety & Casualty Co., supra,* the receiver urged upon this court the very contentions which he again advanced in the instant case; cited in support of those contentions numerous authorities which he now cites, which are relied upon in the opinion now announced; sought to have this court adopt the proposition, now affirmed by the opinion in the present case, that the defendant was liable on the surety bond because of the public policy evidenced in the National Bank Act which, broadly speaking, estopped the surety to set up, as against the receiver, appointed pursuant to the national banking law, a wrong against that law in which it had participated.[4] His contentions were held to be unavailing in view of the cause of action he had pleaded.

[4] Out of sixty-eight pages of argument in petitioner's brief thirty-nine were devoted to this contention; and every proposition now relied upon to sustain the conclusion of the court was advanced in that brief.

In view of what has been said, it is apparent that, under the guise of distinguishing the earlier case, the court in fact overrules it.

MR. JUSTICE MCREYNOLDS joins in this opinion.

NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP.

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

No. 193. Argued January 3, 1940.—Decided February 12, 1940.

1. Certiorari granted to determine whether there was substantial evidence to sustain an order of the National Labor Relations Board which the court below declined to enforce as based on mere suspicion. Pp. 207–209.
2. The requirement of the Act that "The findings of the Board, as to the facts, if supported by evidence, shall . . . be conclusive," must be scrupulously obeyed by the courts. P. 208.
3. An employer-employee relationship within the scope of the National Labor Relations Act may subsist through mutual understanding between the owner of a vessel and members of its crew after its return from a foreign voyage and after the crew, appearing with the master before a shipping commissioner, have been paid off and "discharged" and have executed with the master a mutual release of "all claims for wages in respect of past voyage or engagement," as provided by 46 U. S. C. §§ 564, 641, 644. P. 211.
4. A contract between an employer and a labor union for preferential treatment of the latter in filling vacancies *held* not to require the former to discharge employees because of their having joined another union. P. 213.
5. In forbidding an employer to terminate an employee's tenure of employment or any term or condition of employment because of union activity or affiliation, § 8 (1) (3) of the Labor Act embraces all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment. P. 218.

6. For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party. P. 219.
7. There was substantial evidence to support the findings of the Board:

(1) That, by custom recognized by the respondent ship company, crews of ships returned from abroad, notwithstanding expiration of their shipping articles, have, unless discharged for cause, a continuing tenure or relationship with their employer entitling them to re-sign for future voyages. P. 213.

(2) That the employment or "tenure" of crews and of two licensed officers was terminated because of their affiliations with a union other than that with which the employer had made a preferential contract. P. 220.

(3) That pending an election directed by the Board to permit the ships' crews to select their bargaining agencies, the employer had interfered with its employees' free right to select a union of their own choosing under § 7 of the Act by refusing to grant ships' passes to representatives of the rival union, while at the same time issuing passes to representatives of the union having the preferential contract. P. 224.

103 F. 2d 157, reversed.

CERTIORARI, 308 U. S. 534, to review a decision declining to enforce an order of the National Labor Relations Board and setting it aside.

Mr. Robert B. Watts, with whom *Solicitor General Jackson* and *Messrs. Thomas Harris, Wilber Stammler, Charles Fahy, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Messrs. Gessner T. McCorvey and *C. A. L. Johnstone, Jr.* for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The court below, upon petition of respondent to set aside an order of the Labor Board, decided that the Board's order was not supported by substantial evidence, said the order was based on mere suspicion, and declined

to enforce it. Whether the court properly reached that conclusion is the single question here.

We do not ordinarily grant certiorari to review judgments based solely on questions of fact. In its petition, however, the Board earnestly contended that the record before the Court of Appeals had presented "clear and overwhelming proof" that the Waterman Steamship Company had been guilty of a most flagrant mass discrimination against its employees in violation of the National Labor Relations Act, and that the court had unwarrantedly interfered with the exclusive jurisdiction granted the Board by Congress. The Board's petition also charged that the present was one of a series of decisions in which the court below had failed "to give effect to the provision of the Act that the findings of the Board as to facts, if supported by evidence, shall be conclusive." [1]

In that Act, Congress provided, "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." [2] It is of paramount importance that courts not encroach upon this exclusive power of the Board if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has

[1] The Board specifically referred to *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. 2d 406, rehearing denied 98 F. 2d 870 (also, 91 F. 2d 509; 98 F. 2d 405; 99 F. 2d 56); *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. 2d 411, certiorari denied, 305 U. S. 653; *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91.

[2] 49 Stat. 449, § 10 (e).

deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. And therefore charges by public agencies constitutionally created—such as the Board—that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance. For this reason we granted certiorari.[3]

Respondent, Waterman Steamship Company, of Mobile, Alabama, is engaged in maritime transportation between this country, Europe, and the West Indies. Upon complaint made by the National Maritime Union, a labor organization affiliated with the Committee for Industrial Organization, the Board held hearings and found that respondent had, at Mobile, laid up the ships "Bienville" (27 days) and "Fairland" (7 days) for dry-docking and repairs, and had, in violation of the National Labor Relations Act:

(a) discharged and refused to reinstate, because of membership in the N. M. U., the entire unlicensed crew and the chief steward, Edmund J. Pelletier, of the Steamship "Bienville," and all but three of the crew of the Steamship "Fairland";

(b) discharged and refused to reinstate C. J. O'Connor, second assistant engineer of the "Azalea City" because of his activities in representing aggrieved members of the Marine Engineers Beneficial Association, a labor organization of licensed ship personnel affiliated with the C. I. O.;

(c) and, pending an election directed by the Board to permit the ships' crews to select their bargaining agencies,

[3] 308 U. S. 534. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, *ante*, p. 134.

had interfered with its employees' free right to select a union of their own choosing under § 7 of the Act by refusing to grant ships' passes to representatives of the C. I. O. affiliate, while at the same time issuing passes to representatives of the International Seamen's Union affiliated with the American Federation of Labor.[4]

The Board's order in question was based on the foregoing findings.

A clear understanding of the issues presented by the mass discharge of the crews of the "Bienville" and the "Fairland" necessitates initial reference to the federal laws governing engagement of seamen for foreign voyages. There is provision, 46 U. S. C. 564, that a master of any vessel bound from the United States to foreign ports (with exceptions not pertinent) "shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew . . ." This written agreement, commonly referred to in maritime circles as articles, must specify the nature and duration of the intended voyage or engagement; the port or country at which the voyage will terminate; the number and description of the crew and their employments; the time each seaman must be on board to begin work and the capacity in which he is to serve; wages; provisions to be furnished each seaman; regulations to which the seaman will be subjected on board such as fines, short allowance of provisions or other

[4] In outline, the Board ordered the Waterman Company to cease and desist from issuing ships' passes to the A. F. of L. on a favored basis as compared to the C. I. O.; from discouraging membership in C. I. O. affiliates by discriminating against its members; and from interfering with its employees' rights of self-organization and free collective bargaining. It affirmatively ordered the Company to grant equal passes to the C. I. O. and the A. F. of L., if granted to either; to make whole and offer full reinstatement to those employees found to have suffered discrimination; and to post appropriate notices on the Waterman vessels.

lawful punishments for misconduct; and stipulations of any advance and allotment of the seaman's wages. And the provisions of 46 U. S. C. 567–8 impose penalties for carrying seamen in ships' crews on foreign voyages without entering into the required articles. All seamen "discharged in the United States from merchant vessels engaged in voyages . . . to any foreign port . . . shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner . . ." *Id.* 641. The master and each seaman shall "in the presence of the shipping commissioner, . . . sign a mutual release of all claims for wages *in respect of the past voyage or engagement"*; the release must be recorded in a book which shall be kept by the commissioner, and such release "shall operate as a mutual discharge and settlement of all demands for wages between the parties . . ., on account of wages, in respect of the *past voyage or engagement." Id.*, 644. (Italics supplied.)

Respondent, the Waterman Company, has taken the position that when the crews of the "Bienville" and "Fairland" received their wages and signed off statutory articles in Mobile, all tenure of employment and employment relationship of these men were at an end. From this premise, the Company insists that vacancies were created as the men signed off and, under an outstanding contract with the I. S. U., preference in filling these vacancies had to be given to members of the I. S. U. unless contractual obligations were to be violated.[5] How-

[5] In part, that contract reads: "Section 1. It is understood and agreed that as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; provided, however, that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident." Only the discharge of Pelletier is claimed by the Company to have been due to incompetency. The

ever, the Board contends that the signing off of articles when the ship's voyage ended at Mobile served only to end employment "in respect of the past voyage or engagement" and, therefore, it proceeded to examine the evidence to determine whether there was, after completion of the voyages in question of the "Bienville" and "Fairland," a continuing relationship, tenure, term or condition of employment between the Company and its men. The Act provides [6] that

"It shall be an unfair labor practice for an employer— To interfere with . . . [the employees' right of self-organization].

. . . . . .

"By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

The protection to seamen embodied in the federal statutes which have been referred to has existed in some form since the earliest days of the Nation.[7] This statutory plan was never intended to forbid the parties from mutually undertaking to assure a crew the right to continue as employees and to re-sign if it desires after signing off articles at a voyage's end. The design was to protect seamen from being carried to sea against their will; to prevent mistreatment as to wages and to assure against harsh application of the iron law of the sea during voyages.[8] The Board, therefore, properly heard evi-

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Court below held that O'Connor had taken a vacation and was not discharged, and was thus entitled to vacation pay and reinstatement; the Board had ordered that O'Connor be made whole "for any loss of pay" suffered as a result of the Company's acts which the Board found had been discriminatory.

[6] 49 Stat. 449, 452, §§ 7, 8.

[7] See 1 Stat. 131.

[8] See *Lent Traffic Co. v. Gould,* 2 F. 2d 554, 556; *United States* v. *Westwood,* 266 F. 696, 697; *The Occidental* (D. C.), 101 F. 997. As

dence as to whether the crews of the "Bienville" and "Fairland" had, unless discharged for cause, a continuing tenure or relationship entitling them to re-sign when the temporary lay-ups of their ships ended. If, as the Board found, there were such continuing tenure and customary term or condition of employment, of course no vacancies occurred when the men of the "Bienville" and the "Fairland" signed off articles in Mobile. And respondent's contract with the I. S. U., which only provided preferential treatment of the I. S. U. (A. F. of L.) in filling vacancies, did not require the Company to discharge the N. M. U. (C. I. O.) men from these ships.

If, therefore, there was substantial support in the evidence for the findings that these crews had a continuing right to and customary tenure, term or condition of employment within the purview of the Act even though their ships were temporarily laid up, and that this relationship was terminated by the Company because of the crews' C. I. O. affiliation, the court below was required to enforce the Board's order.

Evidence as to the continuing tenure, and conditions and relation of employment. On the basis of nine to ten years at sea, one witness testified that a ship's crew is customarily kept on when she goes into dry dock and is laid up for temporary repairs; and that both the Waterman Company and the unions had observed that custom. Another, with a background of ten years experience at sea, in visiting some fifty ships in dry dock at Mobile during the preceding few months had learned of forty-nine which had not laid off their entire crews but had kept a substantial number of their crews working aboard ships; the fiftieth had laid off its entire crew after going into dry dock, but "the company kept the jobs open." He knew

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to the history of this legislation, see *United States* v. *The Brig Grace Lathrop*, 95 U. S. 527.

of one vessel that had remained "in dry dock for a period of forty-five days and maintained its crew during that period," several which had done so recently for thirty-day periods, and many for periods "from five to ten days, fifteen days." He had himself been a member of a crew maintained in its entirety while his ship was in dry dock for twenty-two days.

An oiler and deck engineer, with eight years in the service, had been on a Waterman ship which, as recently as 1936, spent six days in repairs, keeping its crew on; and had "known them to stay on fifteen or twenty days and continue working that long." Asked what obligation an employer owes a sailor after the latter returns from a foreign voyage, completes his contract under the ship's articles, is paid off and discharged before a Shipping Commissioner, he answered "If my services are satisfactory and my work efficient, I have the right to stay on that ship, if I have not done anything to be discharged for. Why shouldn't I make another trip? . . . Q. Is it true to state that a seaman's job is still existent, although he may not be drawing pay while the boat is tied up for repairs? A. Yes, sir. Q. There is no vacancy in his job? A. No; there is no vacancy."

The chief steward of the "Bienville," employed by Waterman since 1934 and a seaman since 1918, testified that crews of ships in dry dock—tied up for repairs for a few days—"have to do their work and get paid for it by the Waterman Steamship Corporation" and unless they quit or are fired "for cause" there is no vacancy. The giving of a discharge according to the ship's articles, he understood "to be a termination of the voyage, but not a termination of the employment."

Although at sea but three years, a fireman and oiler testified that he had been re-signed, upon the termination of articles, after each of fourteen trips on a single ship, from Southern ports including Mobile, had been kept as

a member of a crew on a ship in for repairs nine days and had "known of one ship that was laid up [for lack of cargo] for five weeks and the crew went back."

A marine fireman, oiler and watertender, at sea since 1922, had been on a Waterman ship in for repairs ten or twelve days, the crew of which was retained only in part, but those laid off "were notified when the ship went into commission they can go out again." He "was on one [ship] that stayed two months in dry dock . . . just part of the crew . . . [were kept on, but] the whole crew was there for their jobs when she was commissioned again." He had never heard of a mass discharge of an entire crew such as occurred on the "Bienville" and "Fairland." In part, the testimony of this former I. S. U. member was: "Q. Do the unions consider that there is no vacancy until a man resigns? A. Yes; they do not figure it is any vacancy until they call the [Union] Hall for another man."

A seaman in the employ of the Waterman Company intermittently since 1924, had been on a Waterman boat which kept its whole crew during six or seven days in dry dock. It had been his experience that a crew was kept on ships in dry dock or being repaired, unless a ship was to be laid up indefinitely, i. e., for two or three months, in which event only a skeleton crew would be maintained. But, he added, the Waterman Company itself follows the custom of "calling back to the ship" men who have been laid off indefinitely and "are still around," and men standing idly by without pay at the end of a voyage still regard themselves in the employ of the shipowner.

One witness had served as a fireman on a Waterman ship that spent the period between the first of November and Thanksgiving of 1932 in dry dock and undergoing repairs; she kept "approximately all of" her crew aboard ship working during this period; a few were permitted to go home in the interim, but returned when she started

her voyage. On another occasion, he testified, the same Waterman boat stayed in dry dock about sixty days, retaining approximately the entire crew; although after five days in dry dock he was called out of town to appear as a witness, he later got his job back. In his capacity as a shipyard worker in which he was employed at Mobile at the time of this hearing, this same witness observed "we have boats coming in from twenty-five up to thirty days . . . and the crew works in there, and they may want to lay off part of the crew, or work a major part, or maybe they will be discharged, but those that want to go back, their jobs is open if they wish them." Of some six hundred ships he had seen or worked on in dry dock or being repaired, he had seen but one complete discharge of an entire crew, but even that crew were told they could come back "if they wanted their jobs." According to his understanding and that of seamen as he knew it, articles were "protection to the seamen by the United States Government for a certain voyage, and to a certain port, or your final port of discharge or first loading port. That is a termination of the articles to the seaman, but not the end of the employment."

A witness who had worked for the Waterman Company since 1929, who had been a marine engineer for fourteen years, and at sea twenty years, testified that a crew which is laid off is customarily re-employed when a ship emerges from dry dock, unless laid off "for cause." A Waterman ship, on which he had been at the time serving, laid up in Mobile from December, 1936, to about January 25, 1937, "and the engineers were kept on her, and to the best of my knowledge the firemen and watertenders and oilers were kept on there."

The executive vice-president of the Waterman Company recalled that recently the crew of only one other vessel going in for repairs had been discharged, and that this particular crew also had been affiliated with the

N. M. U. (C. I. O.). Of the several Waterman vessels which he mentioned as having been put up in Mobile for dry-docking or repairs during the previous year, he could note only the one that had not kept its entire crew (other than the "Bienville" and "Fairland"); the one other crew that was discharged en masse, he admitted, was the one other also affiliated with the C. I. O.

The witness who had been captain of the "Fairland" when she went into dry dock, had served the Waterman Company continuously since 1924, with the exception of one year, in capacities ranging from ordinary seaman to ship's master. Yet, in all his experience with the Company, he had never heard of a ship in dry dock that had laid off her entire crew. And Waterman's port captain, a veteran of twenty-four years, had taken perhaps a half dozen of Waterman ships into dry dock, never staying more than twenty-four hours in dry dock but with a total of eight to ten days in port, and his crews were never laid off; he preferred to retain a crew for a succeeding voyage.

In the very contract which the Waterman Company made with the I. S. U. there are terms providing that "IN HOME PORT, all men may be required to work eight (8) hours daily . . . [with provision for overtime]." And the section of the contract covering preference for I. S. U. men "shall not be construed to require the discharge of any employee who may not desire to join the [I. S. U.] . . ." That the contract contemplated an employment independent of the articles and subject to termination in a manner other than by the mere expiration of articles, is apparent from the provision that "Nothing in this agreement shall prevent . . . [the Company] from discharging any member of the crew who is not satisfactory to the Company."

All the evidence on this issue which the Board had before it has, of course, not been set out. In summary, it

is glaringly apparent that men who had in various capacities followed the sea in the aggregate for roughly a hundred years, offered testimony that a seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles when his ship lays up in dry dock or for repairs, and that the Waterman Company—and maritime people generally—have recognized and followed this custom. Even the Waterman Company's executive vice-president could cite only one instance in the Company's recent past in which this custom had been departed from, but that particular mass firing of the crew of a ship headed for a temporary lay-up was directed against the only C. I. O. crew, other than those of the "Bienville" and "Fairland," with which the Waterman Company apparently had been asked to deal. And the master of the "Fairland," with personal knowledge of the Company's practice reaching back to 1924, had never heard of "another case where the entire crew was laid off."

In the words of the Act, an employer cannot terminate his employees' "tenure of employment or any term or condition of employment" [9] because of union activity or affiliation. These words are not limited so as to outlaw discrimination only where there is in existence a formal contract or relation of employment between employer and employee. They embrace, as well, all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment. The Act, as has been said, recognizes the employer's right to terminate employment for

[9] § 8, (1), (3).

normal reasons.[10] No obstacle of legal principle barred the Board from finding that there was, even after the ships were temporarily laid up, a relationship of employment or tenure between the Waterman Company and its men. That there may be a tenure or term of employment determinable at will is a recognized principle of law.[11] For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party.[12] A large part of all industrial employment is of this nature. For illustration, factory workers are customarily employed at will, without obligation of employer or employed to continue the relationship when the day's work is done; or, if there is an agreement fixing salary or wages per unit of service, at so much per day, week or month, there may be an indefinite employment terminable by either party at the end of any unit period. But when such employees are customarily continued in their employment with recognition of their preferential claims to their jobs, it cannot be doubted that their wholesale discharge at the end of the day or other unit period, in order to favor one union over another, would be discrimination in regard to the "tenure" or "condition" of their employment in violation of the Act. And employees under such tenure of employment as these seamen were, have a right guaranteed by the Act that they will not be dismissed because of affiliation with a particular union.

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[10] *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 45.

[11] See, e. g., *Alabama Mills* v. *Smith*, 237 Ala. 296; 186 So. 699; *Peacock* v. *Virginia-Carolina Chemical Co.*, 221 Ala. 680; 130 So. 411; *Great Atlantic & Pacific Tea Co.* v. *Summers*, 25 Ala. App. 404; 148 So. 332; cert. den., 226 Ala. 635; 148 So. 333. Cf. *U. S. Fidelity & Guaranty Co.* v. *Millonas*, 206 Ala. 147; 89 So. 732; 29 A. L. R. 520.

[12] Cf. *Morgan* v. *Commissioner*, *ante*, p. 78; *Lyeth* v. *Hoey*, 305 U. S. 188, 193.

Since the Board justifiably found that an employment relationship protected by the Act continued after the "Bienville" and "Fairland" were temporarily laid up, it becomes unnecessary to consider the additional finding of the Board that the "dates and duration of the particular lay-ups were arranged for the purpose of making it possible to discharge the crews because they had joined the N. M. U."

The sole question remaining is whether the evidence supported the findings of the Board that the employment or tenure of the crews and of O'Connor and Pelletier were terminated because they had joined or engaged in the activities of the C. I. O.

Evidence of discrimination because of C. I. O. affiliation. About July 1, 1937, the entire crew of the "Bienville" and all but three of the "Fairland," previously I. S. U. (A. F. of L.), joined the N. M. U. (C. I. O.) in Tampa, Florida. Such action had been decided on in June by the crew of the "Bienville" while she was in Le Havre, France After the crew of the "Bienville" changed to the C. I. O. at Tampa and before she reached Mobile, the A F. of L. representative at Tampa informed the A. F. of L. representative at Mobile, by telephone, that the change had taken place. And the Mobile A. F. of L. representative "at that time" notified the Waterman Company of the change. Intervening scheduled stops of the "Bienville" were cancelled by a memorandum purporting to have been written on July 1 and ordering her to Mobile to "go on inactive status for a period of about twenty days." The port captain of the Waterman Company, who signed this memorandum, stated that it was written on July 1, "to the best of . . . [his] knowledge." He added that it had not been written until after the "Bienville" was on her return voyage from Le Havre. That was after the ship's crew had, in assembly, determined to turn C. I. O. No such cancellation was directed to the

"Fairland." The "Fairland," he testified, was laid up because periodic repairs "were due." On the other hand, her master had no knowledge of any contemplated lay-up until she reached Mobile, and understood, according to advice given him, that she was laid up because "she was behind schedule . . . and they put her back to the next sailing." The Waterman port captain thought she was laid up because repairs "were due"; he had no knowledge that it was because she was behind schedule. Her master's testimony showed, "Q. The laying up plan, then, had been something that was contemplated in Tampa?

"No, Sir.

"Q. It was something that came into existence after you sailed from Tampa and before you came to Mobile, is that right?

"A. Yes."

The "Fairland" is equipped with radio.

The ships were in Mobile by July 6. There was testimony that a member of the crew of the "Bienville," on the sixth, was asked by the executive vice-president of the Company why the change of unions was made and was told by that official "a man has to use his own head." This same witness testified that several of the discharged crew were given some work ashore and that "on a Saturday afternoon we collected three days pay, they held back two days in the week, and about three o'clock in the afternoon the first assistant came around there and I was working on some safety valves on the boilers, and . . . [the assistant port engineer of Waterman Company] said, 'Well, I got a chance to fire you at last,' and I said, 'What is that?' And he said, 'Well, you can get the rest of your money when you are finished,' and I said, 'What's the matter, aren't we going to sail the ship?' And he said, 'No, not unless you go back to the other place,' and I said, 'What other place?' And he said, 'The I. S. U.' "

Pelletier, the steward on the "Bienville" worked for Waterman from 1934 until discharged after joining the N. M. U. (C. I. O.). When the "Bienville" arrived at Mobile, Waterman's port steward went to the boat, and talked with the mate, who informed him that some of the men had joined the N. M. U. According to the port steward's testimony, he then asked the mate, "How is the Steward's Department?" and the mate replied, "Well some of them joined the N. M. U. . . . and later on I [the port steward] found the steward in his room. . . . I asked Pelletier did he join the N. M. U. and he said 'Yes', and I said 'What about the rest of your crew?' and he said 'Well, they all did.' I asked him did they have any reason for it, and he said, 'Yes, everybody did', so I said 'All right' and I left the ship." He returned to the Company's office. Two hours later, he came back to the ship, charged Pelletier with incompetency and discharged him. Pelletier testified that the port steward, when told that the crew and Pelletier had turned N. M. U. said, "Well I have got orders to lay you all off." Pelletier had been promoted just prior to the voyage in question. A new I. S. U. man was put on to finish up his work and remained on as watchman practically the full time the "Bienville" was laid up.

Although her captain had, prior to the coming aboard of a Company official, expressed a desire to keep the "Fairland's" crew, as one of her crew testified, the crew was informed by this official that they could not sail, "but if you take your books and give them to . . . the I. S. U. you can keep your jobs"; another Waterman official "told me I could not sail on any Waterman steamship as long as I was an N. M. U. man." According to this witness, he had left his clothes on the "Fairland" and slept aboard ship when she was in dry dock with the understanding he would re-sign; he was, however, ordered off the ship.

An engineer on the Waterman vessel "Azalea City," eight years with the Company, O'Connor, a member of the M. E. B. A., (also affiliated with the C. I. O.) testified that he acted as spokesman for other engineers on his ship in complaining about working conditions, hours of employment and rates of pay; when he discussed the complaint with the Company's representative, during July, he was told to take a vacation and left the ship on a promise of a more desirable job; neither the vacation, the promised job, nor re-employment of any kind was ever given him. Waterman's executive vice-president had never had an engineer act in such a representative capacity relative to asserted violations of a union contract. And the assistant port engineer stated that it was the custom to call a man of O'Connor's rank when not on vacation; that O'Connor had been promised and then denied a vacation, but had not been called although work had been available; and, in addition that O'Connor had in conversation with him asked "Would Waterman give me employment."

The executive vice-president of the Company would not "until the actual time came" answer the query whether he would reinstate the N. M. U. men even if there were no contract with the I. S. U. He stated that he had received a wire from the Board's regional Director at New Orleans on July 7, recommending and insisting on reinstatement of N. M. U. men dismissed at Mobile, and did not deny that he had first told the Director that his reason for not working N. M. U. men was the existence of the I. S. U. contract. He admitted, however, that later on the same day his decision that the men were removed because the vessels were laying up was attributable to an apparent change of his own mind.

Additional evidence that the discharged N. M. U. men were again treated with discrimination in the allotment

of repair work on the "Bienville" and "Fairland"; and were laid off in a block even from this work—all tended to buttress and illuminate the Board's finding that the tenure of employment of these men of the "Bienville" and "Fairland" was cut short because they had exercised their lawful right to join the C. I. O. One of the men who was given temporary repair work—subsequent to the Board's telegram of the seventh—testified:

"Q. While you were a member of the N. M. U., did you ever wear your N. M. U. badge or button?

"A. Yes, sir; I used to wear it on my cap, on the dock while I was working down there.

"Q. Was there anything ever said to you at the Waterman Steamship about wearing it?

"A. Mr. Ingram told me I would have to take that Maritime Union button off if I wanted to stay around there, and I took it off, and put it in my pocket."

From all this evidence, there can be no doubt of the substantial support for the Board's finding that the crews, O'Connor and Pelletier all lost their jobs because of C. I. O. affiliation and activities.

Evidence of Discrimination as to ships' passes.—The Board found "that the respondent, by issuing passes to representatives of the I. S. U. and refusing to grant such passes to representatives of the N. M. U. for the same purpose and under the same conditions, had interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act." [13] An election to permit a choice of bargaining agency by

[13] The Board ordered, as to ships' passes, that the Company

"Cease and desist:

"From refusing to issue passes to authorized representatives of the National Maritime Union of America in equal numbers and under the same conditions as it grants passes to representatives of the International Seamen's Union of America or its successors; . . ."

the crews has been directed but has not been held pending termination of the present proceeding.[14]

Upon this issue of discrimination concerning passes, N. M. U.'s representative testified that the Company's executive vice-president, about September 24 or 25, 1937, refused his request "for passes for the election of the N. L. R. B." because of the I. S. U. contract. But no provision of the I. S. U. contract referred to ships' passes for representatives of other unions. The respondent's attorney took the position that N. M. U. representatives would not be permitted on board under any conditions. Testifying that I. S. U. representatives were permitted aboard the "Bienville" at all times to contact the men, Pelletier "did not recollect seeing anyone with them." Waterman's executive vice-president who pointed out that I. S. U. delegates were given passes on certain conditions, such as taking out insurance for delegates going aboard, did not know whether in fact there had been compliance by the I. S. U. with the conditions. He testified that he had issued instructions, July 13, to permit I. S. U. representatives aboard ship only to collect dues. But he also testified that they were still permitted to contact members. The master of the "Fairland" stated that he did not receive the instructions of July 13 until August; and that even after the instructions were put in effect, he permitted I. S. U. representatives to board ship unaccompanied; he did not know what they said to the men, whether they brought literature aboard or whether they restricted themselves to the collection of dues. Although always present at the paying off and signing off of articles, when the I. S. U. representatives collected dues, the Company's port captain "did not pay any strict attention whatever to what they were doing." Asked whether he knew what these representatives did at such times, he

[14] See 12 N. L. R. B. 766, 767, 769.

replied, "I did not follow them around to see what they were doing."

Enough has been shown to establish the reasons for the Board's decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. of L. The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.[15] Interference in those matters constituted error on the part of the court below.

All of this is not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers. We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings, far from resting on mere suspicion, are supported by evidence which is substantial. The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment,—and power to do that has been denied the courts by Congress. Whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress.

The cause is reversed and remanded to the Court of Appeals with directions to enforce the Board's order in its entirety.

Reversed.

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

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[15] *American Federation of Labor* v. *Labor Board,* 308 U. S. 401; *National Labor Relations Board* v. *Falk Corporation,* 308 U. S. 453.

CHAMBERS ET AL. *v.* FLORIDA.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 195. Argued January 4, 1940.—Decided February 12, 1940.

1. Convictions of murder obtained in the state courts by use of coerced confessions are void under the due process clause of the Fourteenth Amendment. P. 228.
2. This Court is not concluded by the finding of a jury that a confession by one convicted in a state court of murder was voluntary, but determines that question for itself from the evidence. P. 228.
3. Confessions of murder procured by repeated inquisitions of prisoners without friends or counsellors present, and under circumstances calculated to inspire terror, *held* compulsory. Pp. 238–241.

136 Fla. 568; 187 So. 156, reversed.

CERTIORARI, 308 U. S. 541, to review convictions of murder upon the question whether confessions used in the trial were in violation of due process of law.

Messrs. Leon A. Ransom and *S. D. McGill,* with whom *Mr. Thurgood Marshall* was on the brief, for petitioners.

Mr. Tyrus A. Norwood, Assistant Attorney General of Florida, with whom *Mr. George Couper Gibbs,* Attorney General, was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The grave question presented by the petition for certiorari, granted in forma pauperis,[1] is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.[2]

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[1] 308 U. S. 541.

[2] Petitioners Williamson, Woodward and Davis pleaded guilty of murder and petitioner Chambers was found guilty by a jury; all

First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment.[3] Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means

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were sentenced to death, and the Supreme Court of Florida affirmed. 111 Fla. 707, 151 So. 499; 152 So. 437. Upon the allegation that, unknown to the trial judge, the confessions on which the judgments and sentences of death were based were not voluntary and had been obtained by coercion and duress, the State Supreme Court granted leave to present a petition for writ of error coram nobis to the Broward County Circuit Court, 111 Fla. 707; 152 So. 437. The Circuit Court denied the petition without trial of the issues raised by it and the State Supreme Court reversed and ordered the issues submitted to a jury. 117 Fla. 642; 158 So. 153. Upon a verdict adverse to petitioners, the Circuit Court re-affirmed the original judgments and sentences. Again, the State Supreme Court reversed, holding that the issue of force, fear of personal violence and duress had been properly submitted to the jury, but the issue raised by the assignment of error alleging that the confessions and pleas "were not in fact freely and voluntarily made" had not been clearly submitted to the jury. 123 Fla. 734, 737; 167 So. 697, 700. A change of venue, to Palm Beach County, was granted, a jury again found against petitioners and the Broward Circuit Court once more reaffirmed the judgments and sentences of death. The Supreme Court of Florida, one judge dissenting, affirmed, 136 Fla. 568; 187 So. 156. While the petition thus seeks review of the judgments and sentences of death rendered in the Broward Circuit Court and reaffirmed in the Palm Beach Circuit Court, the evidence before us consists solely of the transcript of proceedings (on writ of error coram nobis) in Palm Beach County Court wherein the circumstances surrounding the obtaining of petitioners' alleged confessions were passed on by a jury.

[3] *Brown* v. *Mississippi,* 297 U. S. 278.

proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.[4]

Second. The record shows—

About nine o'clock on the night of Saturday, May 13, 1933, Robert Darsey, an elderly white man, was robbed and murdered in Pompano, Florida, a small town in Broward County about twelve miles from Fort Lauderdale, the County seat. The opinion of the Supreme Court of Florida affirming petitioners' conviction for this crime stated that "It was one of those crimes that induced an enraged community . . ."[5] And, as the dissenting judge pointed out, "The murder and robbery of the elderly Mr. Darsey . . . was a most dastardly and atrocious crime. It naturally aroused great and well justified public indignation."[6]

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and within the next twenty-four hours from twenty-five to forty negroes living in the community, including petitioners Williamson, Chambers, and Woodward, were arrested without warrants and confined in the Broward County jail, at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J. T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P. M. on the following Monday, May 15, the sheriff and Williams took several of the imprisoned negroes, including Williamson and Chambers, to the Dade County jail at Miami. The

[4] *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Norris* v. *Alabama*, 294 U. S. 587, 590.

[5] 136 Fla. 568, 572; 187 So. 156, 157.

[6] *Id.*, 574.

sheriff testified that they were taken there because he felt a possibility of mob violence and "wanted to give protection to every prisoner . . . in jail." Evidence of petitioners was that on the way to Miami a motorcycle patrolman drew up to the car in which the men were riding and the sheriff "told the cop that he had some negroes that he—[was] taking down to Miami to escape a mob." This statement was not denied by the sheriff in his testimony and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade County jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

It is clear from the evidence of both the State and petitioners that from Sunday, May 14, to Saturday, May 20, the thirty to forty negro suspects were subjected to questioning and cross questioning (with the exception that several of the suspects were in Dade County jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured" and referred to the last night as an "all night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the day time all the week," but did not question them during any night before the all night vigil of Saturday, May 20, because after having "questioned them all day . . . [he] was tired." Other evidence of the State was "that the officers of Broward County were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case.

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrest and until their confessions were finally acceptable to the State's Attorney in the early dawn of Sunday, May 21st, petitioners and their fellow prisoners were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that by Saturday, May 20th, five days of continued questioning had elicited no confession. Admittedly, a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3: 30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners—"They all stayed up all night." "They bring one of them at a time backwards and forwards . . . until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners.

Sometime in the early hours of Sunday, the 21st, probably about 2:30 A. M., Woodward apparently "broke"--

as one of the state's witnesses put it—after a fifteen or twenty minute period of questioning by Williams, the sheriff and the constable "one right after the other." The State's Attorney was awakened at his home, and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worth while call me."[7] This same State's Attorney conducted the state's case in the circuit court below and also made himself a witness, but did not testify as to why Woodward's

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[7] A constable of the community, testifying about this particular incident, said in part:

"Q. Were you there when Mr. Maire [State's Attorney] talked to Walter Woodward the first time he came over there?

"A. Yes, sir.

"Q. Take his confession down in writing?

"A. Yes.

". . .

"Q. If he made a confession why did you all keep on questioning him about it. As a matter of fact, what he said that time wasn't what you wanted him to say, was it?

"A. It wasn't what he said the last time.

"Q. It wasn't what you wanted him to say, was it?

"A. We didn't think it was all correct.

". . .

"Q. What part of it did you think wasn't correct. Would you say what he told you there at that time was freely and voluntarily made?

"A. Yes, sir.

". . .

"Q. What he freely and voluntarily told you in the way of a confession at that time, it wasn't what you wanted?

"A. It didn't make up like it should.

"Q. What matter didn't make up?

"A. There was some things he told us that couldn't possible be true.

". . .

"Q. What did Mr. Maire say about it at that time; did you hear Mr. Maire say at this time 'tear this paper up, that isn't what I want,

first alleged confession was unsatisfactory to him. The sheriff did, however:

"A. No, it wasn't false, part of it was true and part of it wasn't; Mr. Maire [the State's Attorney] said there wasn't enough. It wasn't clear enough.

". . .

"Q. . . . Was that voluntarily made at that time?

"A. Yes, sir.

"Q. It was voluntarily made that time?

"A. Yes, sir.

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when you get something worth while call me,' or words to that effect?

"A. Something similar to that.

"Q. That did happen that night?

"A. Yes, sir.

"Q. That was in the presence of Walter Woodward?

"A. Yes, sir."

And petitioner Woodward testified on this subject as follows:

"A. . . . I was taken out several times on the night of the 20th . . . So I still denied it. . . .

". . . .

"A. He said I had told lies and kept him sitting up all the week and he was tired and if I didn't come across I would never see the sun rise.

". . .

"A. . . . then I was taken back to the private cell. . . . and shortly after that they come back, shortly after that, twenty or twenty-five minutes, and bring me out. . . . I [told Williams] if he would send for the State Attorney he could take down what I said, I said send for him and I will tell him what I know. So he sent for Mr. Maire some time during Saturday night, must have been around one or two o'clock in the night, it was after midnight, and so he sent for Mr. Maire, I didn't know Mr. Maire then, but I know him now by his face.

". . .

"A. Well he come in and said 'this boy got something to tell me' and Captain Williams says 'yes, he is ready to tell you.' . . .

". . .

". . . Mr. Maire had a pen and a book to take down what I told him, which he said had to be on the typewriter, but I didn't see any typewriter, I saw him with a pen and book, so whether it was short-

"Q. You didn't consider it sufficient?

"A. Mr. Maire.

"Q. Mr. Maire told you that it wasn't sufficient, so you kept on questioning him until the time you got him to make a free and voluntary confession of other matters that he hadn't included in the first?

"A. No, sir, we questioned him there and we caught him in lies.

"Q. Caught all of them telling lies?

"A. Caught every one of them lying to us that night, yes, sir.

"Q. Did you tell them they were lying?

"A. Yes, sir.

"Q. Just how would you tell them that?

"A. Just like I am talking to you.

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hand or regular writing I don't know, but he took it down with pen. After I told him my story he said it was no good, and he tore it up. . . .

". . .

"Q. What was it Mr. Maire said?

"A. He told them it wasn't no good, when they got something out of me he would be back. It was late he had to go back and go to bed.

". . .

"A. . . . I wasn't in the cell long before they come back. . . .

". . .

"Q. How long was that from the time you was brought into that room until Mr. Maire left there?

"A. Something like two or three hours, I guess, because it was around sunrise when I went into the room.

"Q. Had you slept any that night, Walter?

"A. No, sir. I was walked all night, not continually, but I didn't have no time to sleep except in short spaces of the night.

". . .

"Q. When Mr. Maire got there it was after daylight?

"A. Yes, sir.

". . .

"Q. Why did you say to them that morning anything after you were brought into the room?

"A. Because I was scared, . . ."

"Q. You said 'Jack, you told me a lie'?

"A. Yes, sir."

After one week's constant denial of all guilt, petitioners "broke."

Just before sunrise, the state officials got something "worthwhile" from petitioners which the State's Attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all-night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned and Williamson and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff "were in the Court room sitting down in a seat." And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions.

Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history.[8] However, in view of its his-

[8] There have been long-continued and constantly recurring differences of opinion as to whether general legislative acts regulating the use of property could be invalidated as violating the due process clause of the Fourteenth Amendment. *Munn* v. *Illinois*, 94 U. S. 113, 125, dissent 136–154; *Chicago, M. & St. P. R. Co.* v. *Minnesota*,

torical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter,[9] to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a pub-

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134 U. S. 418, dissent 461–466. And there has been a current of opinion—which this court has declined to adopt in many previous cases—that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights (Amendments I to VIII). See, e. g., *Twining* v. *New Jersey*, 211 U. S. 78, 98–9, Mr. Justice Harlan, dissenting, 114; *Maxwell* v. *Dow*, 176 U. S. 581, dissent 606; *O'Neil* v. *Vermont*, 144 U. S. 323, dissent 361; *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326; *Hague* v. *C. I. O.*, 307 U. S. 496.

[9] Cf. *Weems* v. *United States*, 217 U. S. 349, 372, 373, and dissent setting out (p. 396) argument of Patrick Henry, 3 Elliot, Debates, 447.

lic tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.[10]

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and

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[10] As adopted, the Constitution provided, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." (Art. I, § 9.) "No Bill of Attainder or ex post facto Law shall be passed" (*Id.*), "No State shall . . . pass any Bill of Attainder, or ex post facto Law. . . ." (*Id.*, § 10), and "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court" (Art. III, § 3). The Bill of Rights (Amend. I to VIII). Cf. Magna Carta, 1297 (25 Edw. 1); The Petition of Right, 1627 (3 Car. 1, c. 1.); The Habeas Corpus Act, 1640 (16 Car. 1, c. 10.), An Act for [the Regulating] the Privie Councell and for taking away the Court commonly called the Star Chamber; Stat. (1661) 13 Car. 2, Stat. 1, C. 1 (Treason); The Bill of Rights (1688) (1 Will. & Mar. sess. 2, c. 2.); all collected in "Halsbury's Stat. of Eng." (1929) Vol. 3.

the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.[11]

This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, *Brown* v. *Mississippi,* that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." [12]

Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and

[11] "In all third degree cases, it is remarkable to note that the confessions were taken from 'men of humble station in life and of a comparatively low degree of intelligence, and most of them apparently too poor to employ counsel and too friendless to have any one advise them of their rights.'" Filamor, "Third Degree Confession," 13 Bombay L. J., 339, 346. "That the third degree is especially used against the poor and uninfluential is asserted by several writers, and confirmed by official informants and judicial decisions." IV National Commission On Law Observance and Enforcement, Reports, (1931) Ch. 3, p. 159. Cf. *Morrison* v. *California,* 291 U. S. 82, 95.

[12] 297 U. S. 278, 286.

the stoutest resistance. Just as our decision in *Brown* v. *Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied." [13]

For five days petitioners were subjected to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings.[14] Some were practical strangers in

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[13] See *Ziang Sung Wan* v. *United States,* 266 U. S. 1, 16. The dissenting Judge below noted, 136 Fla. 568, 576; 187 So. 156, 159, that, in a prior appeal of this same case, the Supreme Court of Florida had said: "Even if the jury totally disbelieved the testimony of the petitioners, the testimony of Sheriff Walter Clark, and one or two of the other witnesses introduced by the State, was sufficient to show that these confessions were only made after such constantly repeated and persistent questioning and cross-questioning on the part of the officers and one J. T. Williams, a convict guard, at frequent intervals while they were in jail, over a period of about a week, and culminating in an all-night questioning of the petitioners separately in succession, throughout practically all of Saturday night, until confessions had been obtained from all of them, when they were all brought into a room in the jailer's quarters at 6:30 on Sunday morning and made their confessions before the state attorney, the officers, said J. T. Williams, and several disinterested outsiders, the confessions, in the form of questions and answers, being taken down by the court reporter, and then typewritten.

"Under the principles laid down in Nickels *v.* State, 90 Fla. 659, 106 So. 479; Davis *v.* State, 90 Fla. 317, 105 So. 843; Deiterle *v.* State, 98 Fla. 739, 124 So. 47; Mathieu *v.* State, 101 Fla. 94, 133 So. 550, these confessions were not legally obtained." 123 Fla. 734, 741; 167 So. 697, 700.

[14] Cf. the statement of the Supreme Court of Arkansas, *Bell* v. *State,* 180 Ark. 79, 89; 20 S. W. 2d 618, 622: "This negro boy was

the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws.[15] The Constitution proscribes

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taken, on the day after the discovery of the homicide while he was at his usual work, and placed in jail. He had heard them whipping Swain in the jail; he was taken from the jail to the penitentiary at Little Rock and turned over to the warden, Captain Todhunter, who was requested by the sheriff to question him. This Todhunter proceeded to do, day after day, an hour at a time. There Bell was, an ignorant country boy surrounded by all of those things that strike terror to the negro heart; . . ." See Münsterberg, On the Witness Stand, (1927) 137 *et seq.*

[15] The police practices here examined are to some degree widespread throughout our country. See Report of Comm. on Lawless Enforcement of the Law (Amer. Bar Ass'n) 1 Amer. Journ. of Pol. Sci., 575; Note 43 H. L. R. 617; IV National Commission On Law Observance And Enforcement, *supra,* Ch. 2, § 4. Yet our national record for crime detection and criminal law enforcement compares poorly with that of Great Britain where secret interrogation of an

such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

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accused or suspect is not tolerated. See, Report of Comm. on Lawless Enforcement of the Law, *supra,* 588; 43 H. L. R., *supra,* 618. It has even been suggested that the use of the "third degree" has lowered the esteem in which administration of justice is held by the public and has engendered an attitude of hostility to and unwillingness to coöperate with the police on the part of many people. See, IV National Commission, etc., *supra,* p. 190. And, after scholarly investigation, the conclusion has been reached "that such methods, aside from their brutality, tend in the long run to defeat their own purpose; they encourage inefficiency on the part of the police." Glueck, Crime and Justice, (1936) 76. See IV National Commission, etc., *supra,* 5; cf. 4 Wigmore, Evidence, (2d ed.) § 2251. The requirement that an accused be brought promptly before a magistrate has been sought by some as a solution to the problem of fostering law enforcement without sacrificing the liberties and procedural rights of the individual. 2 Wig., *supra,* § 851, IV National Commission, etc., *supra,* 5.

The Supreme Court of Florida was in error and its judgment is

Reversed.

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

FEDERAL HOUSING ADMINISTRATION, REGION NO. 4, *v.* BURR, DOING BUSINESS AS SECRETARIAL SERVICE BUREAU.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 354. Argued January 31, February 1, 1940.—Decided February 12, 1940.

1. Under the National Housing Act, as amended, which provides that the Administrator shall, in carrying out the provisions of certain of its titles, "be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal," the Federal Housing Administration is subject to be garnished, under state law, for moneys due to an employee; but only those funds which have been paid over to the Administration in accordance with § 1 of the Act and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution. Pp. 249–250.
2. Waivers by Congress of governmental immunity from suit in the case of such federal instrumentalities should be construed liberally. P. 245.
3. The words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and parcel of the process, provided by statute, for the collection of debts. P. 245.

289 Mich. 91; 286 N. W. 169, affirmed.

CERTIORARI, 308 U. S. 541, to review the affirmance of a judgment against the Federal Housing Administration in a garnishment proceeding.

Mr. Sidney J. Kaplan, with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Melvin H. Siegel, Paul A. Sweeney, Thomas Harris,* and *Abner H. Ferguson* were on the brief, for petitioner.

Mr. Gus O. Nations for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented here is whether the Federal Housing Administration is subject to garnishment for moneys due to an employee. The Supreme Court of the State of Michigan held that it was. 289 Mich. 91; 286 N. W. 169. We granted certiorari in view of the importance of the problem and the confused state of the authorities on the right to garnishee recently created agencies or corporations of the federal government.[1]

In 1930 respondent obtained final judgment in Michigan against one Heffner and one Brooks. In 1938 petitioner was served with a writ of garnishment issued by the Michigan court.[2] Petitioner appeared and filed an answer and disclosure stating that Brooks was no longer connected with it due to his death subsequent to service of the writ but admitting that it owed Brooks at the time

[1] Garnishment of wages due an employee of the United States Shipping Board Merchant Fleet Corporation was disallowed in *McCarthy* v. *United States Shipping Board Merchant Fleet Corp.,* 60 App. D. C. 311; 53 F. 2d 923. Contra: *Haines* v. *Lone Star Shipbuilding Co.,* 268 Pa. 92; 110 A. 788. As to the Home Owners' Loan Corporation, a similar conflict of decisions has arisen. That it is not subject to garnishment see *Home Owners' Loan Corp.* v. *Hardie & Caudle,* 171 Tenn. 43; 100 S. W. 2d 238. And see *Manufacturer's Trust Co.* v. *Ross,* 252 App. Div. 292; 299 N. Y. S. 398. That it is subject to garnishment see *Central Market, Inc.* v. *King,* 132 Neb. 380; 272 N. W. 244; *Gill* v. *Reese,* 53 Oh. App. 134; 4 N. E. 2d 273; *McAvoy* v. *Weber,* 198 Wash. 370; 88 P. 2d 448.

[2] Mich. Stat. Ann. (1938) § 27.1855 *et seq.*

of his death $71.11. Its answer further asserted that it was "an agency of the United States Government and is, therefore, not subject to garnishee proceedings." On motion of respondent judgment was entered against petitioner for the amount of its indebtedness to Brooks and execution was allowed thereunder. On appeal to the Supreme Court of Michigan that judgment was affirmed.

The problem here is unlike that in *Buchanan* v. *Alexander,* 4 How. 20, where creditors of seamen of the frigate Constitution were not allowed to attach their wages in the hands of a disbursing officer of the federal government. That ruling was derived from the principle that the United States cannot be sued without its consent. There no consent whatsoever to "sue and be sued" had been given. Here the situation is different. Sec. 1 of Title I of the National Housing Act (Act of June 27, 1934, c. 847; 48 Stat. 1246) authorized the President "to create a Federal Housing Administration, all of the power of which shall be exercised by a Federal Housing Administrator." That section was amended in 1935 (Act of August 23, 1935, c. 614; 49 Stat. 684, 722) by adding thereto the provision that "The Administrator shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."

Since consent to "sue and be sued" has been given by Congress, the problem here merely involves a determination of whether or not garnishment comes within the scope of that authorization. No question as to the power of Congress to waive the governmental immunity is present. For there can be no doubt that Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process. *Federal Land Bank* v. *Priddy,* 295 U. S.

229; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381.

As indicated in *Keifer & Keifer* v. *Reconstruction Finance Corp., supra,* we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. *Keifer & Keifer* v. *Reconstruction Finance Corp., supra.* Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme,[3] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings. Garnishment and attachment commonly are part and

[3] Cf. *Porto Rico* v. *Rosaly,* 227 U. S. 270.

parcel of the process, provided by statute, for the collection of debts.[4] In Michigan a writ of garnishment is a civil process at law, in the nature of an equitable attachment. See *Posselius* v. *First National Bank,* 264 Mich. 687; 251 N. W. 429. But however it may be denominated, whether legal or equitable,[5] and whenever it may be available, whether prior to [6] or after final judgment,[7] garnishment is a well-known remedy available to suitors. To say that Congress did not intend to include such civil process in the words "sue and be sued" would in general deprive suits of some of their efficacy. Hence, in absence of special circumstances, we assume that when Congress authorized federal instrumentalities of the type here involved to "sue and be sued" it used those words in their usual and ordinary sense.[8] State decisions barring gar-

[4] See Shinn, Attachment & Garnishment, Chs. I, XXIII. As to garnishment of wage claims, see Sturges & Cooper, Credit Administration and Wage Earner Bankruptcies, 42 Yale L. Journ. 487, 503 *et seq.*

[5] Cf. *Williams* v. *T. R. Sweat & Co.,* 103 Fla. 461; 137 So. 698; *Campagna* v. *Automatic Electric Co.,* 293 Ill. App. 437; 12 N. E. 2d 695, with *Commercial Investment Trust, Inc.* v. *William Frankfurth Hardware Co.,* 179 Wis. 21; 190 N. W. 1004; *Diamond Cork Co.* v. *Maine Jobbing Co.,* 116 Me. 67; 100 A. 7.

[6] Col. Code Civ. Proc., ch. 7, § 129; Deering's Calif. Code Civ. Proc., § 543.

[7] N. Y. Civ. Prac. Act, § 684; Purdon's Penn. Stat. § 2994. In Michigan no garnishment for money owing the principal defendant on account of labor performed by him shall be commenced until after judgment has been obtained against such principal defendant. Mich. Stat. Ann., § 27.1855.

[8] In *Weston* v. *City Council of Charleston,* 2 Pet. 449, 464, Chief Justice Marshall in defining the word "suit," as used in the 25th section of the Judicial Act of 1789 giving this Court jurisdiction to review on enumerated conditions a "final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had" (43 Stat. 937), said:

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an

nishment against a public body though it may "sue and be sued" [9] are not persuasive here as they reflect purely local policies concerning municipalities, counties and the like, and involve considerations not germane to the problem of amenability to suit of the modern federal governmental corporation.

Our conclusion is strengthened by the legislative history of the many recently created governmental agencies or corporations. It shows that in but few instances was a proviso added to the "sue and be sued" clause prohibiting garnishment or attachment.[10] The fact that in the run of recent statutes no such exceptions were made and that in only a few of them were any special prohibitions included adds corroborative weight to our conclusion that such civil process was intended.

Up to this point, however, petitioner does not raise its major objections. Rather it grounds its claim to immunity from garnishment largely on statutory construction and on matters of policy. As to the former, it relies heavily on the fact that the authority to "sue and be sued" excludes cases unrelated to the Administrator's own duties or liabilities since the statute provides that the "Administrator shall, in carrying out the provisions of this title [Title I] and titles II and III" be authorized to

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individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

[9] *Central of Georgia Ry. Co.* v. *Andalusia,* 218 Ala. 511; 119 So. 236; *Duvall County* v. *Charleston Lumber Co.,* 45 Fla. 256, 265; 33 So. 531; *Chicago* v. *Hasley,* 25 Ill. 595.

[10] As respects the forty government corporations listed in *Keifer & Keifer* v. *Reconstruction Finance Corp., supra,* pp. 390–391, where Congress included the authority to "sue and be sued," express prohibition against attachment and garnishment was provided in only two instances. They are the Federal Crop Insurance Corporation (52 Stat. 72, 73) and the Farmers' Home Corporation (50 Stat. 527).

"sue and be sued." Petitioner therefore contends that Congress has consented to a suit against the Administrator only where the plaintiff is a party to a transaction with him which in turn is related to "carrying out" the provisions of those titles. Title I contains the only provisions material here. Sec. 1 gave the Administrator, *inter alia*, authority to appoint such officers and employees "as he may find necessary"; to "prescribe their authorities, duties, responsibilities, and tenure and fix their compensation, without regard to the provisions of other laws applicable to the employment or compensation of officers or employees of the United States"; and to "make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this title and titles II and III, without regard to any other provisions of law governing the expenditure of public funds." Sec. 2 gave limited authority to the Administrator to insure financial institutions; § 3, authority to make loans to such institutions. Since the Administrator could be sued, in his official capacity, in "carrying out" the provisions of Title I, it would seem clear that such suits as were based on employment contracts made pursuant to the authority granted by § 1 were permitted. Accordingly, it seems clear that Brooks, whose claim [11] was garnisheed by respondent, could have sued on that claim and obtained the benefit of that civil process which was available in the appropriate state or federal proceeding. *Federal Land Bank* v. *Priddy, supra.* To allow respondent to reach that claim through a writ of garnishment is

[11] While the record shows that Brooks had been "connected" with the petitioner it does not show the nature of the debt due him. The brief which petitioner filed below, however, recited that Brooks was an employee; and no defense was interposed that the claim did not arise under Title I of the Act.

therefore not to enlarge petitioner's liability nor to add one iota to the scope of § 1. For the end result is simply to allow a suit for the collection of a claim on which Congress expressly made petitioner suable. The mere change in the payee does not make the suit unrelated to the duties and liabilities of the Administrator under § 1.

But petitioner strongly urges considerations of policy against this conclusion and stresses the heavy burdens which would be imposed on such governmental instrumentalities if garnishment were permitted. It asserts that the task of preparing answers, disclosures and returns to numerous garnishment processes in the courts of each of the states would appreciably impede the federal functions of such an agency. It points to various state legislation regulating and restricting garnishment against public bodies and concludes that if immunity of public bodies from garnishment is to be abrogated, it should be done by legislation so that the remedy could be appropriately molded to fit the needs of government.

In our view, however, the bridge was crossed when Congress abrogated the immunity by this "sue and be sued" clause. And no such grave interference with the federal function has been shown to lead us to imply that Congress did not intend the full consequences of what it said. Hence, considerations of convenience, cost and efficiency [12] which have been urged here are for Congress which, as we have said, has full authority to make such restrictions on the "sue and be sued" clause as seem to it appropriate or necessary.

There is some point made of the fact that suit was brought against the Federal Housing Administration rather than against the Administrator. But when the

[12] Cf. Fortas, Wage Assignments in Chicago, 42 Yale L. Journ. 526; Nugent, Hamm, Jones, Wage Executions for Debt, Bull. No. 622, Bureau of Lab. Statistics, U. S. Dept. of Labor.

statute authorizes suits by or against the Administrator "in his official capacity" we conclude that that permits actions by or against the Federal Housing Administration. The Administrator acts for and on behalf of the Federal Housing Administration, since by express terms of the Act all of the powers of the latter "shall be exercised" by him. Hence action by him in the name of the Federal Housing Administration would be action in his official capacity.

Petitioner claims that execution should not have been allowed under the judgment. The Act permits the Administrator "to sue and be sued in any court of competent jurisdiction, State or Federal." Whether by Michigan law execution under such a judgment may be had is, like the availability of garnishment, *Federal Land Bank* v. *Priddy, supra,* a state question. And so far as the federal statute is concerned, execution is not barred, for it would seem to be part of the civil process embraced within the "sue and be sued" clause. That does not, of course, mean that any funds or property of the United States can be held responsible for this judgment. Claims against a corporation are normally collectible only from corporate assets. That is true here. Congress has specifically directed that all such claims against the Federal Housing Administration of the type here involved "shall be paid out of funds made available by this Act." § 1. Hence those funds, and only those, are subject to execution. The result is that only those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution. Since no consent to reach government funds has been given, execution thereon would run counter to *Buchanan* v. *Alexander, supra.* To conclude otherwise would be to allow proceedings against the United States where it had not waived its immunity. This re-

striction on execution may as a practical matter deprive it of utility, since funds of petitioner appear to be deposited with the Treasurer of the United States and payments and other obligations are made through the Chief Disbursing Officer of the Treasury.[13] But that is an inherent limitation, under this statutory scheme, on the legal remedies which Congress has provided. And since respondent obtains its right to sue from Congress, it necessarily must take it subject to such restrictions as have been imposed. The fact that execution may prove futile is one of the notorious incidents of litigation, as is the fact that execution is not an indispensable adjunct of the judicial process.[14]

Affirmed.

MR. JUSTICE MURPHY did not participate in the consideration or decision of this case.

SOUTH CHICAGO COAL & DOCK CO. ET AL. *v.* BASSETT, DEPUTY COMMISSIONER.

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

No. 262. Argued January 11, 1940.—Decided February 26, 1940.

1. In providing by the Longshoremen's and Harbor Workers' Act for payment by employers of compensation for injuries or death suffered by employees engaged in maritime employment on vessels in navigable waters, Congress exerted its constitutional power to modify the admiralty law. P. 256.

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[13] Fifth Annual Report, Federal Housing Administration (1938), p. 157.

[14] See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 263; *Commonwealth Finance Corp.* v. *Landis,* 261 F. 440, 443–444. Cf. *Pauchogue Land Corp.* v. *Long Island State Park Comm'n,* 243 N. Y. 15; 152 N. E. 451; *New South Wales* v. *Bardolph,* 52 Commonwealth L. Rep. 455.

2. The classification excepting from the Act a "master or member of a crew of any vessel," § 3 (a) (1), was within that power. P. 256.
3. The Act applies to those who serve on vessels as laborers, whose work is of the sort performed by longshoremen and harbor workers, and who are thus distinguished from those employees who are naturally and primarily on board to aid in navigation. P. 257.
4. In so far as the decision whether an injured employee was or was not a "member of the crew" turns on a question of fact, the authority to determine is conferred by the Act on the deputy commissioner, and his finding, if sustained by evidence, is conclusive and must be accepted by the District Court without attempting a new trial. P. 257.
5. The legal meaning of the word "crew" must be determined with reference to the context and purpose of the particular statute in which the word is used. P. 258.
6. The fact that the boat's captain, to make up the complement of "deckhands" required by a certificate of inspection, included the employee whose status under this Act is in question does not fix his status as that of a member of the crew. The question concerns his actual duties. P. 260.
7. Evidence *held* sufficient to sustain a finding by a deputy commissioner that the person on account of whose death compensation was claimed under the above-mentioned Act was not a member of the crew. P. 260.

104 F. 2d 522, affirmed.

CERTIORARI, 308 U. S. 532, to review the reversal of a judgment of the District Court vacating an award under the Longshoremen's and Harbor Workers' Act.

Mr. Robert J. Fononie, with whom *Mr. Hayes McKinney* was on the brief, for petitioners.

Assistant Attorney General Shea, with whom *Solicitor General Jackson* and *Messrs. Melvin H. Siegel, Paul A. Sweeney,* and *Aaron B. Holman* were on the brief, for respondent.

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

John Schumann, an employee of petitioner, South Chicago Coal & Dock Company, was drowned while serving his employer on a vessel in navigable waters of the United States. His widow was awarded compensation by the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act.[1] The deputy commissioner found that decedent was performing services on the vessel as a laborer and fell from the vessel into the water. The employer and its surety brought suit in the District Court to restrain the enforcement of the award, contending that decedent was employed as a member of the crew and hence that compensation was not payable. The District Court granted a trial *de novo* and finding that the decedent was a member of the crew vacated the award.

The Court of Appeals found that the evidence before the District Court was similar to that heard by the deputy commissioner; that the facts were not in dispute; that the District Court in reviewing the finding of the deputy commissioner was precluded from weighing the evidence, being required to examine the record and ascertain whether there was any evidence to support the commissioner's finding. Holding that there was such evidence, the Court of Appeals reversed the decree of the District Court and directed the dismissal of the bill of complaint. 104 F. 2d 522. Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit in the case of *Maryland Casualty Co.* v. *Lawson,* 94 F. 2d 190, we granted certiorari, 308 U. S. 532.

[1] 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. IV, §§ 901, *et seq.*

The statute provides specifically in § 3 as to "Coverage," that no compensation shall be payable in respect of the disability or death of a "master or member of a crew of any vessel." [2] And these persons were excluded from the definition of the term employee. § 2 (3).[3]

It appears that the vessel was a lighter of 312 net tons used for fueling steamboats and other marine equipment. It was licensed to operate in the Calumet River and Harbor and in the Indiana River and Harbor. The Court of Appeals thus summarized its operations: "It supplied coal to other vessels on their order, each operation consuming only a couple of hours. It had no sleeping or eating quarters. Its certificates of inspection required that 'Included in the entire *crew* hereinafter specified and designated there must be 1 licensed master and pilot, 1 licensed chief engineer, three seamen, 1 fireman'. If deceased were counted as a member of the crew, the full complement of the ship was present. Otherwise not." The captain testified before the deputy commissioner that he had five men on the boat with him, one

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[2] The entire text of § 3 is as follows:

"Sec. 3. *Coverage.*—(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U. S. C. 903.

[3] 33 U. S. C. 902 (3).

engineer, fireman and three "deckhands," the decedent being one of the latter. The Court of Appeals described his chief task as "facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat. He did no work while the boat was en route from dock to the vessel to be fueled." The Court of Appeals thought it significant that his only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no "articles"; that he slept at home and boarded off ship; that he was called very early in the morning each day as he was wanted; that while he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was somewhat akin to temporary employment.

In *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128, we had occasion to consider the purpose and scope of the Longshoremen's and Harbor Workers' Compensation Act. Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. We had held that one engaged as a stevedore in loading a ship lying in port in navigable waters was performing a maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52. But

the Court had also held that in the case of a longshoreman who was injured on the land, although engaged in unloading a vessel, the local law governed and hence the workmen's compensation law of the State applied. *State Industrial Commission* v. *Nordenholt Corporation,* 259 U. S. 263. The distinction had thus been maintained between injuries on land and those suffered by persons engaged in maritime employment on a vessel in navigable waters. As to the latter, no doubt was entertained of the power of Congress to modify the admiralty law and to provide for the payment by employers of compensation.[4] And in thus providing, Congress had constitutional authority to define the classes of such employees who should receive compensation and to exclude those described in § 3. *Nogueira* v. *New York, N. H. & H. R. Co., supra.*

The legislative history of the exception now before us throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy under the Act is exclusive. § 5.[5] This made inapplicable to such employees the provision of § 33 of the Merchants Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act.[6] The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a

[4] See *Waring* v. *Clarke,* 5 How. 441, 457, 458; *The Lottawanna,* 21 Wall. 558, 577; *Butler* v. *Boston Steamship Co.,* 130 U. S. 527, 556, 557; *In re Garnett,* 141 U. S. 1, 14; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 60, 62; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215; *Washington* v. *Dawson & Co.,* 264 U. S. 219, 227, 228; *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 386, 388; *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128, 138.

[5] 33 U. S. C. 905.

[6] 41 Stat. 1007.

citizen of the United States.[7] They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt "seamen." Then, in its final passage, the words "a master or member of a crew" were substituted for "seamen." [8] We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were "seamen." *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Northern Coal Co.* v. *Strand,* 278 U. S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. We think it is clear that Congress in finally adopting the phrase "a master or member of a crew" in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel [9] and to whom state compensation statutes were inapplicable. The question is whether the decedent in this instance fell within that class.

So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not "a member of a crew" turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy com-

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[7] House Rep. No. 1767, 69th Cong., 2d sess., pp. 1, 2, 20.

[8] Cong. Rec., 69th Cong., 2d sess., vol. 68, pt. 5, pp. 5402, 5403, 5908; *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128, 136.

[9] Except where they are engaged "to load or unload or repair any small vessel under eighteen tons net." § 3 (a) (1), 33 U. S. C. 903 (a) (1).

missioner.[10] Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial. We have so held with respect to the conclusiveness of the finding of the deputy commissioner that an injury to an employee arose "out of and in the course of the employment," *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166; as to the finding of the dependency of a claimant for compensation, *L'Hote* v. *Crowell,* 286 U. S. 528, *The Admiral Peoples,* 295 U. S. 649, 653, 654; and as to the finding that the employee had committed suicide and hence that compensation was not payable, *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287. In the *Del Vecchio* case the question was with respect to the application of the exception made by paragraph (b) of § 3 with respect to "Coverage," and we see no reason for a different view as to the application of paragraph (a) (1) of the same section.

Petitioners urge that the question whether the decedent was a member of a "crew" was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a "crew" as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude.

The word "crew" does not have an absolutely unvarying legal significance. As Mr. Justice Story said in *United States* v. *Winn,* 3 Sumn. 209,[11] the general sense of the word crew is "equivalent to ship's company" which would embrace all the officers as well as the common seamen. But it was observed that the laws upon

[10] 33 U. S. C. 919 (a), 921.

[11] 28 Fed. Cas. 733, Case No. 16,740.

maritime subjects sometimes used the word crew in that general sense and "sometimes in other senses, more limited and restrained." "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration. In *The Bound Brook,* 146 F. 160, 164, it was said that "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board." Judge Hough in *The Buena Ventura,* 243 F. 797, 799, thought that statement was a fair summary, and in his view one who served the ship "in her navigation" was a member of the "crew." *Id.,* p. 800. See, also, *Seneca Gravel Co.* v. *McManigal,* 65 F. 2d 779. Recently, in considering the application of the Jones Act to "any seaman," we adverted to the "range of variation" in the use of the word "crew," and it was again emphasized that what concerned us in that case, which had relation to the status of a "master," was "not the scope of the class of seamen at other times and in other contexts." We said that our concern there was "to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained." *Warner* v. *Goltra,* 293 U. S. 155, 158.

That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term

"crew" in other statutes having other purposes. This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty, supra*), were still regarded as distinct from members of a "crew." They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald* v. *Baltimore & Ohio R. Co.*, 71 F. 2d 810; *Diomede* v. *Lowe*, 87 F. 2d 296; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. 2d 245.

Regarding the word "crew" in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three "deckhands" and that the captain included the decedent to make up that complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water." *Scheffler* v. *Moran Towing* Co., 68 F. 2d 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that

there was enough to sustain the deputy commissioner's ruling.

The judgment of the Court of Appeals is

Affirmed.

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

AMALGAMATED UTILITY WORKERS (C. I. O.) *v.* CONSOLIDATED EDISON CO. OF NEW YORK ET AL.

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

No. 342. Argued January 31, 1940.—Decided February 26, 1940.

Under the National Labor Relations Act, the authority to apply to the Circuit Court of Appeals to have an employer adjudged in contempt for failure to obey a decree enforcing an order of the National Labor Relations Board lies exclusively in the Board itself, acting as a public agency. A labor organization has no standing to make such an application in virtue of having filed the charges upon which the Board's proceedings were initiated. P. 269.

106 F. 2d 991, affirmed.

CERTIORARI, 308 U. S. 541, to review the denial of an application for a contempt order.

Mr. Louis B. Boudin for petitioner.

Mr. William L. Ransom for Consolidated Edison Co. et al.; and *Mr. Isaac Lobe Straus,* with whom *Mr. Claude A. Hope* was on the brief, for International Brotherhood of Electrical Workers et al., respondents.

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

The National Labor Relations Board ordered the Consolidated Edison Company of New York and its affiliated companies to desist from certain labor practices

found to be unfair and to take certain affirmative action. The Circuit Court of Appeals granted the Board's petition for enforcement of the order, and its decree, as modified, was affirmed by this Court. 305 U. S. 197. Petitioner, Amalgamated Utility Workers, brought the present proceeding before the Circuit Court of Appeals to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree.

The Board, in response to the motion, asserted its willingness to participate in an investigation to ascertain whether acts in violation of the decree had been committed and suggested that the court direct such investigation as might be deemed appropriate.

The Court of Appeals denied the application upon the ground that petitioner had "no standing to press a charge of civil contempt, if contempt has been committed." The court held that under the National Labor Relations Act "the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed." 106 F. 2d 991. In view of the importance of the question in relation to the proper administration of the National Labor Relations Act, we granted certiorari. 308 U. S. 541.

Petitioner contends that the National Labor Relations Act [1] "creates private rights"; that the Act recognizes the rights of labor organizations; and that it gives the parties upon whom these rights are conferred status in the courts for their vindication. In support of its alleged standing, petitioner urges that under its former name (United Electrical and Radio Workers of America) it filed with the National Labor Relations Board charges against the respondent companies, and that it was upon

[1] 49 Stat. 449, 29 U. S. C. 151, *et seq.*

these charges that the Board issued its complaint and held the hearing which resulted in the order in question. Also, that petitioner was permitted to intervene in the proceedings before the Circuit Court of Appeals where the companies had moved to set aside the Board's order and the Board had moved to enforce it; and that the petitioner had also been heard in this Court in the certiorari proceedings for review of the decree of enforcement.

Petitioner invokes the statement in § 1 of the Act of "findings and policy," with respect to the effect of the denial by employers of the right of employees to organize and to bargain collectively, and in particular the provision of § 7 [2] that

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Neither this provision, nor any other provision of the Act, can properly be said to have "created" the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34, we observed that this right is a fundamental one; that employees "have as clear a right to organize and select their representatives for lawful purposes" as the employer has "to organize its business and select its own officers and agents"; that discrimination and coercion "to prevent the free exercise of the right of employees to self-organization and representation" was a proper subject for condemnation by competent legislative authority. We noted that "long ago"

[2] 29 U. S. C. 157.

we had stated the reason for labor organizations,—that through united action employees might have "opportunity to deal on an equality with their employer," referring to what we had said in *American Steel Foundries* v. *Tri-City Central Council*, 257 U. S. 184, 209. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action "an instrument of peace rather than of strife." To that end Congress enacted the National Labor Relations Act.

To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character and scope of that special procedure are determinative of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.

Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose. Section 10 (a) provides:[3]

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The Act then sets forth a definite and restricted course of procedure. A charge of an unfair labor practice may

[3] 29 U. S. C. 160 (a).

be presented to the Board, but the person or group making the charges does not become the actor in the proceeding. It is the Board, and the Board alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice. If complaint is issued, there must be a hearing before the Board or a member thereof or its agent. The person against whom the complaint is issued may answer and produce testimony. Other persons may be allowed to intervene and present testimony, but only in the discretion of the Board, or its member or agent conducting the hearing. § 10 (b).[4] The hearing is under the control of the Board. The determination whether or not the person named in the complaint has engaged or is engaging in the unfair labor practice rests with the Board. If the Board is of the opinion that the unfair labor practice has been shown, the Board must state its findings of fact and issue its "cease and desist" order with such affirmative requirements as will effectuate the policy of the Act. § 10 (c).[5]

So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. For that purpose the Board is empowered to petition the Circuit Court of Appeals for a decree of enforcement. The court

[4] 29 U. S. C. 160 (b).

[5] 29 U. S. C. 160 (c).

is to proceed upon notice to those against whom the order runs and with appropriate hearing. If the court, upon application by either party, is satisfied that additional evidence should be taken, it may order the Board, its member or agent, to take it. The Board may then modify its findings of fact and make new findings. The jurisdiction conferred upon the court is exclusive and its decree is final save as it may be reviewed in the customary manner. § 10 (e).[6] Again, the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates. Petitioner emphasizes the opportunity afforded to private persons by § 10 (f).[7] But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it. The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in § 10 (e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under § 10 (f), which seeks not to require compliance with the Board's order but to overturn it.

What Congress said at the outset, that the power of the Board to prevent any unfair practice as defined in the Act is exclusive, is thus fully carried out at every stage of the proceeding. The text of the Act is so clear in this respect that there is no need to comment upon its legislative history. But this puts in a strong light the

[6] 29 U. S. C. 160 (e).

[7] 29 U. S. C. 160 (f).

legislative intent. In the Senate, the Committee on Education and Labor in its report on the bill said: [8]

"Section 10 (a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining."

And the Committee on Labor of the House of Representatives in its report stated: [9]

"The Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice listed in section 8 'affecting commerce', as that term is defined in section 2 (7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill."

After referring to the suitable adaptation of the Board's orders to the needs of particular cases, and especially to the power to reinstate employees with or without back pay, the Committee continued:

"No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of in-

[8] Sen. Rep. No. 573, 74th Cong., 1st sess., p. 15.

[9] H. R. Rep. No. 972, 74th Cong., 1st sess., p. 21.

junctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal."

In both Houses of Congress, the Committees were careful to say that the procedure provided by the bill was analogous to that set up by the Federal Trade Commission Act, § 5,[10] which was deemed to be "familiar to all students of administrative law." That procedure, which was found to be prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons, was fully discussed by this Court in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 25, where it was said:

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

That sort of procedure concerning unfair competition was contrasted with that provided by the Interstate Commerce Act in relation to unjust discrimination. We said that "in their bearing upon private rights" they are "wholly dissimilar." The Interstate Commerce Act im-

[10] 38 Stat. 719, 15 U. S. C. 45.

poses upon the carrier many duties and creates in the individual corresponding rights. For the violation of the private right it affords "a private administrative remedy." The interested person can file as of right a complaint before the Interstate Commerce Commission and the carrier is required to make answer. We said that the Federal Trade Commission Act "contains no such features." *Id.*, p. 26. The present Act, drawn in analogy to the Federal Trade Commission Act, contains no such features.

As Congress has in this instance created a public agency entrusted by the terms of its creation with the exclusive authority for the enforcement of the provisions of the Act, decisions dealing with the legal obligations arising under the Railway Labor Act [11] cannot be regarded as apposite. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 569, 570; *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 543, 544.

We think that the provision of the National Labor Relations Act conferring exclusive power upon the Board to prevent any unfair labor practice, as defined,—a power not affected by any other means of "prevention that has been or may be established by agreement, code, law, or otherwise"—necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a "private administrative remedy." Both the order and the decree are aimed at the prevention of the

[11] 45 U. S. C. 151. See 50 Harvard Law Review 1089, 1090.

unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it. As the Conference Report upon the bill stated,[12] in case the unfair labor practice is resumed, "there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings."

The order of the Court of Appeals denying petitioner's motion is

Affirmed.

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

MINNESOTA EX REL. PEARSON *v.* PROBATE COURT OF RAMSEY COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 394. Argued February 6, 7, 1940.—Decided February 26, 1940.

Under a Minnesota statute a person may be subjected to a proceeding akin to lunacy proceedings with a view to his restraint if proven to be of a "psychopathic personality." In a prohibition proceeding the State Supreme Court construed the statute as intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil

[12] Conference Report, Cong. Rec., 74th Cong., 1st sess., pt. 9, p. 10,299.

on the objects of their uncontrolled and uncontrollable desire; and upheld the statute and quashed the alternative writ. Upon appeal here, *held:*

1. This Court must accept the state court's construction. P. 273.

2. The word "include" as used in that court's opinion, will be taken as defining the entire class of persons to whom the statute applies and not as describing merely a portion of a larger class. Pp. 273–274.

3. The statute, so construed, is not too vague and indefinite to constitute valid legislation. P. 274.

4. The objection that it denies the equal protection of the laws because of unreasonable classification, is untenable. P. 274.

The legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest.

5. In its procedural aspect, the statute is not invalid on its face. P. 275.

6. Procedural objections that are based upon possible applications of the statute in the progress of the cause which have not as yet been passed upon by the state court, are premature. P. 277.

205 Minn. 545; 287 N. W. 297, affirmed.

APPEAL from a judgment quashing an alternative writ of prohibition.

Mr. Joseph F. Cowern for appellant.

Messrs. Chester S. Wilson and *Kent C. van den Berg,* with whom *Messrs. J. A. A. Burnquist* and *John A. Weeks* were on the brief, for appellee.

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

Appellant, Charles Edwin Pearson, petitioned the Supreme Court of Minnesota for a writ of prohibition commanding the Probate Court of Ramsey County, and its Judge, to desist from proceeding against him as a "psychopathic personality" under Chapter 369 of the Laws of Minnesota of 1939. A proceeding under the statute had been brought in the Probate Court for the

commitment of appellant and an order for his production and examination had been issued.

Appellant contended that the statute violated the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. After hearing upon an alternative writ, the Supreme Court overruled these contentions and quashed the writ. 205 Minn. 545; 287 N. W. 297. The case comes here on appeal. Jud. Code, § 237 (a); 28 U. S. C. 344 (a).

The statute, in § 1, defines the term "psychopathic personality" as meaning

"the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

Section 2 provides that, except as otherwise therein or thereafter provided, the laws relating to insane persons, or those alleged to be insane, shall apply with like force to persons having, or alleged to have, a psychopathic personality. There is a proviso that before proceedings are instituted the facts shall first be submitted to the county attorney who if he is satisfied that good cause exists shall prepare a petition to be executed by a person having knowledge of the facts and shall file it with the judge of the probate court of the county in which the "patient" has his "settlement or is present." The probate judge shall set the matter down for hearing and for examination of the "patient." The judge may exclude the general public from attendance. The "patient" may be represented by counsel and the court may appoint counsel for him if he is financially unable to obtain such assistance. The "patient" is entitled to compulsory process for the attendance of witnesses in his behalf.

The court must appoint two duly licensed doctors of medicine to assist in the examination. The proceedings are to be reduced to writing and made parts of the court's records. From a finding of the existence of psychopathic personality, the "patient" may appeal to the district court.

After setting forth the general principles which governed its determination, the state court construed the statute in these words:

"Applying these principles to the case before us, it can reasonably be said that the language of § 1 of the act is intended to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined."

This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 513; *Hicklin* v. *Coney,* 290 U. S. 169, 172; *Georgia Railway & Electric Co.* v. *Decatur,* 295 U. S. 165, 170. Moreover, as it was the manifest purpose of the court to determine definitely the meaning of the Act, we accept the view presented by the Attorney General of

the State at this bar, that the court used the word "include" as defining the entire class of persons to whom the statute applies and not as describing merely a portion of a larger class. In advance of a decision by the state court applying the statute to persons outside that definition, we should not adopt a construction of the provision which might render it of doubtful validity. *Stephenson* v. *Binford,* 287 U. S. 251, 277.

This construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation. There must be proof of a "habitual course of misconduct in sexual matters" on the part of the persons against whom a proceeding under the statute is directed, which has shown "an utter lack of power to control their sexual impulses," and hence that they "are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." These underlying conditions, calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime. *Nash* v. *United States,* 229 U. S. 373, 377; *Fox* v. *Washington,* 236 U. S. 273, 277, 278; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348; *United States* v. *Wurzbach,* 280 U. S. 396, 399. Appellant's criticisms are drawn from his interpretation of the statute and find no warrant in the statute as the state court has construed it.

Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not

the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Semler* v. *Dental Examiners,* 294 U. S. 608, 610, 611; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 400.

There remains the question whether, apart from definition and classification, the procedure authorized by the statute adequately safeguards the fundamental rights embraced in the conception of due process. In this relation it is important to note that appellant has challenged the proceeding *in limine* by seeking to prevent the probate judge from entertaining it. To support such a challenge, the statute in its procedural aspect must be found to be invalid on its face and not by reason of some particular application inconsistent with due process. In that light the argument on this branch of the case also fails.

As we have seen, the facts must first be submitted to the county attorney who must be satisfied that good cause exists. He then draws a petition which must be "executed by a person having knowledge of the facts." The probate judge must set the matter for hearing and for examination of the person proceeded against. Provision is made for his representation by counsel and for compelling the production of witnesses in his behalf. The court must appoint two licensed doctors of medicine to assist in the

examination. The argument that these doctors may not be sufficiently expert in this type of cases merely invites conjecture. There is no reason to doubt that qualified medical men are usually available. Laws as to proceedings where persons are alleged to be insane are made applicable. Appellant says that the patient cannot be released on bail. The State contests this, insisting that he may be so released pending hearing or on appeal, pointing to Mason's Minnesota Statutes, 1938 Supplement, § 8992–178. Appellant contends that if the court finds the patient to be within the statute, he must be committed "for the rest of his life to an asylum for the dangerously insane." Mason's Minn. Stat., 1938 Supp., § 8992–176. The State also contests this conclusion, maintaining that the commitment is without term and subject to the right of the patient, or any one interested in him, to petition the committing court for release at any time. Mason's Minn. Stat., 1938 Supp., § 8992–143; Laws of 1935, Chap. 72, § 143; as amended by Laws of 1939, Chap. 270, § 8. The statute gives a right of appeal from the finding of the probate judge upon compliance with certain specified provisions of the Minnesota laws. Appellant contends that this excludes other provisions of laws relating to appeals in insanity cases. Again, appellant's position is contested by the State upon the ground that there is no express limitation or exclusion in the language of the statute and that other provisions governing appellate procedure apply. These various procedural questions, and others suggested by appellant, do not appear to have been passed upon by the state court.

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of

cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here, for none have occurred. The applicable statutes are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186, 187; *Stephenson* v. *Binford, supra.* On the contrary, we must assume that the Minnesota courts will protect appellant in every constitutional right he possesses. His procedural objections are premature.

The judgment is

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* KEHOE.

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

No. 419. Argued February 7, 8, 1940.—Decided February 26, 1940.

A conclusion of fact by the Board of Tax Appeals supported by substantial evidence binds the Circuit Court of Appeals. P. 279. 105 F. 2d 552, reversed.

CERTIORARI, 308 U. S. 543, to review a judgment reversing a decision of the Board of Tax Appeals sustaining a ruling of the Commissioner of Internal Revenue.

Mr. John Philip Wenchel, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Harry Marselli* were on the brief, for petitioner.

Mr. Robert T. McCracken, with whom *Messrs. Leo W. White, R. M. O'Hara,* and *W. H. Gillespie* were on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent Kehoe, in 1926, made an income tax return for 1925 and paid the amount computed thereon. In 1927, after inquiry concerning his affairs, the Commissioner assessed and collected an additional sum. Respondent waived appeal to the Board of Tax Appeals and became party to a closing agreement under § 1106 (b) Revenue Act 1926,[1] approved by the Secretary of the Treasury January 27, 1928.

In 1932 the Commissioner undertook to set aside this agreement and made a deficiency assessment of more than Two Hundred Thousand Dollars, also a fifty per cent penalty. Respondent appealed to the Board of Tax Appeals where he maintained there was no adequate proof

[1] February 26, 1926, c. 27, 44 Stat. 9, 113—

"Sec. 1106 (b). If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

to support the assessment. The Board held the Commissioner had adequately sustained the burden of showing fraud or malfeasance or misrepresentation of fact, and did not err in setting the agreement aside.

The matter then went to the Circuit Court of Appeals, Third Circuit, which ruled there was no adequate evidence to support the conclusion and judgment of the Board. The facts are much discussed in a majority and dissenting opinion, 105 F. 2d 552. Another narration of them seems unnecessary.

Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. *Helvering* v. *Rankin,* 295 U. S. 123, 131; *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40.

Here, upon evidence which we think is substantial (the dissenting member of the court below held the same view), the Board found fraud in fact which affected the closing agreement, and that the Commissioner properly set the contract aside. The court below should have accepted this finding of fact. As it failed so to do the challenged judgment must be reversed. The ruling of the Board is affirmed.

Reversed.

RUSSELL ET AL., CO-PARTNERS, *v.* TODD ET AL., CO-PARTNERS.

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

No. 329. Argued January 12, 1940.—Decided February 26, 1940.

1. The shareholders' liability, "equally and ratably," for the debts of a joint stock land bank, under § 16 of the Federal Farm Loan Act, is enforceable only by a single representative suit in equity in behalf of all the creditors, in which the existence and extent of insolvency, and the ratable shares of the contribution by shareholders, can be ascertained and an equitable distribution made of the fund recovered. P. 285.

   The suit is not any the less in equity because it turns out that the liability of the shareholders equals the full par-value of their stock. P. 286.
2. The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state courts afford. P. 286.

   The jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice.
3. The Rules of Decision Act embraces rules established by judicial decision as well as statutory rules, but does not apply to suits in equity. P. 287.
4. Equity provides its own rule of limitations through the doctrine of laches, in the absence of any statute of limitations made applicable to equity suits. P. 287.
5. When consonant with equitable principles, federal courts of equity apply as their own the local statutes of limitations applicable to equitable causes of action. P. 288.
6. Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. P. 289.
7. Where the federal equity jurisdiction is exclusive and is not exercised in aid of a legal right, state statutes of limitations barring actions at law are inapplicable; and in the absence of any state statute barring the equitable remedy in like cases, the federal court

is remitted to and applies the doctrine of laches as controlling. P. 289.

8. In the absence of a controlling Act of Congress, federal courts of equity, in enforcing rights arising under federal statutes, will, without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. P. 293.

9. Sec. 49 of the New York Civil Practice Act, barring in three years actions against directors or stockholders of moneyed corporations or banking associations to enforce a liability created by the common law or by statute, appears to have been construed by the state courts as inapplicable to suits where the remedy is exclusively equitable. *Held*, that the present equitable cause of action given by § 16 of the Federal Farm Loan Act is not barred by the three year statute of limitations prescribed by that section. Pp. 290, 293.

10. The extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies, is not considered. P. 294.

104 F. 2d 169, affirmed.

CERTIORARI, 308 U. S. 541, to review the affirmance of a decree, 1 F. Supp. 788; 20 *id.* 930, 936, which overruled a plea of the statute of limitations and granted relief to the plaintiffs in a suit to enforce shareholders' liability for debts of an insolvent joint stock land bank.

Mr. Ralph M. Carson, with whom *Messrs. Samuel A. Pleasants* and *John B. Coleman* were on the brief, for petitioners.

The three-year limitation bars the action.

No distinction is made between actions in equity and those at law. Civil Practice Act, § 49; *Wright* v. *Russell,* 269 N. Y. 683; *Reisman* v. *Hall,* 257 App. Div. 892; *Nettles* v. *Childs,* 281 N. Y. 636; *Schram* v. *Cotton,* 281 N. Y. 499. The ten-year limitation is inapplicable.

Under New York law laches alone is not a defense against a claim of right. *Pollitz* v. *Wabash R. Co.,* 207 N. Y. 113. Laches now subsists in New York as an equitable defense only, in cases where the favor or discretion of the court is sought, and serves to shorten, but

never to extend, the time limited by the statute of limitations. *Groesbeck* v. *Morgan,* 206 N. Y. 385, 389; *Calhoun* v. *Millard,* 121 N. Y. 69, 82; *Goldberg* v. *Berry,* 231 App. Div. 165, 170; *Coghlan* v. *Coghlan & Shuttleworth, Inc.,* 226 App. Div. 764. The concept of laches supplanting limitations and thus extending the period in which an action would otherwise be barred by the statute has been since at least 1848 utterly foreign to the law of New York. A fixed limitation of time has been imposed upon every remedy, legal and equitable. *Gilmore* v. *Ham,* 142 N. Y. 1. The New York courts have applied these limitations strictly, and have refused to vary them even in cases of hardship. *Schmidt* v. *Merchants Dispatch Co.,* 270 N. Y. 287; *Matter of City of New York,* 239 N. Y. 220, 225; *Erickson* v. *Macy,* 236 N. Y. 412, 415; *Gilmore* v. *Ham, supra; Engel* v. *Fischer,* 102 N. Y. 400; *Streeter* v. *Graham & Norton Co.,* 263 N. Y. 39.

Laches is a matter of substantive law. It affects the right, not merely the remedy. To apply such a doctrine of substantive law in a State where it is no longer recognized, to govern claims of right, is a plain violation of the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202. The doctrine of laches relied upon below is based upon the theory of a general federal equity jurisprudence, and must fall with it.

Independently of the New York rule, existing federal precedents required the application to this case of limitations, rather than laches, by reason of the concurrent jurisdiction of law and equity.

Jurisdiction herein lies primarily at law by virtue of the fact that money is the measure of the liability imposed upon petitioners by the statute, 12 U. S. C. § 812. *Weeks* v. *Love,* 50 N. Y. 568, 570; *Van Hook* v. *Whitlock,* 3 Paige Ch. 409, 416, 417. True, the statute imposes liability upon the shareholders "equally and ratably, and not

one for another." In some cases this language might be deemed to require an accounting among all the shareholders in order to assure the proportionate payment of his liability by each, but any such possibility is excluded here by the fact that the assessment required is 100%. Each of the defendant shareholders was liable in full.

Under New York Civil Practice Act, § 195, which at the inception of this action was available to the plaintiffs under the Conformity Act, 28 U. S. C. § 724, the plaintiffs could have stated a representative claim at law in the District Court for the benefit of all the creditors, without resort to equity. *McKenzie* v. *L'Amoureux,* 11 Barb. 516; *Kirk* v. *Young,* 2 Abb. Pr. 453; *Cherry* v. *Howell,* 4 F. Supp. 597, 599.

The only reason adduced for maintaining the exclusive jurisdiction of equity in this case is that the receiver of a joint stock land bank can not himself sue to enforce the shareholders' statutory liability. *Wheeler* v. *Greene,* 280 U. S. 49.

The jurisdiction of equity herein is at most concurrent and does not affect the operation of the statute of limitations at law. *Curtis* v. *Connly,* 257 U. S. 260; *McDonald* v. *Thompson,* 184 U. S. 71; *Morgan* v. *Hamlet,* 113 U. S. 449.

This Court has applied the statute of limitations at law to equitable actions in form indistinguishable from the present. *Pollard* v. *Bailey,* 20 Wall. 520; *Terry* v. *Little,* 101 U. S. 216; *Carrol* v. *Green,* 92 U. S. 509; *Godfrey* v. *Terry,* 97 U. S. 171; *Clarke* v. *Boorman's Executors,* 18 Wall. 493, 505, 506; *Bacon* v. *Howard,* 20 How. 22, 26; *Boone County* v. *Burlington R. Co.,* 139 U. S. 684, 692; *Pearsall* v. *Smith,* 149 U. S. 231, 237; *Wilson* v. *Koontz,* 7 Cranch 202, 205–6.

Mr. George A. Spiegelberg for Todd et al., respondents, and Lissenden et al., intervener-respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The question decisive of this case is whether, in a suit brought in the federal district court in New York to enforce the statutory liability of shareholders of a joint stock land bank for its debts, the court rightly declined to apply the three-year state statute of limitations.

Respondents Todd, Work and Weiss, copartners, in behalf of themselves and other creditors of the insolvent Ohio Joint Stock Land Bank of Cincinnati, Ohio, brought suit in the District Court for Southern New York against petitioners, copartners, to enforce their liability as record shareholders of the bank under § 16 of the Federal Farm Loan Act, 39 Stat. 374, 12 U. S. C. § 812. Petitioners, among other defenses, pleaded the New York three-year statute of limitations. § 49 (4) N. Y. Civil Practice Act. The district court found, as is conceded here, that the cause of action accrued April 6, 1928; that plaintiffs in the suit had notice of its accrual on April 15, 1928, and that the suit was commenced three years and eight months later, on December 16, 1931. It overruled the plea of limitations and gave judgment for respondents. 1 F. Supp. 788; 20 F. Supp. 930, 936. The Court of Appeals for the Second Circuit affirmed, 104 F. 2d 169.

Both courts, holding that the suit was exclusively within the equity jurisdiction of the court, ruled that the doctrine of laches and not the state statute of limitations was applicable, and held that respondents had not been guilty of laches. We granted certiorari, 308 U. S. 541, limited to the question of the application of the New York statute, upon a petition which challenged the decision below as in conflict with the decisions of this Court applying the three-year statute of limitations in a suit to enforce the liability of stockholders of a state bank in *Platt* v. *Wilmot,* 193 U. S. 602; cf. as to liability of stockholders of national banks, *McDonald* v. *Thompson,* 184 U. S. 71; *McClaine* v. *Rankin,* 197 U. S. 154.

Section 16 of the Federal Farm Loan Act provides that the shareholders of every joint stock land bank "shall be held individually responsible, equally and ratably, and not one for another, for all . . . debts . . . of such bank to the extent of the amount of stock owned by them at the par value thereof. . . ." Unlike the comparable provisions of the National Bank Act, R. S. §§ 5151, 5234, 12 U. S. C. §§ 63, 192, which authorize the receiver of a national bank to enforce the liability of stockholders of an insolvent national bank assessed against them by the comptroller of the currency, this section of the Federal Farm Loan Act confers no power on the receiver of a farm loan bank to levy an assessment on the stockholders of an insolvent bank or to maintain a suit to enforce their liability. *Wheeler* v. *Greene,* 280 U. S. 49; *Christopher* v. *Brusselback,* 302 U. S. 500, 502; *Brusselback* v. *Cago Corporation,* 85 F. 2d 20.

As the liability of the stockholders as prescribed by this section is to pay "equally and ratably," the sole remedy is by plenary representative suit brought in equity in behalf of all creditors of the bank, in which the existence and extent of insolvency, and the ratable shares of the contribution by shareholders can be ascertained and an equitable distribution made of the fund recovered. But this amount cannot be determined and its distribution effected without resort to the procedures traditionally employed by equity upon a bill for an accounting and for the distribution of a fund brought into its custody. No stockholder is liable for more than his proportion of the debts not exceeding the par value of his stock. His proportion can be ascertained only upon an accounting of the debts and of the stock and a pro rata distribution of the liability among the shareholders and of the proceeds of recovery among the creditors. Such a suit during its progress and at its conclusion by a final decree of distribution requires the exercise of powers which are pecu-

liarly those of a court of equity to bring before it in a single suit all the necessary parties to ascertain their rights and liabilities, and to adjust and settle them by its decrees. *Pollard* v. *Bailey,* 20 Wall. 520; *Terry* v. *Little,* 101 U. S. 216; *Richmond* v. *Irons,* 121 U. S. 27; *Christopher* v. *Brusselback, supra.*

When the receiver or officer performing like functions is authorized by statute to assess the shareholders, the assessment is binding on them by reason of their membership in the corporation, and each shareholder then becomes liable in a suit at law for the amount of the assessment. See *Christopher* v. *Brusselback, supra,* 503, and cases cited. It is for this reason that there is a divergence between the procedure for recovering assessments of shareholders of national banks, and that for enforcing the liability of shareholders in a federal land bank. In the latter case there is no legal remedy, the relief being afforded exclusively in equity. The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state courts afford. *Di Giovanni* v. *Camden Fire Insurance Assn.,* 296 U. S. 64; *Atlas Life Insurance Co.* v. *Southern, Inc.,* 306 U. S. 563. And the jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice. *Stratton* v. *St. Louis S. W. Ry. Co.,* 284 U. S. 530, 534.

The present suit is not any the less in equity because it turns out that the liability of the shareholders equals the full par-value of their stock. The amount of the liability could not be determined and assessed without an accounting of assets and liabilities, and distribution could not be effected among creditors without resort to the power traditionally that of a court of equity to make its determination of the rights of the parties effective

through its decrees *in personam*. Here the decree directs payment into court of the amount found to be due, for distribution among the creditors in conformity to the further order of the court.

The suit being in equity, brought in a federal district court, the question decisive of this case is what lapse of time will bar recovery in the absence of an applicable federal statute of limitations. The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U. S. C. 725, directing that the "laws of the several states" "shall be regarded as rules of decision" in the courts of the United States, applies only to the rules of decision in "trials at common law" in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. *Wagner* v. *Baird,* 7 How. 234, 258; *Stearns* v. *Page,* 7 How. 819, 828, 829; *Philippi* v. *Philippe,* 115 U. S. 151, 157; *United States* v. *Beebe,* 127 U. S. 338; *Curtner* v. *United States,* 149 U. S. 662, 676; *Alsop* v. *Riker,* 155 U. S. 448, 460; *Abraham* v. *Ordway,* 158 U. S. 416, 420. In the application of the doctrine of laches it recognized that prejudice may arise from delay alone, so prolonged that in the normal course of events evidence is lost or obscured; and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits to assert equitable interests in real estate will, without more, be barred after the lapse of twenty years when ejectment or the right of entry for the assertion of a comparable legal interest in the land would be barred. *Elmendorf* v. *Taylor,* 10

Wheat. 152, 173; *Hovenden* v. *Lord Annesly,* 2 Sch. & Lef. 607. And where resort was had to equity in aid of a legal right, equity, following the law, would refuse its aid if the legal right had been barred by the applicable statute of limitations. *Carrol* v. *Green,* 92 U. S. 509; *Godden* v. *Kimmell,* 99 U. S. 201, 210; *Wood* v. *Carpenter,* 101 U. S. 135; *Philippi* v. *Philippe, supra; McDonald* v. *Thompson, supra;* Pomeroy, Equity Jurisprudence (4th ed.), § 1441 and cases cited.

In federal courts of equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by state statutes of limitations, will nevertheless, when consonant with equitable principles, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard. *Bacon* v. *Howard,* 20 How. 22, 26; *Clarke* v. *Boorman's Executors,* 18 Wall. 493, 505, 506; *Boone County* v. *Burlington & M. R. R. Co.,* 139 U. S. 684, 692; *Pearsall* v. *Smith,* 149 U. S. 231, 233, 237; *Benedict* v. *City of New York,* 250 U. S. 321.[1]

[1] But federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of special equitable doctrines, making it inequitable to apply the statute. Laches may bar equitable remedy before the local statute has run. *Alsop* v. *Riker,* 155 U. S. 448, 460, 461; *Abraham* v. *Ordway,* 158 U. S. 416; *Patterson* v. *Hewitt,* 195 U. S. 309, 318, *et seq.; Badger* v. *Badger,* 2 Clifford 137, 154; *Lemoine* v. *Dunklin County,* 51 F. 487, 492; *Kelley* v. *Boettcher,* 85 F. 55, 62; *Pooler* v. *Hyne,* 213 F. 154, 159. On the other hand, time has been held to be no bar to an equitable suit for a trustee's accounting. *Michoud* v. *Girod,* 4 How. 503, 561; cf. *Badger* v. *Badger,* 2 Wall. 87, 92; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his

Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. It thus stays its hand in aid of a legal right which, under the Rules of Decision Act, would be unenforcible in the federal courts of law as well as in the state courts. *Wilson* v. *Koontz,* 7 Cranch 202, 205–6; *Michoud* v. *Girod,* 4 How. 503, 561; *Stearns* v. *Page,* 7 How. 819; *Clarke* v. *Boorman's Executors, supra,* 505; *Carrol* v. *Green, supra; Godfrey* v. *Terry,* 97 U. S. 171, 176, 180; *Baker* v. *Cummings,* 169 U. S. 189; *Metropolitan Bank* v. *St. Louis Dispatch Co.,* 149 U. S. 436; *McDonald* v. *Thompson, supra; Hughes* v. *Reed,* 46 F. 2d 435; cf. *Wagner* v. *Baird,* 7 How. 234; *Godden* v. *Kimmell, supra; Wood* v. *Carpenter, supra.*

But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling. *Wagner* v. *Baird, supra,* 258; *Badger* v. *Badger,* 2 Wall. 87, 94–5; *Kirby* v. *Lake Shore & Michigan Southern R. Co.,* 120 U. S. 130, 139; *Metropolitan Bank* v. *St. Louis Dispatch Co., supra,* 448; *Speidel* v. *Henrici,* 120 U. S. 377, 386, 387; see *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, where no statute of limitations was pleaded. 244 F. 61, 65.

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rights because of the fraud or inequitable conduct of the defendant. *Michoud* v. *Girod, supra,* 561; *Meader* v. *Norton,* 11 Wall. 442; *Bailey* v. *Glover,* 21 Wall. 342, 348; *Kirby* v. *Lake Shore & Michigan Southern R. Co.,* 120 U. S. 130; *Rugan* v. *Sabin,* 53 F. 415, 420; *Stevens* v. *Grand Central Mining Co.,* 133 F. 28; *Johnson* v. *White,* 39 F. 2d 793.

The question remains whether the court below correctly held that the doctrine of laches and not the local three-year statute of limitations is controlling. The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, unless it is applied to like causes of action in the state courts.

The present suit was brought in less than four years after the cause of action had accrued, and it is conceded that the cause of action is not barred unless by the three-year statute. Section 49 of the Civil Practice Act provides that "the following actions must be commenced within three years after the cause of action has accrued: . . . (4) An action against a director or stockholder of a moneyed corporation, or banking association . . . to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which . . . the liability was created." This Court has recognized that this statute is a bar to actions at law and has so applied it in suits to recover assessments on shareholders of a bank. See *Platt* v. *Wilmot, supra.*

Respondents, admitting that the statute is a bar to suits at law, argue that it is inapplicable to suits in equity and that when the remedy at law is so inadequate that resort must be had to remedies which are traditionally equitable, the limitation is not that of the three-year but of the ten-year statute, which is made applicable to all actions for which no limitation is otherwise specially prescribed. § 53, N. Y. Civil Practice Act.

At the outset we are confronted with those cases in which this Court in *McDonald* v. *Thompson, supra,* and

the state courts [2] have recognized and applied the statutory bar to an action at law to equity suits brought in aid of the legal right to recover an assessment upon stockholders. But as we have seen, those cases are referable to the doctrine accepted and applied in the federal courts of equity that equity does not give relief predicated on a legal right which the statute has barred.

Here the jurisdiction being exclusively in equity to enforce rights cognizable only in equity, statutes barring legal causes of action, as we have seen, are not controlling and we turn to the argument of petitioners that the three-year statute is a bar as well to such suits brought in the state courts, even though they are suits in which it is necessary to resort to remedies which are exclusively or traditionally equitable.

The precise question thus raised appears not to have been decided by the New York Court of Appeals. In *Mencher* v. *Richards,* 256 App. Div. 280; 9 N. Y. S. 2d 990, which was a stockholders' suit brought against directors of a moneyed corporation for an accounting for profits gained through their malfeasance in office, the Appellate Division of the Supreme Court held that the three-year statute did not apply. It pointed out that the statute relates only to causes of action for which a money judgment will suffice and not to suits which, al-

[2] *Schram* v. *Cotton,* 281 N. Y. 499; 24 N. E. 2d 305; *Nettles* v. *Childs,* 281 N. Y. 636; 22 N. E. 2d 477; 255 App. Div. 849; 7 N. Y. S. 2d 1021; *Wright* v. *Russell,* 245 App. Div. 708; 281 N. Y. S. 994; 155 Misc. 877; 280 N. Y. S. 614; leave to appeal denied, 269 N. Y. 683; *Reisman* v. *Hall,* 257 App. Div. 892; 12 N. Y. S. 2d 442, *a fortiori* suits at law in the federal courts to recover assessments upon stockholders of banks are barred by the three-year statute. *Platt* v. *Wilmot,* 193 U. S. 602; *Hobbs* v. *National Bank of Commerce,* 96 F. 396; *Seattle National Bank* v. *Pratt,* 103 F. 62; *Platt* v. *Hungerford,* 116 F. 771; *Whitman* v. *Atkinson,* 130 F. 759; *Ramsden* v. *Gately,* 142 F. 912.

though specifically within the language of the statute, require resort to the equitable remedy for an accounting, and that as to them the ten-year statute applies. In so construing the statute, it followed the rulings of the Court of Appeals that under the New York statutory scheme of limitations, suits in equity brought against corporate directors for an accounting for want of an adequate legal remedy are governed by the ten-year statute of limitations and not statutes fixing a shorter period of limitations which would be applicable if the suit were at law. *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86; 200 N. E. 589; *Potter* v. *Walker*, 276 N. Y. 15; 11 N. E. 2d 335.[3] Cf. *Gilmore* v.

[3] In *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86; 200 N. E. 590, the Court of Appeals declared (pp. 89, 90):

"In an action in equity the ten-year limitation prescribed by section 53 of the Civil Practice Act is applicable unless, in a particular action, a party has a choice of two remedies, one at law, the other in equity, both complete and adequate, and he selects the action in equity. In that event the party whose cause of action would be barred under the six-year statute, if he should elect to proceed at law, may not enlarge this time by electing to proceed in equity. Such is the rule where the remedies are concurrent. (*Rundle* v. *Allison*, 34 N. Y. 180; *Keys* v. *Leopold*, 241 N. Y. 189; 149 N. E. 828; *Clarke* v. *Boorman's Executors*, 85 U. S. 493.)

"The exception is not applicable in cases of concurrent jurisdiction, however, if a party's remedy at law is inadequate and imperfect and he is required to go into equity to procure complete and adequate relief. (*Rundle* v. *Allison, supra; Mann* v. *Fairchild*, 14 Barb. 548.)

"If relief may be had at law in an action for damages and in equity for rescission of a contract on the ground of fraud with a reconveyance of land and an accounting for profits, the action in equity is subject to the ten-year limitation though the action for damages is barred under the six-year statute. (*Schenck* v. *State Line Telephone Co.*, 238 N. Y. 308; 144 N. E. 592.)"

In *Potter* v. *Walker*, 276 N. Y. 15; 11 N. E. 2d 335, the court said (pp. 25, 26):

"In respect to those causes of action by which is sought to recover profits received by directors by reason of wrongful acts, an action

Ham, 142 N. Y. 1; 36 N. E. 826; *Treadwell* v. *Clark,* 190 N. Y. 51; 82 N. E. 505.

In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Appellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive that the three-year statute does not apply to suits like the present where the remedy is exclusively equitable. See *Wichita Royalty Co.* v. *City Bank,* 306 U. S. 103, 107.

We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. Cf. *Mason* v. *United States,* 260 U. S. 545; *Jackson County* v. *United States,* 308 U. S. 343. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action. As that does not appear here with respect to the three-year statute, the court be-

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at law would not afford adequate relief. To the extent that an accounting is necessary, the right and the remedy must necessarily be of an equitable nature. The Appellate Division is, therefore, clearly right in applying the ten-year Statute of Limitations as to such causes of action. (Civ. Prac. Act, § 53; *Hanover Fire Ins. Co.* v. *Morse Dry Dock & Repair Co.,* 270 N. Y. 86.)"

Wright v. *Russell,* 269 N. Y. 683, 245 App. Div. 708; 281 N. Y. S. 994; 155 Misc. 877; 280 N. Y. S. 614, and *Reisman* v. *Hall,* 257 App. Div. 892; 12 N. Y. S. 2d 442, cited by petitioner, do not qualify this doctrine. There, although representative actions were brought, the Illinois constitution under which the liability arose had been interpreted as permitting actions at law, *Golden* v. *Cervenka,* 278 Ill. 409; 116 N. E. 273. Since the legal action would have been barred within three years, the court, as in *McDonald* v. *Thompson,* 184 U. S. 71, and consistently with *Potter* v. *Walker, supra,* applied the same period to the equitable action founded upon it.

low rightly declined to give effect to that statute and as it found that the cause of action was not barred by laches, it rightly gave judgment for respondents.

Petitioners argue that under New York law, laches is not a defense to actions like the present and that in the light of our decisions in *Erie R. Co.* v. *Tompkins, supra, Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, federal courts in the exercise of the equity jurisdiction conferred upon them by § 24 of the Judicial Code, 28 U. S. C. § 41, are no longer free to apply a different rule. But in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. In the circumstances we have no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies.

Affirmed.

MR. JUSTICE ROBERTS is of opinion that the judgment should be reversed for the reasons stated in the dissenting opinion of Clark, J., in the Circuit Court of Appeals.

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

FISCHER *v.* PAULINE OIL & GAS CO.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 239. Submitted December 12, 1939.—Decided February 26, 1940.

1. Where a state supreme court bases its judgment exclusively upon its construction of a federal statute, expressly declining to consider an alternative local ground, the judgment is reviewable by this Court. P. 296.

2. Section 67 (f) of the Bankruptcy Act does not intend that an adjudication of bankruptcy shall operate automatically, and irrespective of any action on the part of the trustee, to discharge an execution lien obtained within four months prior to the filing of the petition in bankruptcy. P. 300.

   The section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him, or as respects the bankrupt's exempt property. P. 301.

3. A trustee in bankruptcy appeared in a state court and unsuccessfully objected to the confirmation of a sale on execution of property that had belonged to the debtor, upon the ground that the execution lien had been discharged by force of § 67 (f) of the Bankruptcy Act. *Held* that the decision against him, from which he did not appeal, was binding, as to that question, against the trustee and against one who later applied for, and with the trustee's acquiescence obtained, confirmation by the bankruptcy court of a sale of the same property which had been made to him by the debtor's assignee for creditors. P. 303.

185 Okla. 108; 90 P. 2d 411, reversed.

CERTIORARI, 308 U. S. 509, to review the reversal of a judgment directed for the plaintiff in an action to quiet title to an oil and gas lease, to recover materials, machinery, etc., and for damages. Plaintiff relied on a sheriff's sale, confirmed by a state court; defendant on a sale by an assignee for creditors, confirmed by a court of bankruptcy.

Mr. Claude H. Rosenstein submitted for petitioner.

Mr. Charles E. France submitted for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

An appeal taken in this case was 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), we granted certiorari, 308 U. S. 509, because the judgment of the Supreme Court of Oklahoma [1] is based upon a construction of § 67 (f) of the Bankruptcy Act of 1898,[2] which raises an important question concerning the operation of the section, not settled by decision of this court, on which state courts have reached conflicting conclusions.

The petitioner brought action to quiet his title to an oil and gas lease and to gain possession of the leased premises together with materials, machinery, tools, and appliances thereon, and for mesne profits, and damages. His claim was based on a sheriff's deed consummating an execution sale under a judgment entered upon an award of the State Industrial Commission against Geraldine Oil Company. The respondent's title was derived through a conveyance by an assignee for the benefit of creditors of the same company, confirmed by a bankruptcy court. The respondent cross-petitioned for a judgment declaring the sheriff's sale to petitioner void and quieting respondent's title. The trial court directed a verdict for petitioner and entered judgment thereon, which the Supreme Court reversed.

August 30, 1934, the Commission made an award to one Rainbolt against Snyder, as employer, and Geraldine Oil Company, as owner of the property. For payment of the award Geraldine Oil Company was secondarily liable.

October 11, 1934, Geraldine Oil Company, being insolvent, assigned the property in question to a trustee for the benefit of creditors.

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[1] *Pauline Oil & Gas Co.* v. *Fischer,* 185 Okla. 108; 90 P. 2d 411.

[2] 11 U. S. C. § 107 (f). The provisions of § 67 (f) of the Bankruptcy Act of 1898 are now carried over into, modified and clarified by chapter VII, § 67a, (1), (2), (3) and (4) of the Chandler Act of June 22, 1938, 52 Stat. 840, 875. The question here presented, however, may arise under the later Act.

December 8, 1934, the award in favor of Rainbolt was filed of record in a State District Court and became a judgment of that court.

January 21, 1935, the assignee for the benefit of creditors sold the property to the respondent.

September 13, 1935, execution issued on the Rainbolt judgment, and, September 17th, the sheriff levied on the property as property of the Geraldine Oil Co. The execution was issued on the theory that the assignment for the benefit of creditors was invalid, and the property, therefore, remained that of the assignor.[3]

October 24, 1935, Geraldine Oil Company was adjudged a voluntary bankrupt in the District Court of the United States for Western Oklahoma.

November 12, 1935, the sheriff sold the property, pursuant to the execution, and the petitioner bought it. A notice of the adjudication in bankruptcy was read at the sale in the presence of the petitioner. On the same day the sheriff made return of the sale to the court out of which the execution issued.

November 21, 1935, the trustee in bankruptcy filed in that court his objections to the confirmation of the sheriff's sale, alleging, *inter alia,* that Geraldine Oil Company was insolvent when Rainbolt obtained judgment and had been so ever since; that the company had been adjudicated a bankrupt within four months of the securing of the lien under the execution, and that, by virtue of § 67 (f) of the Bankruptcy Act, the lien was absolutely void.

March 28, 1936, the court ordered that the sale be confirmed and granted the trustee in bankruptcy an exception to its action. The latter gave notice of appeal to the Supreme Court of Oklahoma, but it does not appear that he perfected an appeal. The order of confirmation was entered of record April 22, 1936.

[3] See *Wells* v. *Guaranty State Bank,* 56 Okla. 688; 156 P. 896; *First State Bank* v. *Bradshaw,* 174 Okla. 268; 51 P. 2d 514.

June 4, 1936, the respondent petitioned the United States District Court for confirmation of the sale of the property made to the respondent by the assignee for the benefit of creditors on January 21, 1935. The trustee in bankruptcy objected, but subsequently withdrew his objections and the referee made an order confirming the sale. The assignee then paid to the trustee the consideration received by him from the respondent as purchaser at the assignee's sale. It does not appear that the petitioner had notice of the application or was present at the hearing.

June 10, 1936, the sheriff delivered a deed to the petitioner as purchaser at the execution sale.

Both petition and answer allege that the respondent was in possession of the property at the time suit was brought, and we may assume that the petitioner never was in possession.

The Supreme Court held that entry of the Commission's award in the State Court made it a judgment of that court; that such judgment did not constitute a lien on the property of Geraldine Oil Company in question; and that no lien was acquired until the levy of execution on September 17, 1935, about a month prior to the adjudication of the company as a bankrupt.

The respondent asserted that, as the judgment in favor of Rainbolt was not a lien when Geraldine Oil Company assigned for the benefit of creditors, or when the assignee sold the property to the respondent, its title must prevail; and, in the alternative, that the same result must follow from the fact that since the lien of the levy was obtained less than four months prior to the filing of the petition in bankruptcy, it was voided by § 67 (f).

The Supreme Court stated that, if either of these contentions were sound, the petitioner could not prevail. It expressly declined to consider the efficacy of the sale by the assignee for the benefit of creditors to pass title

to the respondent clear of the lien of the subsequent levy, and rested its decision upon its view of the effect of § 67 (f). Since the judgment is based exclusively upon a federal ground, we have jurisdiction.

Section 67 (f) provides:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, . . . shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, . . . shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided,* That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The court held that the section, *proprio vigore,* nullified the lien of the levy so that the property passed to the trustee discharged thereof, and concluded that, since, at the time of the sheriff's sale, the property was discharged of the lien, the sale, and the deed delivered pursuant to it, were void; and, as a trustee's sale would pass title clear of the lien, the same result would follow from the bankruptcy court's validation, with the trustee's consent, of the assignee's sale previously made.

The question is whether the state court was right in holding that, by force of § 67 (f), the adjudication in bankruptcy automatically discharged the lien of the levy, irrespective of any action on the part of the trustee. Expressions supporting this view may be found in cases decided by federal courts,[4] and statements squinting in the same direction have been made by this court.[5] In none of these instances, however, was the litigation between third parties, or between the lienor or one claiming title under an execution sale, and an opponent deriving title from the trustee in bankruptcy. In all of them a bankruptcy receiver or trustee instituted action in the bankruptcy court or some other court, or became a party to the proceeding in which the lien was acquired, to avoid the lien, or the bankrupt brought suit to avoid the lien as to property set apart to him as exempt in the bankruptcy case.

Some state courts have definitely held that the adjudication operates automatically to nullify the lien, which must be treated as void whenever and wherever drawn into question, either in a direct or a collateral proceeding, and whether the trustee in bankruptcy has taken the property into his possession or abandoned it.[6]

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[4] *In re Tune,* 115 F. 906; *In re Beals,* 116 F. 530; *In re Federal Biscuit Co.,* 214 F. 221, 224.

[5] *Clarke* v. *Larremore,* 188 U. S. 486, 488; *Chicago, B. & Q. R. Co.* v. *Hall,* 229 U. S. 511, 514; *Lehman Stern & Co.* v. *S. Gumbel & Co.,* 236 U. S. 448, 454.

[6] *Mohr & Sons* v. *Mattox,* 120 Ga. 962; 48 S. E. 410; *Hobbs* v. *Thompson,* 160 Ala. 360; 49 So. 787; *Finney* v. *Knapp Co.,* 145 Ga. 400; 89 S. E. 413; *Greenberger* v. *Schwartz,* 261 Pa. 265; 104 A. 573; *Archenhold Co.* v. *Schaefer,* 205 S. W. 139 (Tex. Civ. App.); *Morris Fertilizer Co.* v. *Jackson,* 27 Ga. App. 567; 110 S. E. 219; *Mack* v. *Reliance Ins. Co.,* 52 R. I. 402; 161 A. 134; *Whittaker* v. *Bacon,* 17 Tenn. App. 97; 65 S. W. 2d 1083; *Bank of Garrison* v. *Malley,* 103 Tex. 562; 131 S. W. 1064. Compare, *Kellogg-Mackay-Cameron Co.* v. *Schmidt Baking Co.,* 101 Ill. App. 209; *Keystone Brewing Co.* v.

On the other hand, it was said in *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 429: "For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy." The court there pointed out that a number of issues of fact must be resolved before it can be determined that the lien is void. And, in *Pigg & Son* v. *United States,* 81 F. 2d 334, 337, it was held that liens obtained in judicial proceedings within four months of the filing of the petition are not void, but voidable in a proper suit, and that the property affected by the lien does not automatically pass to the trustee, discharged of the lien.

In *Connell* v. *Walker,* 291 U. S. 1, 3, this court indicated that the operation of § 67 (f) is not automatic, since the trustee in bankruptcy has an election either to avoid the lien, or to be subrogated to it for the benefit of the bankrupt estate.

A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him.[7] It is settled, however, that not only may the trustee avoid the lien (*Taubel-Scott-Kitzmiller Co.* v. *Fox, supra; Connell* v. *Walker, supra*), but that the bankrupt may assert its invalidity as respects property set apart to him as exempt in the bankruptcy proceeding. *Chicago, B. & Q. R. Co.* v. *Hall,* 229 U. S. 511. But the lien is not avoided for the

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Schermer, 241 Pa. 361; 88 A. 657; *Lamb* v. *Kelley,* 97 W. Va. 409; 125 S. E. 102.

[7] *Frazee* v. *Nelson,* 179 Mass. 456; 61 N. E. 40; *Swaney* v. *Hasara,* 164 Minn. 416; 205 N. W. 274; *Hutchins* v. *Cantu,* 66 S. W. 138 (Tex. Civ. App.); *Equitable Credit Co.* v. *Miller,* 164 Ga. 49; 137 S. E. 771; *Neugent Garment Co.* v. *U. S. Fidelity & G. Co.,* 202 Wis. 93; 230 N. W. 69.

benefit of the bankrupt save as to his exempt property or nullified as respects other lienors or third parties.[8]

Although § 67 (f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially. The courses open to the trustee under the Bankruptcy Act of 1898 were to proceed to have the lien declared void, by plenary suit,[9] or by intervention in the court where it was obtained,[10] or by applying, in the bankruptcy cause, to restrain enforcement,[11] as might be appropriate in the circumstances.

In the instant case the trustee intervened in the state court and opposed the confirmation of the execution sale

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[8] See the cases in Note 7, *supra*, and *McCarty* v. *Light*, 155 App. Div. 36; 139 N. Y. S. 853; *Travis* v. *Bixler Co.*, 20 Cal. App. 2d 279; 66 P. 2d 1263; *Danby Millinery Co.* v. *Dogan*, 47 Tex. Civ. App. 323; 105 S. W. 337; *Smith* v. *First National Bank*, 76 Colo. 34; 227 P. 826; *Taylor* v. *Buser*, 167 N. Y. Supp. 887.

[9] See *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra.*

[10] 11 U. S. C. § 29 (b). See *Lehman Stern & Co.* v. *S. Gumbel & Co.*, 236 U. S. 448; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734.

[11] *Clarke* v. *Larremore*, 188 U. S. 486. The Chandler Act, § 67a (4), 52 Stat. 876, vests summary jurisdiction in the bankruptcy court to hear and determine, after notice to the parties in interest, all questions affecting the validity of the lien.

on the ground that § 67 (f) had avoided and discharged the lien of the levy. The issue was decided against him and he did not appeal. Later, when the respondent, who had purchased at the assignee's sale, asked the bankruptcy court to confirm that sale, the trustee withdrew his objections to confirmation and accepted from the assignee the consideration received from the respondent as purchaser at the latter's sale. The trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of the execution did not constitute an encumbrance upon respondent's title. But we think, if in other circumstances the trustee's conduct could amount to an election to avoid the lien, it can have no such effect here, in view of the prior decision against him on that issue in the state court.

We are of opinion that the trustee, having raised the issue in the state court, was bound by the final decision of that tribunal. The estoppel of the judgment of the state court extended not only to him but to the respondent as his transferee. This conclusion requires reversal of the judgment.

We do not pass upon the question whether the title of the respondent, derived from the sale of the property to it by the assignee for the benefit of creditors, is, by virtue of that sale, superior to the title of the petitioner. This is a question of state law which the court below remains free to decide.

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

Reversed.

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

GERMANTOWN TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 462. Argued February 8, 1940.—Decided February 26, 1940.

A trust company, which held and administered a fund enabling its patrons to invest small amounts in securities, filed with a collector for the district where it conducted its business a fiduciary return setting forth the gross income of the fund, deductions, net income, etc.—all the information necessary to the calculation of any tax that might be due,—and attached a list of the beneficiaries of the fund and their shares of the income. The beneficiaries included these shares in their individual returns. The Commissioner made an additional return for the fund and assessed a deficiency which the Board of Tax Appeals set aside as too late. *Held:*

1. The venue for review was in the circuit in which the fiduciary return was filed. Rev. Act, 1926, § 1002 (a), as amended by the Rev. Act, 1932, § 519. P. 308.

2. The assessment was barred under the Rev. Act, 1932, § 276 (a), two years after the fiduciary return was filed. P. 309.

3. Sec. 275 (c), providing a four year limitation if a corporation makes "no return of the tax imposed," and § 276 (a), providing that in case of failure to file a return the tax may be assessed "at any time,"—are inapplicable. P. 309.

106 F. 2d 139, reversed.

CERTIORARI, 308 U. S. 544, to review a judgment which reversed a decision of the Board of Tax Appeals holding an income tax assessment barred by limitations.

Mr. Harold Evans, with whom *Messrs. Paul F. Myers* and *Martin W. Meyer* were on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case involves the construction and application of provisions of the Revenue Act of 1926, as amended by that of 1934, and of the Revenue Act of 1932, relating to the venue of proceedings to review a decision of the Board of Tax Appeals and setting limitations upon the assessment of income tax.

The petitioner is a trust company, doing a general business as such, including administering trust estates and acting as agent for the custody, handling, and management of its clients' investments. In 1930 it created, by an appropriate instrument, a fund to afford those for whom it acted the advantage of investing small amounts in securities at minimum expense and with opportunity of ready liquidation. The fund has since been managed according to the terms of the agreement. In the course of administration the petitioner has paid to the participants their respective shares of income from the invested principal, and has filed fiduciary returns of income on Treasury Form 1041, intended for use by trustees.

March 15, 1933, the petitioner, as trustee, filed such a return, for the calendar year 1932, with the Collector of Internal Revenue for the First District of Pennsylvania, at Philadelphia. The return accurately set forth the gross income, the deductions, and the net income,—in short all information necessary to the calculation of any tax which might be due,—and attached a list of the beneficiaries of the fund, and their shares of the income. No corporation income tax return was filed on Treasury Form 1120. The participants in the fund, who were required to make individual returns for the year 1932, included in their respective returns, filed on or before March 15, 1933, their shares of income.

September 17, 1936, pursuant to the recommendation of a treasury agent that the fund be taxed as a corpora-

tion,[1] the respondent prepared from the Form 1041 return, a substitute corporation return on Form 1120, covering the year 1932, and, on February 27, 1937, gave notice of a consequent deficiency of tax.

The petitioner carried the matter to the Board of Tax Appeals for redetermination, asserting that it was taxable as a trust and not as an association and that assessment and collection of the asserted deficiency was barred by the expiration of two years from the date its return was filed. The Board held the assessment barred.

The respondent petitioned the United States Court of Appeals for the Third Circuit to review the Board's decision. That court held that the venue provision of § 1002 (a) of the Revenue Act of 1926, as amended by § 519 of the Revenue Act of 1934,[2] empowered it to entertain the petition, and that the assessment of a deficiency was not barred by §§ 275 and 276 of the Revenue Act of 1932,[3] the applicable section, in its view, being 275 (c).[4]

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[1] § 1111 (a) (2) of the Revenue Act of 1932, 47 Stat. 169, 289: "The term 'corporation' includes associations . . ." See *Morrissey* v. *Commissioner*, 296 U. S. 344.

[2] "Sec. 1002. (a) Except as provided in subdivision (b) [relating to venue by stipulation], such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made *the return of the tax in respect of which the liability arises* or, if no return was made, then by the Court of Appeals of the District of Columbia." (Italics supplied.) 44 Stat. 9, 110; 48 Stat. 680, 760; 26 U. S. C. 641 (b).

[3] "Sec. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

"Except as provided in section 276—

"(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

. . . . . .

"(c) *Corporation and Shareholder.—If a corporation makes no return of the tax imposed by this title,* but each of the shareholders

The petitioner sought certiorari on the ground that the Circuit Court of Appeals' decision that the fiduciary return it had filed was a return which governed venue under § 1002, as amended, but no return within the meaning of § 275 (c), conflicts with a decision of the Circuit Court of Appeals for the Second Circuit.[5] Because of the conflict we granted certiorari.

Petitioner and respondent agree that the court below was right in holding the return in question was such a return as fixed the venue of the petition for review in the Third Circuit, where the return was filed. We concur in this view.

The petitioner contends that the fiduciary return filed on Form 1041 was a return within the meaning of § 275 (a), which limits the time for assessment to two years after the filing of the return. The respondent insists that the return was "no return of the tax" within the meaning of § 275 (c), and, therefore, the four-year limitation specified in that section applies.

As the notice of deficiency was given more than two years after the filing of the fiduciary return, and within four years of the filing of the last return by any participant in the fund, decision turns upon which subsection governs.

We hold that the return was a return within the meaning of § 275 (a) and that the petitioner cannot be held

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includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed." (Italics supplied.)

"Sec. 276. SAME—EXCEPTIONS.

"(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." Revenue Act of 1932, 47 Stat. 169, 237.

[4] *Commissioner* v. *Germantown Trust Co.*, 106 F. 2d 139.

[5] *Commissioner* v. *Roosevelt & Son Inv. Fund*, 89 F. 2d 706.

to have made no return so as to bring the case within § 275 (c).

First. We are of opinion that if the return filed by the petitioner was such as to create venue of the proceeding for review in the court below, it was also a return under the terms of § 275 (a), so that the two-year period of limitations imposed by that section is applicable.

The return was a fiduciary return. It is admitted that the petitioner in respect of the fund was a fiduciary and was bound to file such a return.[6] It contained all of the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax. Section 1002 (a), as amended, *supra,* confers venue upon the Circuit Court for the circuit in which was made "the return of the tax in respect of which the liability arises." Section 275 (a) provides that the amount of tax must be assessed within two years after "the return was filed." Section 275 (c) fixes a period of four years for assessment "if a corporation makes no return of the tax imposed by this title," but each shareholder returns his distributive share of the net income.

We think the language of the sections is such that it cannot be said the fiduciary return filed by the petitioner was a return of the tax in respect of which the liability arises but was no return of the tax imposed by the statute.

The respondent urges that the two sections have separate aims; that the venue provision was inserted for the convenience of taxpayers, so that they should not be compelled to litigate in courts far from their domicile, whereas the limitation sections have nothing to do with the designation of a forum. Conceding that this is true, it remains that, if the return in question complies with the one description, it equally complies with the other.

[6] Revenue Act of 1932, 47 Stat. 169, 214.

We find no adequate reason for attributing a different meaning to the two phrases.

Second. Section 275 (c) is inapplicable. Sections 275 and 276 set up a complete scheme of limitations on assessment of income taxes. Section 275 (a) imposes a limitation of two years after the filing of the return. Section 276 (a) provides that there shall be no period of limitations if a false return, or no return, be filed. If the statute went no further, and if the respondent's position is correct that, in this case, the taxpayer was a corporation and filed no return as such, then there would be no period of limitations whatever. This was the situation under the Revenue Act of 1924.[7]

The legislative history demonstrates that § 275 (c) was adopted to set a period of limitations where no return is filed by the association but returns are filed only by the members. In other words, subsection (c) was adopted to limit, rather than to enlarge, the time for assessment in such a case.[8]

The respondent's contention is that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax, treated as one imposed upon an association (classified as a corporation under the statute), can be computed, such a return is to be deemed no return. We think this view inadmissible.

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[7] Revenue Act of 1924, §§ 277 (a) (1) and 278 (a); 43 Stat. 253, 299.

[8] The provision was first inserted as § 277 (a) (5) of the Revenue Act of 1926, 44 Stat. 9, 58. The Committee Reports on the section, construed in connection with the course of the bill in Congress, sustain, rather than negative, the view that the section was intended to impose a period of limitation where one had not theretofore existed. See H. Rep. No. 1, 69th Cong., 1st Sess., p. 11; S. Rep. No. 52, 69th Cong., 1st Sess., p. 28. Compare Hearings, Committee on Ways and Means of the House, 73rd Cong., 1st Sess., p. 146.

It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever.[9]

The judgment is

Reversed.

MAYO, COMMISSIONER OF AGRICULTURE OF FLORIDA, ET AL. *v.* LAKELAND HIGHLANDS CANNING CO. ET AL.

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

No. 270. Argued January 12, 1940.—Decided February 26, 1940.

Canners of citrus fruits operating in Florida, some of them domiciled in other States, sued to enjoin an official from enforcing an order made under color of a Florida statute and purporting to fix the price to be paid the grower for grapefruit, the bill alleging unconstitutionality of the statute, invalidity of the order for failure to comply with the statutory requirements, and threat of irreparable injury. *Held:*

1. That, upon application under Jud. Code, § 266, heard upon the bill, affidavits and other evidence, the question before the District Court was not whether the Act was constitutional or unconstitutional; nor whether there had been compliance with its requirements, if valid; but was whether the showing made raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the Act, pending final hearing, would inflict irreparable damages upon the complainants. P. 316.

The court should have confined itself to those issues. Expressions of opinion on the ultimate merits were premature.

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[9] *Zellerbach Paper Co.* v. *Helvering,* 293 U. S. 172, 180; *Commissioner* v. *Stetson & Ellison Co.,* 43 F. 2d 553; *United States* v. *Tillinghast,* 69 F. 2d 718; Mabel Elevator Co., 2 B. T. A. 517; Abraham Werbelovsky, 8 B. T. A. 442, 446; Estate of F. M. Stearns, 16 B. T. A. 889; J. R. Brewer, 17 B. T. A. 704.

2. It is of the highest importance to a proper review in the granting or refusing of a preliminary injunction that there be explicit findings of fact, in compliance with § 52 (a) of the Rules of Civil Procedure. P. 316.

3. The question whether the bill failed to state facts sufficient to raise a substantial question as to the constitutional validity of the statute could have been raised for prompt decision by motion to dismiss. P. 317.

4. The bill raises questions of the validity of the statute, and as to whether it has ever been put in operation in accordance with its terms, that preclude a judgment of dismissal. P. 318.

5. The mere fact that the Act fixes prices is, in itself, insufficient to invalidate it; and allegation of that fact does not raise substantial federal questions. P. 318.

6. Nonresident plaintiffs may be entitled to maintain the suit before one District Judge, upon the ground that the conditions of the statute were not officially complied with, even though it be found that there is no substance in the constitutional questions presented. P. 318.

28 F. Supp. 44, reversed.

APPEAL from an interlocutory decree of injunction.

Messrs. William C. Pierce and *O. K. Reaves,* with whom *Messrs. George Couper Gibbs,* Attorney General of Florida, and *H. E. Carter,* Assistant Attorney General, were on the brief, for appellants.

Mr. G. L. Reeves, with whom *Mr. John B. Sutton* was on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellees, corporations of Florida and other States, and individuals, engaged in the canning of citrus fruits in that State, filed their bill in the District Court for Southern Florida against Nathan Mayo, as Commissioner of Agriculture of Florida, praying injunctions, temporary and final, to restrain him from cancelling their licenses

as citrus fruit dealers, from enforcing against them a regulation made pursuant to a state statute, and from interfering with the conduct of their business by reason of their failure to comply with the statute.

On presentation of the bill and motion for temporary relief, the court issued a restraining order and convened a court of three judges. The Florida Citrus Commission was permitted to intervene as a defendant. After hearing on affidavits, filed by appellees and appellant Mayo, and, on evidence offered by the appellees, the court granted a temporary injunction pending final hearing.[1] The Commissioner and the intervenor have appealed.

The bill alleges the importance of the grapefruit canning industry in the State, and asserts that the appellees, in the conduct of their business, packed over sixty per cent. of the total grapefruit and grapefruit juice canned in the State in seasons prior to that of 1938–1939. It recites the adoption by the legislature of the Growers' Cost Guarantee Act (Chap. 16862 of the Acts of 1935) which, after declaring that the production and distribution of citrus fruit is a paramount industry of the State, upon which the prosperity of the State largely depends, and assigning reasons for the protection of the industry and the maintenance of prices commensurate with the cost of production of citrus fruit, authorizes the Commissioner of Agriculture, in his discretion, with the consent and advice of the Governor, to declare the existence of an emergency in the industry; and provides that, if he does so, then,—upon petition of owners or controllers of fifty per cent. or more of the producing acreage of citrus fruit, and, upon procurement by the Florida Citrus Commission from producers, shippers, or handlers, not subject to the provisions of the act, of binding agreements to conform thereto and abide by its terms,—the Commission shall

[1] 28 F. Supp. 44.

determine and record annually the average reasonable cost, per standard packed box, of producing citrus fruit. The statute provides that, thereupon, every contract with a grower for the purchase of fruit is to be held to require the purchaser to pay the grower a price per box equal to such ascertained and recorded cost; and continues: "Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale . . . shall be valid and binding and the terms thereof shall measure the rights of the respective parties." By its terms the act is to apply to any one or more of the varieties of citrus fruit.

The complaint further refers to the Bond and License Act (Chap. 16860, Laws of Florida, 1935, as amended by Chap. 17777, Acts of 1937), which requires every dealer (which term includes processors of citrus fruit) to take a license and provides that if the Commissioner determines that any dealer has violated the provisions of any applicable act he may suspend or revoke the license of the offender. Operation as a dealer without license is made a misdemeanor.

The bill alleges that the packing season for canning citrus products in Florida begins about November 1st of each year and continues until June or July of the following year; that preparations for canning include the ordering of cans, labels, contracting for purchase of fruit, securing labor, planning of factory operations, and obtaining orders for the product.

It is alleged that, under the Growers' Cost Guarantee Act, the appellant Mayo, as Commissioner of Agriculture, with the consent and advice of the Governor, declared an emergency in the citrus industry on January 13, 1939, and that the Citrus Commission passed a resolution Jan-

uary 16, 1939, reciting that more than fifty per cent. of the owners or controllers of producing acreage of grapefruit in the State have requested the Commission to determine the cost of production of grapefruit, fixing the cost per standard packed box at thirty-two cents for the season 1938–1939, and decreeing that every contract with a grower shall be held to require that the purchaser shall, in any event, pay the grower the amount so fixed as the cost of production.

The bill states that the expected pack of grapefruit for the season 1938-39 was large, but that, due to the regulation, the output of the canned product has been less, by two million cases, than that of the previous season; that, since January 19, 1939, each of appellees has been offered quantities of grapefruit by Florida growers, at prices ranging from twelve cents per box for fruit to be processed into juice, to twenty-five cents per box for fruit to be canned into sections or hearts, and that, but for the regulation in question, each could, and would, have purchased such fruit, canned the same, and sold the canned product at a large profit; that, as a result of the regulation, much of the fruit remains unsold and is spoiling.

The bill further asserts that many growers own their own canning plants and may, therefore, process their fruit without being subject to the burden of the Cost Guarantee Law; and that many growers, with like immunity, process their fruit through coöperative organizations to which the Commissioner does not apply the cost price provisions of the law and regulations.

According to the bill a large proportion of the Florida canned fruit is sold in interstate and foreign commerce and much of it competes with that produced in other States which brings lower prices, and, consequently, the appellees cannot pay thirty-two cents per box and sell in competition with fruit elsewhere processed.

It is further averred that one of the appellees had made binding contracts of purchase prior to issue of the regulation, the obligation of which has been impaired thereby.

After alleging that each appellee has a large investment; that the payment of thirty-two cents per box would render it impossible for them to sell their processed grapefruit except at a loss; that the enforcement of the regulation will cause them large losses and irreparable damage; that if they do not comply with the regulation the Commissioner will revoke their licenses, and that, if he should do so, they will be compelled to suspend business or subject themselves to risk of fine and imprisonment under the Bond and License Act, the bill charges that the Growers' Cost Guarantee Law, as administered and as applied to them, is unconstitutional and void as illegally attempting to regulate interstate commerce, as violating the equal protection clause of the Fourteenth Amendment, because discriminating between coöperatives and the complainants, as taking their property without due process of law, and as impairing the obligation of contracts. The bill also challenges the regulation on the ground that the Commission failed to ascertain, in accordance with the law, that fifty per cent. of the owners or controllers of acreage had requested regulation and also failed to observe the condition precedent to making any order, namely, that all persons not subject to the provisions of the act should execute binding agreements to be governed thereby.

At the time of hearing and decree for preliminary injunction no answer or motion to dismiss had been filed. The court in its opinion stated that the defendants had appeared and, though they had not filed answers, argued the case "and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved."

The court in its opinion, after a running commentary, concluded: "We find the Act unconstitutional." The court then went on to say that there was no proof before it that the Commission had procured agreements, as required by the act, from shippers or handlers not subject to the provisions of the act, and that, while this fact might not render the act violative of the Constitution, it required an injunction to restrain the Commission from enforcing the prices fixed. An injunction was issued to remain in force until final hearing.

We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.

The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure.[2]

The appellants complain that the court's opinion decides a question which was not open on the hearing and

[2] Compare *Home Telephone & Teleg. Co.* v. *Kuykendall,* 265 U. S. 206; *Railroad Commission* v. *Maxcy,* 281 U. S. 82; *Public Service Comm'n* v. *Wisconsin Telephone Co.,* 289 U. S. 67; *Interstate Circuit* v. *United States,* 304 U. S. 55; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194; *Polk Company* v. *Glover,* 305 U. S. 5.

prejudices their position on final hearing; that the decision goes beyond the question of a prima facie showing made for the purpose of obtaining a temporary injunction and proceeds upon assumptions of fact not sustained by the evidence which appellants could have negatived by proof adduced at final hearing. The appellees insist that in holding the act unconstitutional the court did so only for the purposes of temporary relief and that its conclusion in this respect can have no effect upon the ultimate decision of the cause upon the merits. Nevertheless, the parties have essayed, in view of the action of the court below, to argue in this court the question of the constitutionality of the statute, whereas, if the court below had confined itself to the issue presented, namely, whether the proofs warranted the entry of an injunction pending a decision of the constitutional and other questions presented, the parties could either have obtained a trial on the merits long before an appeal from the interlocutory order could be heard in this case or, if an appeal from the interlocutory order had been perfected here, would have been restricted in argument to the question whether, upon proper findings and conclusions, the court had abused its discretion in granting or refusing an injunction.[3]

Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.

The appellants insist that the bill fails to state facts sufficient to raise a substantial question as to the constitutional validity of the statute. They could have made this point in the District Court by a motion to

[3] *United States* v. *Corrick*, 298 U. S. 435, 437.

dismiss and obtained a prompt decision on it. They omitted so to do.

The record does not warrant a judgment of dismissal. The complaint raises constitutional questions of due process, equal protection, and violation of the obligation of contract. It further raises questions as to whether the act has ever been put into operation in accordance with its terms.

The appellees' principal attack upon the statute, based upon the Constitution, centers on its regulation of prices. The mere fact that the act fixes prices is, in itself, insufficient to invalidate it;[4] and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction, except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal.

Some of the complainants are corporations of States other than Florida, and allegations of the bill, which were not denied, sufficiently allege an amount in controversy in excess of $3,000 with respect to each complainant. In respect of the Commission's alleged failure to comply with the statute, it may be that these complainants are entitled to maintain the suit although not entitled to a hearing before a three judge court, even though it be found that there is no substance in the constitutional questions presented.

The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable

[4] *Nebbia* v. *New York*, 291 U. S. 502; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 569. Compare *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346.

injury. Congress intended that, in this class of suits, prompt hearing and decision shall be afforded the parties so that the States shall be put to the least possible inconvenience in the administration of their laws.

Both the court below and the appellants are in part responsible for the inexcusable delay in the disposition of this case. We are advised that since the entry of the injunction the defendants have answered the bill, and there appears to be no reason why the case cannot promptly be finally heard and decided upon the merits. We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing, and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52 (a) of the Rules of Civil Procedure.

Reversed.

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

Opinion of MR. JUSTICE FRANKFURTER.

A different disposition of the case seems to me to be required.

Citrus fruit occupies a central and indeed pervasive rôle in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. The appropriateness of regulations to be adopted for the citrus fruit industry is thus peculiarly a matter for the legislature of Florida in whose keeping is the shaping of that state's social and economic policy. In *Nebbia* v. *New York,* 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare. *United States* v. *Rock Royal Co-op.,* 307

U. S. 533. Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. The allowable exercise of legislative discretion to attain price stability finds obvious occasion in the case of a commodity as basic to a state's economy as citrus fruit is to that of Florida. Certainly neither in the bill nor in the Court's opinion is a reason vouchsafed to take the present suit out of the scope of the *Nebbia* doctrine. The wisdom of such a policy—its efficacy to achieve the desired ends—is of course not our concern.

The price level here challenged was not hastily or crudely fixed. It was the result of an approved modern method for dealing with the complexities of such a problem. The price was not fixed directly by statute. It was ascertained under appropriate safeguards by a body established to carry into apt result the legislative policy for assuring "the grower returns at least equal to the cost of production. . . ." Laws of Florida, 1935, c. 16862. The Florida Citrus Commission on January 16, 1939, fixed minimum prices for grapefruit, thereby establishing what is colloquially known as a "floor" for the market, so as to prevent the destructive play of blind economic forces.

This action was thereupon commenced in the District Court for the Southern District of Florida, not by any of the growers but by some canners, appellees here. On March 23, 1939, they sought to enjoin the Commissioner of Agriculture and other state officials from enforcing the fixed minimum prices. They claimed that these deprived them of the opportunity to buy in a cheaper market—the cheapness of competition indifferent to any but immediate consequences. They claimed irreparable damage and asked for both a temporary and a permanent injunction. On April 28, 1939, in the circumstances set forth in this Court's opinion, the District Court declared the statute unconstitutional and granted an interlocutory injunction. There were no findings—and there

could have been none on this record—taking the statute out of the doctrine announced in the *Nebbia* case.[1] Certainly a consumer has no constitutional right to buy as cheaply as an unregulated industry would, under adverse circumstances, be compelled to sell.

Pursuant to the delays inevitable in a litigation like the present, an order allowing appeal was not granted until July 3, and the case was filed here on August 7, where in due course it was reached for argument on January 12, 1940. As a result, the injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.

I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous. We ought to apply what was characterized in *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 527, as "the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Even if the present

[1] Appellees also attacked the Florida statute because of its provisions exempting co-operative and grower-owned canneries. This attack, however, must fail under our decision in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. Appellees' contention that the statute is an unconstitutional burden on interstate commerce is likewise without substance. *Sligh* v. *Kirkwood*, 237 U. S. 52; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346. Nor is there substantial basis for appellees' contention that the order unconstitutionally impairs the obligation of any contracts they may have previously made for the purchase of grapefruit at a price lower than that fixed under the statute. See, *e. g.*, *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372. Cf. *Knox* v. *Lee*, 12 Wall. 457, 550–51.

bill is taken at face value, it does not make out "a case reasonably free from doubt." The withdrawal of the injunction from industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy. Congress has also given indication in § 266 of the Judicial Code (28 U. S. C. § 380) of its concern over the misuse of the injunction, fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.

The supervisory power of this Court over the district courts becomes especially appropriate in equity suits. We ought to feel free to apply the traditional powers of the chancellor on appeal to act as though the suit were before him *de novo*. Compare *United States* v. *Rio Grande Irrigation Co.*, 184 U. S. 416, 423. The present case demands that we enforce the "important rule" of *Massachusetts State Grange* v. *Benton, supra.*

Inasmuch as the Florida statute is obviously constitutional, the bill does not raise a substantial federal question and the District Court was without jurisdiction to entertain it on behalf of the appellees who are citizens of Florida. As to them, the case should be remanded to the District Court with directions to dismiss the bill.

Some of the appellees, however, are citizens of other states, and among the allegations of the bill, in addition to the amount of damage requisite to give diversity jurisdiction, are those of failure by the state officials to comply with some of the conditions which appellees assert to be indispensable for the issuance of a valid price-fixing order under the statute. Whatever may be the merits of these contentions, in any event they do not touch the constitutionality of the statute or the order,

and so § 266 of the Judicial Code cannot be invoked for their adjudication. As to these appellees, the judgment below should be vacated and the case remanded to the District Court for any proceedings that may be appropriate before a single judge. But compare *Gilchrist* v. *Interborough Co.*, 279 U. S. 159.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in these views.

COBBLEDICK ET AL. *v.* UNITED STATES.*

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

No. 571. Argued January 30, 1940.—Decided February 26, 1940.

An order of the District Court denying a motion to quash a subpoena *duces tecum* requiring one to appear with papers and testify before a grand jury is not a "final decision" within the meaning of Jud. Code § 128 (a). Pp. 324, 330.

107 F. 2d 975, affirmed.

CERTIORARI, 308 U. S. 547, to review judgments dismissing, for want of jurisdiction, appeals from orders denying motions to quash subpoenas *duces tecum*.

Mr. Donald R. Richberg, with whom *Messrs. Felix T. Smith* and *Chalmers G. Graham* were on the brief, for petitioners.

Mr. Wendell Berge, with whom *Solicitor General Biddle, Assistant Attorney General Arnold* and *Mr. James C. Wilson* were on the brief, for the United States.

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*Together with No. 572, *Brawner et al.* v. *United States,* and No. 573, *Palmuth et al.* v. *United States,* also on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Opinion of the Court by MR. JUSTICE FRANKFURTER, announced by the CHIEF JUSTICE.

The District Court for the Northern District of California denied motions to quash subpoenas *duces tecum* addressed to the petitioners and directing them to appear and produce documents before a United States grand jury at the July, 1939, term of that court. From the denial of these motions petitioners sought review by way of appeal to the Circuit Court of Appeals for the Ninth Circuit, 107 F. 2d 975. That court found itself to be without jurisdiction and dismissed the appeals. We brought the cases here, 308 U. S. 547, because of conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit, *In re Cudahy Packing Co.*, 104 F. 2d 658. The matter in controversy—and the sole question raised in all three cases—vitally concerns the effective administration of the federal criminal law. The question is whether an order denying a motion to quash a subpoena *duces tecum* directing a witness to appear before a grand jury is included within those "final decisions" in the district court which alone the circuit courts of appeal are authorized to review by § 128 (a) of the Judicial Code (28 U. S. C. § 225).[1]

Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act[2] and has been departed from only when observance of it would practically defeat the

[1] Section 128 (a) provides that, "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions. . . ." Similar language was used in the Act of 1891, c. 517, 26 Stat. 828.

[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83–85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539.

right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases.[4] An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction

[3] See § 129 of the Judicial Code, 28 U. S. C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation.

[4] See *United States* v. *More*, 3 Cranch 159. Only by certificate of division of opinion in the circuit courts could review be obtained. See Curtis, Jurisdiction of the United States Courts, 82. By the Act of 1889 review as of right was allowed in capital cases. 25 Stat. 655, 656. For the history of federal criminal appeal see *United States* v. *Sanges*, 144 U. S. 310, 319–22.

before its reconsideration by an appellate tribunal. *Cogen* v. *United States,* 278 U. S. 221.

In thus denying to the appellate courts the power to review rulings at *nisi prius,* generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . ." Mr. Chief Justice Taft, in *Segurola* v. *United States,* 275 U. S. 106, 112. This is so despite the fact that a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause. Such was the ruling in *Alexander* v. *United States,* 201 U. S. 117. In that case, witnesses were directed to appear and produce documents before a special examiner designated by the circuit court to hear testimony in a suit brought by the United States to enforce the Sherman Law. Upon refusal to submit the documents called for in the subpoena, the United States petitioned the circuit court for an order requiring compliance. The petition was granted, and appeals were then allowed to this Court. These appeals were dismissed for want of jurisdiction. The grounds of the decision are best indicated in the language of the opinion:

"In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case . . . This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit." 201 U. S. at 121–22.

We must now decide whether the situation of a witness summoned to produce documents before a grand jury is so different from that of the witness in the *Alexander* case that the sound considerations of policy controlling there should not govern here. The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes "a judicial inquiry," *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States,* 221 U. S. 361. The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none

may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander* case. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. See *Hale* v. *Henkel, supra,* and *Wilson* v. *United States, supra.* At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.

This analysis of finality is illustrated by *Perlman* v. *United States,* 247 U. S. 7.[5] There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the district court was "not final" but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman "powerless to avert the mischief of the order . . ." 247 U. S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a

[5] Compare *Go-Bart Co.* v. *United States,* 282 U. S. 344.

means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.[6]

One class of cases dealing with the duty of witnesses to testify presents differentiating circumstances. These cases have arisen under § 12 of the Interstate Commerce Act, whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission.[7] In these cases the orders of the district court directing the witness to answer have been held final and reviewable. *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447; *Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434. Such cases were duly considered in the *Alexander* case, and deemed to rest "on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences." 201 U. S. at 121. The differences were thought controlling. Appeal from an order under § 12 was again here in the *Ellis* case, *supra*, fully argued in the briefs, and again differentiated from a situation like that in the *Alexander* case. "No doubt" was felt that an appeal lay from the district court's direction to testify. "It

[6] *Burdeau* v. *McDowell*, 256 U. S. 465, is consistent with our analysis. In that case proceedings were commenced in the district court for the recovery of documents held by the Government for use before a grand jury. The district court granted the relief sought, and the Government appealed. In this Court the action of the district court was treated as final, and hence subject to review. But the practical considerations there involved were entirely different from those which must govern here. In *Burdeau* v. *McDowell* the action of the district court was itself an interruption of the grand jury's inquiry; appeal by the Government did not halt the "orderly progress" of the inquiry.

[7] 25 Stat. 858; 49 U. S. C. § 12.

is the end of a proceeding begun against the witness"—was the pithy expression for this type of case. 237 U. S. at 442. And it is a sufficient justification for treating these controversies differently from those arising out of court proceedings unrelated to any administrative agency. The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself.

We deem it unnecessary to say more in sustaining the Circuit Court of Appeals. The challenged judgment is

Affirmed.

MR. JUSTICE MURPHY did not participate in the consideration or decision of these cases.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CLIFFORD.

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

No. 383. Argued February 5, 1940.—Decided February 26, 1940.

1. A husband who declared himself trustee of certain securities for the term of five years, to pay to his wife the income accruing during that period, but retained in himself the right to accumulate income, and, with insignificant exceptions, the complete control over the principal fund—its conversion, investment, reinvestment, etc.—and the reversion of the corpus at the end of the term, may properly be found by the federal taxing authorities to be owner of the fund, within the intent of § 22 (a) of the Revenue Act of 1934, notwithstanding the trust, and taxable on the trust income as part of his personal income. P. 335.

   Where the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, it can not be said that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22 (a). P. 336.
2. The broad language of § 22 (a) of the Revenue Act of 1934 indicates the purpose of Congress to use the full measure of its taxing power within the definable categories specified therein. P. 337.
3. Whether the creator of a trust may still be treated under § 22 (a) as the owner of the corpus, is not determined by technicalities of the law of trusts and conveyances, but must depend on analysis of the terms of the trust and on all the circumstances attendant on its creation and operation. P. 334.

   Where the grantor is the trustee, and the beneficiaries members of his family group, special scrutiny is necessary, lest what is in reality but one economic unit be increased to two or more by devices which, though valid under state law, are not conclusive under § 22 (a) of the Revenue Act. P. 335.
4. The fact that Congress made specific provision in § 166 of the Revenue Act of 1934 for revocable trusts but failed to adopt a Treasury recommendation that similar specific treatment should be given income from short term trusts, did not subtract the latter from § 22 (a). P. 337.

105 F. 2d 586, reversed.

CERTIORARI, 308 U. S. 542, to review a judgment which reversed a decision of the Board of Tax Appeals (38 B. T. A. 1532), sustaining a deficiency assessment.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, L. W. Post,* and *Richard H. Demuth* were on the brief, for petitioner.

Mr. Thomas P. Helmey, with whom *Mr. F. H. Stinchfield* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1934 respondent declared himself trustee of certain securities which he owned. All net income from the trust was to be held for the "exclusive benefit" of respondent's wife. The trust was for a term of five years, except that it would terminate earlier on the death of either respondent or his wife. On termination of the trust the entire corpus was to go to respondent, while all "accrued or undistributed net income" and "any proceeds from the investment of such net income" was to be treated as property owned absolutely by the wife. During the continuance of the trust respondent was to pay over to his wife the whole or such part of the net income as he in his "absolute discretion" might determine. And during that period he had full power (a) to exercise all voting powers incident to the trusteed shares of stock; (b) to "sell, exchange, mortgage, or pledge" any of the securities under the declaration of trust "whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration" as respondent in his "absolute discretion may deem fitting"; (c) to invest "any cash or money in the trust estate or any income therefrom" by loans, secured or unsecured, by deposits in

banks, or by purchase of securities or other personal property "without restriction" because of their "speculative character" or "rate of return" or any "laws pertaining to the investment of trust funds"; (d) to collect all income; (e) to compromise, etc., any claims held by him as trustee; (f) to hold any property in the trust estate in the names of "other persons or in my own name as an individual" except as otherwise provided. Extraordinary cash dividends, stock dividends, proceeds from the sale of unexercised subscription rights, or any enhancement, realized or not, in the value of the securities were to be treated as principal, not income. An exculpatory clause purported to protect him from all losses except those occasioned by his "own wilful and deliberate" breach of duties as trustee. And finally it was provided that neither the principal nor any future or accrued income should be liable for the debts of the wife; and that the wife could not transfer, encumber, or anticipate any interest in the trust or any income therefrom prior to actual payment thereof to her.

It was stipulated that while the "tax effects" of this trust were considered by respondent they were not the "sole consideration" involved in his decision to set it up, as by this and other gifts he intended to give "security and economic independence" to his wife and children. It was also stipulated that respondent's wife had substantial income of her own from other sources; that there was no restriction on her use of the trust income, all of which income was placed in her personal checking account, intermingled with her other funds, and expended by her on herself, her children and relatives; that the trust was not designed to relieve respondent from liability for family or household expenses and that after execution of the trust he paid large sums from his personal funds for such purposes.

Respondent paid a federal gift tax on this transfer. During the year 1934 all income from the trust was dis-

tributed to the wife who included it in her individual return for that year. The Commissioner, however, determined a deficiency in respondent's return for that year on the theory that income from the trust was taxable to him. The Board of Tax Appeals sustained that redetermination. 38 B. T. A. 1532. The Circuit Court of Appeals reversed. 105 F. 2d 586. We granted certiorari because of the importance to the revenue of the use of such short term trusts in the reduction of surtaxes.

Sec. 22 (a) of the Revenue Act of 1934, 48 Stat. 680, includes among "gross income" all "gains, profits, and income derived . . . from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. Cf. *Helvering* v. *Midland Mutual Life Insurance Co.*, 300 U. S. 216. Hence our construction of the statute should be consonant with that purpose. Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus. See *Blair* v. *Commissioner*, 300 U. S. 5, 12. In absence of more precise standards or guides supplied by statute or appropriate regulations,[1]

[1] We have not considered here Art. 166–1 of Treasury Regulations 86 promulgated under § 166 of the 1934 Act and in 1936 amended (T. D. 4629) so as to rest on § 22 (a) also, since the tax in question arose prior to that amendment.

the answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation. And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest what is in reality but one economic unit be multiplied into two or more [2] by devices which, though valid under state law, are not conclusive so far as § 22 (a) is concerned.

In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22 (a).

So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect

[2] See Paul, The Background of the Revenue Act of 1937, 5 Univ. Chic. L. Rev. 41.

any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22 (a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before. Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22 (a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure

the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements.

The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the "victim of despotic power when for the purpose of taxation he is treated as owner altogether." See *DuPont* v. *Commissioner*, 289 U. S. 685, 689.

We should add that liability under § 22 (a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, *Helvering* v. *Wood, post,* p. 344, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, *Helvering* v. *Wood, supra,* cannot be said to have subtracted from § 22 (a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22 (a) or specific treatment under a separate provision [3] (such as was accorded revocable trusts under § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22 (a), a specific provision covering short term trusts might well do no more than to carve out of § 22 (a) a defined group of cases to which a rule of thumb

[3] As to the disadvantage of a specific statutory formula over more generalized treatment see Vol. I, Report, Income Tax Codification Committee (1936), a committee appointed by the Chancellor of the Exchequer in 1927. In discussing revocable settlements the Committee stated, p. 298:

"This and the three following clauses reproduce section 20 of the Finance Act, 1922, an enactment which has been the subject of much litigation, is unsatisfactory in many respects, and is plainly inadequate to fulfil the apparent intention to prevent avoidance of liability to tax by revocable dispositions of income or other devices. We think the matter one which is worthy of the attention of Parliament."

would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22 (a).

In view of this result we need not examine the contention that the trust device falls within the rule of *Lucas* v. *Earl,* 281 U. S. 111 and *Burnet* v. *Leininger,* 285 U. S. 136, relating to the assignment of future income; or that respondent is liable under § 166, taxing grantors on the income of revocable trusts.

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

Reversed.

MR. JUSTICE ROBERTS, dissenting:

I think the judgment should be affirmed.

The decision of the court disregards the fundamental principle that legislation is not the function of the judiciary but of Congress.

In every revenue act from that of 1916 to the one now in force a distinction has been made between income of individuals and income from property held in trust.[1] It has been the practice to define income of individuals, and, in separate sections, under the heading "Estates and Trusts," to provide that the tax imposed upon individuals shall apply to the income of estates or of any kind

[1] Revenue Act of 1916, 39 Stat. 756, § 2 (a) (b); Revenue Act of 1918, 40 Stat. 1057, § 213 (a), § 219; Revenue Act of 1921, 42 Stat. 227, § 213 (a), § 219; Revenue Act of 1924, 43 Stat. 253, § 213 (a), § 219; Revenue Act of 1926, 44 Stat. 9, § 213 (a), § 219; Revenue Act of 1928, 45 Stat. 791, § 22 (a), §§ 161 to 169, incl.; Revenue Act of 1932, 47 Stat. 169, § 22 (a), §§ 161 to 169 incl.; Revenue Act of 1934, 48 Stat. 680, § 22 (a), §§ 161 to 167, incl.; Revenue Act of 1936, 49 Stat. 1648, § 22 (a), §§ 161 to 167, incl.

of property held in trust. A trust is a separate taxable entity. The trust here in question is a true trust.

While the earlier acts were in force creators of trusts reserved power to repossess the trust corpus. It became common also to establish trusts under which, at the grantor's discretion, all or part of the income might be paid to him, and to set up trusts to pay life insurance premiums upon policies on the grantor's life. The situation was analogous to that now presented. The Treasury, instead of asking this court, under the guise of construction, to amend the act, went to Congress for new legislation. Congress provided, by § 219 (g) (h) of the Revenue Act of 1924, that if the grantor set up such a life insurance trust, or one under which he could direct the payment of the trust income to himself, or had the power to revest the principal in himself *during any taxable year,* the income of the trust, for the taxable year, was to be treated as his.[2]

After the adoption of these amendments taxpayers resorted to the creation of revocable trusts with a provision that more than a year's notice of revocation should be necessary to termination. Such a trust was held not to be within the terms of § 219 (g) of the Revenue Act of 1924, because not revocable within the taxable year.[3]

Again, without seeking amendment in the guise of construction from this court, the Treasury applied to Congress, which met the situation by adopting § 166 of the Revenue Act of 1934, which provided that, in the case of a trust under which the grantor reserved the power *at*

[2] See *Corliss* v. *Bowers,* 281 U. S. 376; *Burnet* v. *Wells,* 289 U. S. 670.

[3] *Lewis* v. *White,* 56 F. 2d 390; 61 F. 2d 1046; *Langley* v. *Commissioner,* 61 F. 2d 796; *Commissioner* v. *Grosvenor,* 85 F. 2d 2; *Faber* v. *United States,* 1 F. Supp. 859.

any time to revest the corpus in himself, the income of the trust should be considered that of the grantor.

The Treasury had asked that there should also be included in that act a provision taxing to the grantor income from short term trusts. After the House Ways and Means Committee had rendered a report on the proposed bill, the Treasury, upon examination of the report, submitted a statement to the Committee containing recommendations for additional provisions; amongst others, the following: "(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust." Congress adopted an amendment to cover the one situation but did not accept the Treasury's recommendation as to the other.[4] The statute, as before, clearly provided that the income from a short term irrevocable trust was taxable to the trust, or the beneficiary, and not to the grantor.

The regulations under § 166 of the Act of 1932 contained no suggestion that term trusts were taxable to the creator though, if the petitioner is right, they would be equally so under that act as under later ones. Thus though the Treasury realized that irrevocable short term trusts did not fall within the scope of § 166, instead of going to Congress for amendment of the law it comes here with a plea for interpretation which is in effect such amendment.

Its claim, in support of this effort, that a reversionary interest in the grantor is a "power to revest" the corpus within the meaning of § 166 so as to render the income taxable to the grantor is plainly untenable.[5] That theory

[4] Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 151; H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24.

[5] *United States* v. *First National Bank*, 74 F. 2d 360; *Corning* v. *Commissioner*, 104 F. 2d 329.

was first advanced in a regulation issued under the 1934 act,[6] but was abandoned March 7, 1936, when the regulation was revised to read substantially in its present form.[7] The Board of Tax Appeals held a possibility of reverter is not the "power to revest" described in § 166.[8] The petitioner acquiesced in the decision.[9] The Treasury thereafter ruled that a grantor was not taxable on the income of a trust where he had retained a reversionary interest.[10]

I think it clear that the administrative interpretation has not been consistent and that reënactment of § 166 is, therefore, not a ratification by Congress of the present construction.

The revised regulations indicating that in some circumstances the separate taxability of the trust may be ignored are said to rest on § 166, and also on § 22 (a) which defines income. The regulation is not only without support in the statute but contrary to the entire statutory scheme and, as it now stands, is vague and meaningless, as respects the taxability to the grantor of income from an irrevocable term trust.

To construe either § 166 or § 22 (a) of the statute as justifying taxation of the income to respondent in this case is, in my judgment, to write into the statute what is not there and what Congress has omitted to place there.

If judges were members of the legislature they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax but, as judges, they exercise a very different function. They ought to read the act to cover nothing more than Congress has specified.

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[6] Regulations 86, Art. 166–1.

[7] T. D. 4629, C. B. XV–1, 140.

[8] Downs *v.* Commissioner, 36 B. T. A. 1129.

[9] C. B. 1938–1, p. 9.

[10] I. T. 3238, C. B. XVII–2, p. 204.

Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer. Relief in either case should be sought in another quarter.

No such dictum as that Congress has in the income tax law attempted to exercise its power to the fullest extent will justify the extension of a plain provision to an object of taxation not embraced within it. If the contrary were true, the courts might supply whatever they considered a deficiency in the sweep of a taxing act. I cannot construe the court's opinion as attempting less.

The fact that the petitioner is in truth asking us to legislate in this case is evident from the form of the existing regulation and from the argument presented. The important portion of the regulation reads as follows: "In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: The fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus."

In his brief the petitioner says:

"On the other hand, the income of a long term irrevocable trust which committed the possession and control

of the corpus to an independent trustee *would not likely* be taxed to the settlor merely because of a reversionary interest. The question here, as in many other tax problems, *is simply one of degree.* The grantor's liability to tax must depend upon whether he retains so many of the attributes of ownership as to require that he be treated as the owner for tax purposes, or whether he has given up the substance of his dominion and control over the trust property.

"Under these circumstances, the question of *precisely where the line should be drawn* between those irrevocable trusts which deprive the grantor of command over the trust property and those which leave in him the practical equivalent of ownership is, in our view, *a matter peculiarly for the judgment of the agency charged with the administration of the tax law.*" (Italics supplied.)

It is not our function to draw any such line as the argument suggests. That is the prerogative of Congress. As far back as 1922, Parliament amended the British Income Tax Act, so that there would be no dispute as to what short term trust income should be taxable to the grantor, by making taxable to him any income which, by virtue of any disposition, is payable to, or applicable for the benefit of, any other person for a period which cannot exceed six years.[11]

If some short term trusts are to be treated as nonexistent for income tax purposes, it is for Congress to specify them.

MR. JUSTICE MCREYNOLDS joins in this opinion.

[11] 12 and 13 Geo. 5, ch. 17, § 20, L. R. Statutes, Vol. 60, p. 373. Though the provision has been thought unsatisfactory, the suggestion made for improvement is that the matter be brought before Parliament for action.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WOOD.

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

No. 384. Argued February 5, 1940.—Decided February 26, 1940.

1. Section 166 of the Revenue Act of 1934, providing that the income from a trust shall be taxable to the grantor where "at any time the power to revest in the grantor title to any part of the corpus of the trust is vested" in him is inapplicable in the absence of such power, though the term of the trust be short and the corpus will soon revert to the grantor. A mere reversion is not a power to revest within the meaning of § 166. P. 347.
2. Having invoked before the Board of Tax Appeals and the court below the comparatively narrow provisions of § 166 of the Revenue Act of 1934, to sustain the tax in question, and having expressly waived reliance on any other section, the Commissioner of Internal Revenue may not resort here for the first time to the broader provisions of § 22 (a). P. 348.

104 F. 2d 1013, affirmed.

CERTIORARI, 308 U. S. 543, to review the affirmance of a decision of the Board of Tax Appeals (37 B. T. A. 1065), which reversed a determination of a deficiency in income tax.

Mr. Warner W. Gardner, with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, L. W. Post,* and *Richard H. Demuth* were on the brief, for petitioner.

Messrs. George M. Wolfson and *Dean G. Acheson* for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, like *Helvering* v. *Clifford, ante,* p. 331, is here on certiorari, the problems in the two cases being the same

in certain essential respects. In April 1931 respondent, who owned twenty-five shares of stock of Book-of-the-Month Club, Inc., made himself trustee of those shares under an agreement which was to expire in three years [1] or earlier on the death of either him or his wife. By the trust he was to "hold, invest, and reinvest" the shares, to "collect the net income therefrom" and to pay it to his wife. He had the power to "retain" the stock or to "sell" it or "any part thereof" at such "time and on such terms" as he should "deem proper." [2] It was provided that his power of investment or reinvestment of "any of the property or moneys held in trust" was not to be restricted by any law governing investments by trustees. He was also given power to "fix and determine" the value of the property for all purposes of the trust and to determine "whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income," with the proviso, however, that stock dividends and subscription rights should be treated as principal. He was prohibited from receiving any commissions with respect to principal or income; and an exculpatory clause purported to protect him against any loss except that occasioned by his wilful misconduct. He had the power to appoint a substitute trustee.[3] On termination of the trust "all property then held in trust" was to go to him. The trust contained no power of revocation nor any power to revest in the grantor at any time, prior to the date of termination, title to any part of the corpus.

[1] In 1932 the term was extended to five years from April, 1931.

[2] His right to sell was subject to a collateral agreement, not material here, with one Scherman, granting Scherman a preëmptive right in case respondent decided to sell.

[3] No substitute trustee was, however, appointed, respondent continuing to act as trustee until termination of the trust in 1936.

During 1934 respondent paid over to his wife $8,750, which was the entire income from the trust for that year. She included it in her income tax return. The Commissioner, being of the opinion that the income was taxable to respondent, determined a deficiency in his 1934 return. Respondent appealed to the Board of Tax Appeals which held that petitioner was in error (37 B. T. A. 1065). The Circuit Court of Appeals affirmed (104 F. 2d 1013) on the authority of *United States* v. *First National Bank*, 74 F. 2d 360.

Petitioner maintains that the trust income is taxable to respondent either under § 166 or § 22 (a) of the Revenue Act of 1934 (48 Stat. 680) or both.

By § 166 the income from a trust is taxable to the grantor where "at any time the power to revest in the grantor title to any part of the corpus of the trust is vested" in him or in any person "not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom." [4] Petitioner has not undertaken to establish that under New York law, which governs this trust, respondent had the power to revoke it prior to the end of the term. But in his contention that the trust here involved is covered by § 166, petitioner points out that there is no practical difference between a revocable trust and one certain to be terminated soon. And he argues that it would not be sensible

[4] Sec. 166 reads in full:

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

"(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

to impute to Congress a purpose to impose the tax when the grantor has an executory power to revest title in himself but to withhold the tax when the grantor, by provisions in the trust deed, has already exercised that power.

Our difficulty lies not in an inability to see the similarity of those situations but in being able to say that Congress treated them the same under § 166. A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate. See Tiffany, Real Property (2nd ed.) § 129 *et seq.*, § 316 *et seq.* Congress seems to have drawn § 166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here. Whether wisely or not, Congress confined § 166 to trusts where there was a "power to revest." The problem of interpretation under § 166 is therefore quite different from that under § 22 (a). The former is narrowly confined to a special class; the latter by broad, sweeping language is all inclusive. *Helvering* v. *Clifford, supra.* Accordingly, the wide range for definition and specification under the latter is lacking under § 166. And so far as § 166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed. The legis-

lative history corroborates this conclusion. When the 1934 Act was before the House Committee, the Treasury recommended that income from short term trusts and from revocable trusts should be taxable to the creator.[5] The Congress adopted the latter[6] by an appropriate amendment to § 166; but it did not select the former for special treatment. When such clear choice of ideas has been made in the drafting of a specific provision of the law, its language must be taken at its face value. Sec. 166 is therefore not applicable to this trust since respondent is given no power to recall the corpus. He or his estate gets it at the end of the term, on the death of his wife, or on his own death—whichever is the earliest.

For a wholly different reason, petitioner's argument based on § 22 (a) must fail. The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22 (a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than

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[5] Revenue Revision, 1934, Hearings before the Committee on Ways & Means, H. R. 73rd Cong., 2nd Sess., p. 151. The recommendation read: "The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust."

[6] Conference Rep. No. 1385, H. R. 73rd Cong., 2nd Sess., p. 24:

"Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate amendments require the income from trusts of this type to be reported by the grantor. The House recedes."

§ 166. Though petitioner in his petition for certiorari relied on § 22 (a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. As we have indicated, the issues under § 166 and § 22 (a) are not coterminous. Though both deal with concepts of ownership, the range of inquiry under the latter is broad, under the former confined. To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation.[7] See *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418. It is not apparent why a less strict rule is necessary in order adequately to protect the revenue.

Affirmed.

Mr. Justice Roberts concurs in the result.

[7] Art. 166–1 of Treasury Regulations 86, originally promulgated under § 166, was not promulgated under § 22 (a) until 1936 (T. D. 4629), two years after the tax liability here in issue occurred. Hence we do not have a case of reliance by the government on a regulation which during the taxable year in question rested on two legs, one of which was § 22 (a).

NATIONAL LICORICE CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 272. Argued February 7, 1940.—Decided March 4, 1940.

1. Substantial evidence sustains a finding by the National Labor Relations Board that a particular union was the choice of a majority of employees, as bargaining representative of all, at a time when their employer refused to deal with it as representative of employees who were not members of the union. P. 357.
2. Employees in a plant agreed individually with the employer not to strike or to demand a closed shop or a signed agreement with any union, also for arbitration as to wages and hours, but that the question of the propriety of an employee's discharge should in no event be one for arbitration or mediation. The contracts were procured with the aid of a committee of employees which was created for that purpose, and dominated, by the employer, and retained thereafter no function other than that of joining the employer in selection of an arbitrator. *Held:*

   (1) That the contracts were in violation of the National Labor Relations Act and were appropriate subjects for the remedial action of the Board authorized by § 10 of the Act. P. 359.

   (2) An order of the Board precluding the employer from taking any benefit of the contracts and from carrying out any of their provisions the effect of which would be to infringe rights guaranteed by the Act, was valid, although the employees who made the contracts were not parties to the Board's proceeding. P. 361.

   (3) Such order does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication. P. 365.

   (4) Section 10 (a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and, within the limits prescribed in that section, to determine what action the employer must take to remove or avoid their consequences. P. 365.

   (5) A provision of the order, requiring the employer to post notice that the contracts with individual employees (who were not parties to the proceedings) are "void and of no effect," should be modified so as to say in lieu that the contracts were made in

violation of the Act, and that the employer will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; but this without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts. P. 367.

(6) The Board has jurisdiction to deal with violations which though not set up in the charge invoking its action, § 10 (b), are continuations of violations there alleged, of the same class and for the same objects. P. 367.

104 F. 2d 655, affirmed with modification.

CERTIORARI, 308 U. S. 535, to review a judgment for the enforcement of an order of the National Labor Relations Board.

Mr. Abraham Mann for petitioner.

Mr. Robert B. Watts, with whom *Solicitor General Jackson* and *Messrs. Charles Fahy* and *Laurence A. Knapp* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Apart from the sufficiency of the evidence to support an order of the National Labor Relations Board, the questions of importance presented for our decision are whether the Board has authority to order an employer not to enforce contracts with its employees, found to have been procured in violation of the National Labor Relations Act, and to contain provisions violating that Act, in the absence of the employees as parties to the proceeding; and whether the Board has authority to make its order relating to the contracts, although the unfair labor practices found to affect the contracts were not set up in the charge presented to the Board, on the basis of which it issued its complaint.

On August 2, 1937, the Bakery & Confectionery Workers International Union of America, Local Union No. 405, a labor organization, affiliated with the American Federa-

tion of Labor, lodged with the National Labor Relations Board an amended charge, alleging that petitioner had engaged in certain unfair labor practices in violation of the National Labor Relations Act. After a complaint by the Board charging petitioner with unfair labor practices had been served October 7, 1937, and after hearings, the Board found jurisdictional facts, which need not be repeated, and other facts which may be shortly summarized as follows: Petitioner is engaged in business in the manufacture of licorice products which it sells and ships in commerce, employing at its Brooklyn, New York, plant about one hundred and forty production employees. The Board found that early in July, 1937, the Union began to secure signatures of petitioner's employees to applications for membership; that on July 14, 1937, ninety-nine of petitioner's one hundred and forty employees had signed applications for membership, designating the Union as the applicant's representative for collective bargaining; that the number had increased to one hundred and nine on July 19th or 20th. On that date a meeting was held between representatives of the Union and officers of petitioner, at which the Union demands were presented. The negotiations came to nothing and were promptly followed by an unsuccessful effort on the part of petitioner's representatives to circulate among the employees a petition, nominating a committee to act as their collective bargaining representative.

On July 29th a second meeting took place between representatives of the Union and the president and other officers of the company, at which the petitioner declined to recognize the Union as the bargaining representative of all the employees, and declared that it would negotiate with the Union only as the bargaining representative of its members. The meeting adjourned without reaching any agreement. On August 2nd the employees went out on strike. The plant was closed and not reopened

until the conclusion of the strike on August 25th. August 5th had been agreed upon for a third meeting, and on the evening of August 2nd, after the strike had begun, the Union representatives wrote to petitioner stating that the Union was ready to meet with petitioner at any time or place which it would designate "in order to mediate the dispute and through collective bargaining arrive at a mutually satisfactory agreement." Petitioner replied, declaring that it believed the Union had called the strike. It cancelled the meeting of August 5th and asserted that it would not "set any further time for negotiations until we have a letter from you informing us as to whether or not this strike was instigated, ordered or approved by your Union or officials of the Union." Representatives of the Union denied that it had called the strike. The Board found that the strike was the result of spontaneous action by the employees because of dissatisfaction with the course of negotiations between the Union and petitioner.

On August 27th after the plant was reopened, petitioner sent a letter to each employee requesting him to return to work on August 30th. On the same day petitioner's representative met with three employees who stated that they were anxious to return to work, and asked whether they could have their own committee and bargain with petitioner. They were informed that if they could obtain the authorization of a majority of the employees, petitioner would deal with them. Thereafter, petitioner's president, at the request of one of the three, prepared a form of letter designating a committee of workers as the Collective Bargaining Representatives of the employees and revoking the authority to any other organization. The letter was signed by the members of the committee and one hundred and ten other employees, and returned to petitioner on September 9th.

At a meeting with the Committee on September 10th petitioner's president renewed proposals for a contract,

which he had made at the meetings with the Union representatives on July 20th and July 29th, stipulating for a five per cent. wage increase, time and a half for overtime, and one week's vacation with pay. The Committee's only request related to pay for holidays and a reduction of the term of the contract from five to three years, which was granted with some modification. As finally agreed upon the contract purports to be made between the petitioner, the Committee and "each and every one of the employees."[1] Petitioner furnished the Committee members with mimeographed copies of the agreement, telling them to explain it to the best of their ability to the employees, and giving explicit instructions as to the manner in which the individual contracts were to be executed. There was testimony by a number of witnesses that petitioner's president informed the employees that he would not "protect their jobs and they would not get five per cent. if they did not sign the agreement." One group of fourteen employees asked for

[1] An officer of petitioner admitted that he had consulted with the Brooklyn Chamber of Commerce in forming the contracts. The contracts involved here follow the "Balleisen formula," said to be devised by L. L. Balleisen, Industrial Secretary of the Chamber. The contract "executed between the company and each workman individually and not as a collective agreement with representatives of the employees, as provided by the Act," *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. 2d 97, 100, has been held to violate the Act in *National Labor Relations Board* v. *Hopwood Retinning Co., supra; National Labor Relations Board* v. *American Mfg. Co.*, 106 F. 2d 61, 66; Matter of Atlas Bag & Burlap Co., 1 N. L. R. B. 292; Matter of Cating Rope Works, Inc., 4 N. L. R. B. 1100; Matter of Metropolitan Engineering Co., 4 N. L. R. B. 542; Matter of David E. Kennedy, Inc., 6 N. L. R. B. 699; Matter of Art Crayon, Inc., 7 N. L. R. B. 102; Matter of Eastern Footwear Corp., 8 N. L. R. B. 1245; Matter of American Numbering Machine Co., 10 N. L. R. B. 536; Matter of Centre Brass Works, Inc., 10 N. L. R. B. 1060; Matter of Fanny Farmer Candy Shops, Inc., 10 N. L. R. B. 288; Matter of National Meter Co., 11 N. L. R. B. 320.

representation on the Committee and were referred to petitioner's president, who, in refusing the request, informed them that "the Committee had been picked already. There is enough right now on the Committee." The contract is stated to be directly between the petitioner and the individual employee and under it the Committee as such has no rights or duties. It was signed by the Committee and one hundred and eighteen employees. The Committee appears to have functioned only so long as it was necessary to obtain the individual signatures on the contract. The benefits of the contract were limited to those employees who signed. In return the signers relinquished the right to strike, the right to demand a closed shop or signed agreement with any union. The contract also contained provisions for arbitration as to rate of wages and the number of regular hours of employment per week by an arbitrator designated by and mutually acceptable to petitioner and the Committee, but provided that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation. . . ."

From these subsidiary findings of fact the Board concluded that petitioner, by refusing to bargain collectively with the Union on July 20th and July 29th and thereafter, had engaged in unfair labor practices within the meaning of § 8 (5) of the Act; that petitioner, by coercing and intimidating employees in the exercise of their rights to self-organization and collective bargaining, and by persuading and coercing its employees to refrain from becoming members of the Union and to sign individual contracts of employment, had engaged in an unfair labor practice within the meaning of § 8 (1) of the Act, and that by initiating, sponsoring and dominating a labor organization of its employees, the Collective Bargaining Committee, it had engaged in unfair labor practices within the meaning of § 8 (1) and (2) of the Act. The

Board's order directed petitioner to desist from dominating and interfering with the administration of the Collective Bargaining Committee, from recognizing the Committee as representing petitioner's employees, from giving effect to petitioner's contracts with the Committee and with the individual employees, and from refusing to bargain collectively with the Union. As affirmative relief, designed to effectuate the policy of the Act as authorized by § 10 (c), the Board ordered petitioner to bargain collectively, on request, with the Union; to withdraw recognition from the Committee; to inform the Committee and employees who had contracted individually that "such contract constitutes a violation" of the Act; that the employees are relieved from all obligations under it; that petitioner will "no longer demand its performance" and to post appropriate notices.

The Court of Appeals for the Second Circuit, upon petition of the Board for enforcement of the order, directed that it be enforced except for a modification of that part of the order which directed that petitioner recognize and bargain with the Union. The order of the Court of Appeals directed that this part of the Board's order be conditioned upon a determination in an election that the Union is still the choice as bargaining representative of a majority of the employees. 104 F. 2d 655.

Upon a petition which challenged the authority of the Board to make so much of its order as related to the contracts with petitioner's employees, without making the employees parties to the proceeding, we granted certiorari October 9, 1939, because of the importance of the question in the administration of the National Labor Relations Act, and because of an asserted misapplication of the principles of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261 and *Consolidated Edison Co.* v. *National Labor Relations Board,* 305

U. S. 197. Of lesser moment are questions, also raised by the petition,[2] whether the Board's finding that the Union was still the authorized bargaining representative of a majority of petitioner's employees, is supported by substantial evidence and, if not, whether the Circuit Court of Appeals properly directed the Board to conduct an election to determine whether the Union still represents a majority of petitioner's employees, and, finally, whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that the creation of the Organization Committee and petitioner's contracts with individual employees involved unfair labor practices, since both occurred after the charge was lodged with the Board and after its complaint was served on petitioner.

1. The Board found that petitioner, on July 20th and 29th, 1937, and thereafter, refused to recognize and to bargain collectively with the representative (the Union) of a majority of its employees. If we assume, as petitioner argues, that a majority of its employees had freely revoked their designation of the Union as bargaining representative and chosen in its stead the Collective Bargaining Committee, these circumstances do not militate against the findings of the Board that the Union represented the employees during July and August when the petitioner refused to bargain with it, nor do they relieve petitioner from the consequences of its refusal to bargain, which was an unfair labor practice.

Since the Court of Appeals has confirmed the findings of the Board, there is no occasion here to review the evidence in detail. *Cincinnati, H. & D. Ry. Co.* v. *Interstate*

[2] Petitioner's brief assails the Board's order on numerous grounds not set up in his petition for certiorari. We limit our review to the questions specifically raised in the petition. Rule 38. See *General Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 177, 178.

Commerce Commission, 206 U. S. 142, 154; *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 456. It is enough, with the findings not challenged, that there is evidence that by July 20th one hundred and nine of petitioner's one hundred and forty employees had signed applications for membership in the Union, designating it as the applicant's representative for collective bargaining, and that on that date negotiation began between petitioner and the Union representatives which was continued until August. The evidence shows that attempts by petitioner between that date and July 20th to circulate a petition among its employees nominating a committee to act as their collective bargaining representative failed. A few employees signed. Then, a number cancelled their signatures. The petition was returned to the petitioner's superintendent and was destroyed by an assistant secretary of the company. There is testimony that at the meeting with the Union representatives on July 29th petitioner's president declined to recognize the Union as the bargaining representative of all the employees, and declared that he would negotiate with it only as the bargaining representative of the Union members, refusing to bargain with it as the representative of all the employees, a plain violation of the Act. §§ 8 (5), 9 (a). This was followed by petitioner's refusal, on August 2nd, to negotiate with Union representatives. There was also evidence from which the Board could have found that the negotiations on July 20th and July 29th were not entered into by the petitioner in good faith, and were but thinly disguised refusals to treat with the Union representatives.

In view of the evidence already noted of the choice of the Union as bargaining representative by a large majority of the employees between July 14th and 20th, of the complete failure of petitioner's efforts to disturb that representation between the 20th and the 29th, there was

substantial evidence to support the Board's conclusion that the Union was the choice as bargaining representative of appellant's employees during July and in August, at least until the 5th, when petitioner refused to treat with the Union.

As will presently appear, the bargaining committee and the contracts obtained through its mediation were both the products of unfair labor practices, and the Committee, under the Board's order, was not entitled to recognition as the bargaining representative of the employees. Such injury, if any, as the petitioner might have suffered from the Board's order requiring it to recognize and bargain with the Union, is avoided by the direction of the Court of Appeals that this part of the order be conditioned upon a determination by an election that the Union is still the choice of a majority of the employees. The Board has not petitioned for certiorari and does not complain of this direction.

2. The petition for certiorari does not assail the findings of the Board that petitioner's officials initiated the organization of the Committee, and that it "sponsored and dominated the formation of the Committee and thereafter dominated its administration and contributed support to it." We shall not re-examine those issues here, more than to say that the evidence discloses that the purpose of creating the Committee was to secure the contracts and by the contracts the Committee was left without any further function to perform except to join with the employer in choosing an arbitrator for the arbitration of specified labor disputes.

But the petition raises the question whether the terms of the contract, as the Court of Appeals held, violate the National Labor Relations Act, and it challenges the authority of the Board because of the absence of the individual employees, as parties, to make any order respecting the contracts. The contracts, as the Board found, were

not only procured through the mediation of a company-dominated labor organization, but they were the means adopted to "eliminate the Union as the collective bargaining agency of its employees." We think it plain also that by their terms they imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the Act.

By the contract each employee agreed not "to demand a closed shop or a signed agreement by his employer with any Union." This provision foreclosed the employee from bargaining for a closed shop or a signed agreement with the employer, frequent subjects of negotiation between employers and employees, see *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* 236 *et seq.; National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U. S. 332, 342; cf. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 553, 555, note 7. In addition the restriction upon the employee's right to ask a signed agreement extending only to agreements with "any union" is in plain conflict with the public policy of the Act to encourage the procedure of collective bargaining, see § 1, since it discriminates against labor organizations by forbidding signed contracts with labor unions while it permits them with the individual workers. See *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* 236.

It likewise forestalls collective bargaining with respect to discharged employees, first providing that a discharged employee may submit to the employer facts indicating that his discharge was unreasonable and then stipulating that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation." The effect of this clause was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representatives, or in any way except personally.

Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra,* 265; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241. Hence the Board was free by its order to direct that the appellant should take no benefit from the contracts unless it was without authority to act because the individual signers of the contracts had not been made parties to the proceeding. It is urged that in the absence of the employees who signed the contract, the Board was powerless to declare it void and of no effect as to those employees, and that consequently it could make no order forbidding petitioner to make use of the contracts as the means of defeating the policy and purposes of the Act.

Consolidated Edison Co. v. *National Labor Relations Board, supra,* is not decisive of this question. There, page 236, after pointing out that the Board's "power to command affirmative action is remedial, not punitive, and is to be exercised in the aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act," decision was rested specifically on the ground that "here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."

It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law. *Pennoyer* v. *Neff,* 95 U. S. 714; *Riverside & Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189; cf. *Arizona* v. *California,* 298 U. S. 558, 571, 572. For that reason there is no occasion to consider now how far the contract rights, if any, of the employees may be passed upon by the Board and their exercise restricted by its order in proceedings to which the employees have been made parties. As the Board's power can be effectively exercised only upon petitioner, the employees are entitled to notice and hearing only if the statute requires them to be made parties to the proceeding. Consequently the only question we are called on to decide is whether, in the circumstances of this case, the exercise of the Board's authority is such a departure from accepted modes of procedure as rightly to be regarded as beyond the power conferred on the Board by § 10 of the Act.

The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co., ante,* p. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . ." § 1.

The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by § 10 (c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.*

In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. *Shields* v. *Barrow,* 17 How. 130, 140; *Carroll* v. *New York Life Ins. Co.,* 94 F. 2d 333; cf. *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, 48. Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.

But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate, so that the court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it. *General Investment Co.* v. *Lake Shore Ry.,* 260 U. S. 261, 285, 286; *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 10 F. Supp. 512,

515, aff'd 76 F. 2d 1002; *Fidelity & Deposit Co.* v. *Montana,* 92 F. 2d 693, 698; *Brogdex Co.* v. *Food Machinery Co.,* 92 F. 2d 787, 789; *Commercial Casualty Ins. Co.* v. *Lawhead,* 62 F. 2d 928, 931, 932; cf. *Hamilton* v. *Savannah, F. & W. Ry. Co.,* 49 F. 412; *Howe* v. *Howe & Owen Ball Bearing Co.,* 154 F. 820, 828; *Alcazar Amusement Co.* v. *Mudd & Colley Amusement Co.,* 204 Ala. 509; 86 So. 209; *E. L. Husting Co.* v. *Coca-Cola Co.,* 194 Wis. 311; 216 N. W. 833; *Nokol Co.* v. *Becker,* 318 Mo. 292; 300 S. W. 1108.

Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights.

The Board's order runs only against petitioner. It directs that it shall cease recognizing the Committee as the representative of any of the employees for the purpose of dealing with petitioner concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work; that it shall not "give effect" to the contracts with its employees; that it notify each

employee that the contract violates the Act and that petitioner "is therefore obliged to discontinue such contract as a term or condition of employment; and the employees are released from its obligations and the respondent [petitioner here] will no longer demand its performance," and that it "will no longer offer, solicit, enter into, continue, enforce or attempt to enforce such contracts with its employees."

The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication. We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. Section 10 (a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice.

In these respects the order does not go beyond those in suits brought by the United States to restrain violations of the Sherman Act, where the injunction was broad enough to prevent the offender from carrying out contracts with persons not parties to the suits. *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 456; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30;

Interstate Circuit, Inc. v. *United States,* 306 U. S. 208, 220. Similarly, in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties. E. g. *Butterick Co.* v. *Federal Trade Commission,* 4 F. 2d 910; *Q. R. S. Music Co.* v. *Federal Trade Commission,* 12 F. 2d 730; *J. W. Kobi Co.* v. *Federal Trade Commission,* 23 F. 2d 41. Cf. *Federal Trade Commission* v. *Beech-Nut Co.,* 257 U. S. 441. In *Virginian Railway Co.* v. *System Federation No. 40, supra,* 539, 540; 11 F. Supp. 621, 623, the effect of the decree was to order the employer to deal exclusively with the Federation, although the employer had a contract with an association not a party to the suit, found to be a dominated labor organization. In every case the third persons were left free to assert such legal rights as they might have acquired under their contracts. But in all, the public right was vindicated by restraining the unlawful actions of the defendant even though the restraint prevented his performance of the contracts.

As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal, we think they are not indispensable parties for purposes of the Board's order and the statute does not require their presence as parties to the present proceeding and there was no abuse of the Board's discretion in its failure to make them parties.[3] It is unnecessary to consider now to what ex-

[3] Orders of the Board have been upheld which direct the employer to cease giving effect to such contracts, although no notice was given

tent or by what procedure it would be necessary to make the employees parties to a proceeding pending before the Board in the event that it undertook to make an order directed to the employees foreclosing any asserted rights under their contracts in order to effectuate the policies of the Act. Compare the procedure used in *New England Divisions Case,* 261 U. S. 184, 197.

The Board's order to post notices requires the notice to announce that the contracts with the employees are "void and of no effect." In order that the notice may more accurately represent the affirmative action of the Board and that misinterpretation of its action may be avoided, the order appealed from should be so modified as to omit the quoted words and direct that clause (3) of the Board's order, numbered 2 (d) specifying the contents of the notice, read as follows:

(3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts.

3. The amended charge, which initiated the present proceeding pursuant to § 10 (b) of the Act, was lodged

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to the company-dominated labor organizations or the employees. *National Labor Relations Board* v. *Hopwood Retinning Co.,* 98 F. 2d 97, 99, 100; *National Labor Relations Board* v. *Eagle Mfg. Co.,* 99 F. 2d 930; *National Labor Relations Board* v. *Ronni Parfum, Inc.,* 104 F. 2d 1017; *National Labor Relations Board* v. *Stackpole Carbon Co.,* 105 F. 2d 167, 169; *Titan Metal Mfg. Co.* v. *National Labor Relations Board,* 106 F. 2d 254. *Contra: National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. 2d 198; *National Labor Relations Board* v. *Sterling Electric Motors, Inc.,* 109 F. 2d 194; 5 Labor Relations Reporter 600.

with the Board by the Union on August 2, 1937, before petitioner had succeeded in organizing the Committee and in securing the signatures of its employees to the contracts, but after petitioner's unsuccessful attempt in July to deal with its employees independently of the Union. The charge, in addition to other unfair labor practices not now material, alleged that petitioner had "coerced and attempted to coerce its employees into signing individual contracts with the said company; in that the said company has called meetings of its employees and has compelled said employees to attend said meetings, and has attempted to compel said employees to form committees, not of their own choosing, to bargain collectively with the said company; . . ."

The complaint elaborated the charge with particularity, setting forth that petitioner had formed and initiated a labor organization of its employees, dominated and interfered with the administration of that organization, and had continued to do so down to the date of the complaint, October 2, 1937; that petitioner "has made signing of individual contracts a condition of employment"; and that by these and other acts petitioner "is interfering with, restraining, and coercing its employees in exercise of the rights guaranteed by § 7 of the Act."

Petitioner contends that the charge is a jurisdictional prerequisite to the complaint and subsequent proceedings, and that they are restricted to the specific unfair labor practices alleged in the charge. See *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. 2d 97. It argues that in the proceedings before the Board there was a fatal departure from the charge insofar as the Board's finding and order are concerned with the subsequent organization of the Committee and the signing of the employees' contracts. The argument is addressed only to want of power in the Board and raises no question of unfairness to petitioner in the preparation and prosecution of his case.

It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that "the Board was within its power in treating the whole sequence as one."

We find it unnecessary to discuss other points raised by the petitioner. We have considered them and find them without merit.

The order below will be modified as directed by this opinion and as so modified it will be affirmed.

Affirmed.

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

MR. JUSTICE DOUGLAS:

MR. JUSTICE BLACK and I see no reason or occasion for the modification of the order. For as stated in the

opinion of the Court, the Board has not undertaken to pass on the rights of the employees under those contracts. Nor has any employee urged, here or below, that the order affects his contractual rights or casts a cloud on them. Whether the employees would be indispensable parties to the proceeding should the Board in order to effectuate the policies of the Act undertake to nullify their rights is a question on which we want to reserve decision until the Board passes on it and until it is put in issue by persons who have a standing to raise it.

PARAMINO LUMBER CO. ET AL. *v.* MARSHALL, DEPUTY COMMISSIONER, ET AL.

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

No. 271. Argued January 30, 1940.—Decided March 11, 1940.

1. A private Act of Congress which, after an award of compensation for disability made by a deputy commissioner under the Longshoremen's & Harbor Workers' Compensation Act had become final by expiration of the time for review, authorized and directed the Employees' Compensation Commission to review the order and issue a new one, whereupon there was awarded additional compensation for disability continuing beyond the date as of which by the prior order it was deemed to have terminated, *held*, as to the employer and insurance carrier, not violative of the due process clause of the Fifth Amendment. Pp. 374, 378.
2. The Act was validly enacted by Congress to cure a defect in administration developed in the handling of a claim compensable under the Longshoremen's & Harbor Workers' Compensation Act. P. 379.
3. The enactment by Congress of private Acts, except bills of attainder and grants of nobility, is not forbidden by the Federal Constitution. P. 380.
4. The contention that the equal protection clause of the Fourteenth Amendment should be read into the due process clause of the Fifth Amendment, and that the Act denies equal protection, is rejected. Pp. 379–380.

5. The Act is not invalid as an encroachment by Congress on the judicial function. P. 381.

27 F. Supp. 823, affirmed.

APPEAL from a decree of a District Court of three judges upholding the constitutionality of a special Act of Congress and dismissing libels in two cases consolidated for hearing.

Mr. Stanley B. Long, with whom *Mr. Edward G. Dobrin* was on the brief, for appellants.

The Act grants to Clark special privileges not accorded to other longshoremen similarly situated, and denies to appellants the equal protection of the laws.

Due process has the same meaning in the Fifth and Fourteenth Amendments. *Twining* v. *New Jersey,* 211 U. S. 78, 100, 101; *United States* v. *Armstrong,* 265 F. 683, 690; *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Bartlett Trust Co.* v. *Elliott,* 30 F. 2d 700, 701; *Hibben* v. *Smith,* 191 U. S. 310, 325.

Due process requires equal treatment of all persons similarly situated, and protects against arbitrary classification and discrimination by Congress. *Hurtado* v. *California,* 110 U. S. 516, 535, 536; *United States* v. *Armstrong, supra; United States* v. *Yount,* 267 F. 861, 863; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657, 662; *Bank of Columbia* v. *Okeley,* 4 Wh. 235, 244; *Caldwell* v. *Texas,* 137 U. S. 692, 697; *Southern Bell T. & T. Co.* v. *Calhoun,* 287 F. 381, 384; *United States* v. *Ballard,* 12 F. Supp. 321, 326; *Wallace* v. *Currin,* 95 F. 2d 856, 867; *Pryor* v. *Western Paving Co.,* 184 P. 88, 90; *Vanzant* v. *Waddel,* 2 Yerg. 260, 269, 270; *Sims* v. *Rives,* 84 F. 2d 871, 878; see, also, *Maxwell* v. *Dow,* 176 U. S. 581; *Barclay* v. *Edwards,* 267 U. S. 442, 450. Cf. *Truax* v. *Corrigan,* 257 U. S. 312, 331, 332.

The due process provision of the Fifth Amendment is broad enough in its scope and purpose to include the

equal protection clause specifically set forth in the Fourteenth Amendment. Willoughby on the Constitution, 2d Ed., (1929) pp. 1928, 1929; Story on the Constitution, 5th Ed., (1891) pp. 705, 706.

The Act is violative of due process however beneficent its purpose.

The compensation award was a final adjudication vesting property rights. A valid, final judgment vests property rights not alterable by subsequent legislation. *United States* v. *Peters,* 5 Cranch 115, 136; *McCullough* v. *Virginia,* 172 U. S. 102, 125; *Memphis* v. *United States,* 97 U. S. 293, 297; *Hoyt Metal Co.* v. *Atwood,* 289 F. 453, 454, 455; *Gilman* v. *Tucker,* 28 N. E. 1040.

A compensation order under the Longshoremen's Act is a final determination of "private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson,* 285 U. S. 22, 51. An award embodies the liability imposed by the Act; and the duty to abide by it is judicially enforceable.

Subject only to the statutory provisions for review and modification, an award is a final determination of all questions involved in the litigation and the rights and liabilities fixed therein are unalterable. *Shugard* v. *Hoage,* 89 F. 2d 796; *Mille* v. *McManigal,* 69 F. 2d 644; *Associated Indemnity Corp.* v. *Marshall,* 71 F. 2d 235; *Campbell* v. *Lowe,* 10 F. Supp. 288; *Didier* v. *Crescent Wharf & Warehouse Co.,* 15 F. Supp. 91; *Globe Stevedoring Co.* v. *Peters,* 57 F. 2d 256; *Bulczak* v. *Independent Pier Co.,* 17 F. Supp. 973; *United Fruit Co.* v. *Pillsbury,* 55 F. 2d 369. See, also, *Twine* v. *Locke,* 68 F. 2d 712.

In *Williams* v. *Norris,* 12 Wh. 117, the private Act was remedial only.

Assuming that the statutory right to file a claim for the reopening of an award and for additional compensation is in the nature of a continuing cause of action

(compare *Mattson* v. *Department of Labor and Industries,* 293 U. S. 151), the time limitation is inseparable from the right. *Young* v. *Hoage,* 90 F. 2d 395; *Ayers* v. *Parker,* 15 F. Supp. 447; *Kobilkin* v. *Pillsbury,* 103 F. 2d 667.

The lapse of the time limit on such statutory causes of action not only bars the remedy but destroys the liability as well, and an act of the legislature reviving them constitutes a deprivation of property without due process of law. *Danzer & Co.* v. *Gulf & Ship Island R. Co.,* 268 U. S. 633; *Peninsula Produce Exchange* v. *New York, P. & N. R. Co.,* 137 A. 350; aff'd 276 U. S. 599. See, also, *New York Central R. Co.* v. *Lazarus,* 278 F. 900, 904; *Wenatchee Produce Co.* v. *Great Northern Ry. Co.,* 271 F. 784, 785.

The Act attempts to create a new substantive right for the benefit of Clark and is not merely an amendment to the Longshoremen's Act.

Although retrospective operation of a statute in and of itself affords no basis for invalidating it, the vice of this Act is its attempt to attach to closed transactions new liabilities and obligations. *Webster* v. *Cooper,* 14 How. 488; *Barnitz* v. *Beverly,* 163 U. S. 118; *Bradley* v. *Lightcap,* 195 U. S. 1; *Ettor* v. *Tacoma,* 228 U. S. 148; *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139. See, also, *Dash* v. *Van Kleek,* 7 Johns. 477. Property rights vested under existing statutes may not be destroyed by repeal thereof. *United States* v. *Kendall,* 263 F. 126; *Arnold & Murdock Co.* v. *Industrial Comm'n,* 145 N. E. 342; *Dow* v. *Norris,* 4 N. H. 16.

A further infirmity is that the Act arbitrarily takes property from one private individual and gives it to another. *Missouri Pacific R. Co.* v. *Nebraska,* 164 U. S. 403; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Duncan & Co.* v. *Wallace,* 21 F. Supp. 295, 308.

The Act is an attempted usurpation by Congress of judicial functions. It is judicial in nature and authorizes a readjudication between individuals of private property rights arising out of past transactions.

Legislative grant of a new trial, rehearing or further determination in a cause which has proceeded to final adjudication under existing statutes is an attempted exercise of judicial power. *Merrill* v. *Sherburne,* 1 N. H. 199; *Petition of Siblerud,* 182 N. W. 168, 169; *Union School District No. 1* v. *Foster Lumber Co.,* 286 P. 774, 775; *Pocono Pines Hotels Co.* v. *United States,* 73 Ct. Cls. 447, 499; see, also, *Casieri's Case,* 190 N. E. 118; *Roles Shingle Co.* v. *Bergerson,* 19 P. 2d 94. Congress possesses no judicial power. *Kilbourn* v. *Thompson,* 103 U. S. 168.

Mr. Oscar A. Zabel, with whom *Mr. Edwin J. Brown, Sr.* was on the brief, for John T. Clark, appellee. *Solicitor General Biddle* was on a memorandum for Wm. A. Marshall, appellee.

Mr. Justice Reed delivered the opinion of the Court.

The question is whether the due process clause of the Fifth Amendment is violated by a private act of Congress directing a review of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act [1] after there had been a final award by the deputy commissioner and after the time for review of the award had expired.

On January 17, 1931, the appellee Clark fell and fractured a rib while working on the navigable waters of the United States as a longshoreman for the appellant Paramino Lumber Company. The other appellant, the Union Insurance Company of Canton, Ltd., is the in-

[1] 33 U. S. C. §§ 901–50.

surance carrier of the Lumber Company under the Compensation Act. The fall having disabled Clark, the appellants voluntarily paid him compensation. Then, on Clark's application, hearings were had under the Compensation Act which resulted in a determination on August 26, 1931, by the deputy commissioner that Clark had been wholly disabled from the date of his fall to July 4, 1931, that on the latter date he had recovered from the disability, and that he had been paid by appellants all the compensation due him. No proceedings being brought to review this award, it became final in thirty days.[2] Almost five years later, the Congress passed a private act ordering the Compensation Commission to review Clark's case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards "to the contrary notwithstanding."[3] The information which led the House and Senate Committees on Claims to recommend passage of the act[4] indicated that

[2] 44 Stat. 1436, § 21; 33 U. S. C., § 921.

[3] 49 Stat., pt. 2, p. 2244. The act in full reads:

"That in the case of John T. Clark, of Seattle, Washington, whose disability compensation under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was terminated as of July 5, 1931, by a compensation order filed August 26, 1931, the Employees' Compensation Commission be, and it is hereby, authorized and directed to review such order in accordance with the procedure prescribed in respect of such claims in section 19 of said Act, and in accordance with such section to issue a new compensation order which may terminate, continue, increase, or decrease such compensation, the provisions of sections 21 and 22 of the said Act, as amended, to the contrary notwithstanding: *Provided*, That such new order shall not affect any compensation paid under authority of the prior order."

[4] S. Rep. No. 1645, 74th Cong., 2d Sess.; H. R. Rep. No. 1892, 74th Cong., 1st Sess. The information before the Committees is attached to both reports and includes statements by the doctors who examined, X-rayed, and operated on Clark after the deputy commissioner's order; letters from the Compensation Commission

Clark had first been treated by his employer's physician who operated on his twelfth rib and reported that an examination of the eleventh rib showed a firm union at the site of the fracture of that rib. On the basis of this report the deputy commissioner concluded that Clark had recovered and terminated his compensation. But Clark's pain continued, and within four months of the deputy commissioner's order X-rays taken by other physicians disclosed that the fracture of the eleventh rib was ununited, and in order to give Clark relief an operation fusing the bone fragments had to be performed. After this the rib healed, but in March, 1935, the physician who performed the second operation reported that Clark was still experiencing pain in the region of his injury. Since the deputy commissioner had no jurisdiction over the case after he made his order, and since the time for judicial review expired prior to the time of the operation on the eleventh rib, Clark had no opportunity under the act to have his compensation readjusted.[5]

After an unsuccessful attempt by appellants to enjoin a hearing under the private act,[6] a hearing was had and

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discussing the history of the case; and a letter from the deputy commissioner to the sponsor of the act, Congressman Zioncheck, relating the deputy commissioner's participation in the case.

[5] See note 2 *supra*. Section 22 of the Compensation Act (33 U. S. C. § 922), allowing the deputy commissioner to issue an amended award "on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner," was not available to Clark because at the time of his discovery of his continued disability the deputy commissioner could only take such action "during the term of an award." 44 Stat. 1437. On May 26, 1934, the section was amended (48 Stat. 807) to allow new awards because of changed conditions to be made "at any time prior to one year after the date of the last payment of compensation." Had this been in force at the time of Clark's injury, presumably it would have afforded him a remedy for a new award, but when it was passed more than a year had expired from the last payment of compensation.

[6] 95 F. 2d 203.

the deputy commissioner issued a new award granting Clark compensation for total disability from the date of the prior award, July 4, 1931, to January 5, 1939. Appellants brought two actions against Clark and the deputy commissioner seeking injunctions against the operation of the private act through prohibition of any further steps under the new award. The first bill was framed as an independent suit in equity; the second sought relief under the section of the Compensation Act providing for "injunction preceedings" to review awards made under the Act.[7] Under the Act of August 24, 1937,[8] a three-judge court was convened and the Attorney General duly notified. The causes having been transferred to the admiralty side of the court and consolidated for all purposes, the appellees filed exceptions claiming that the appellants had failed to state a cause of action. The court upheld the validity of the special act and sustained the appellee's exceptions.[9]

By direct appeal the appellants challenge the decree below, contending that the private act violates the due process clause of the Fifth Amendment. The argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights.

An award under the Longshoremen's and Harbor Workers' Compensation Act determines the liability of

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[7] 44 Stat. 1436, § 21; 33 U. S. C. § 921.

[8] 50 Stat. 752, § 3; 28 U. S. C. § 380a.

[9] *Paramino Lumber Co.* v. *Marshall*, 27 F. Supp. 823; discussed in Comment, The Constitutionality of Private Acts of Congress (1940) 49 Yale L. J. 712.

employer to employee.[10] But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee.[11] In such circumstances we see no violation of the due process clause.

The principle underlying this conclusion is illustrated by *Graham & Foster* v. *Goodcell.*[12] There a retroactive act of the Congress barred recovery by taxpayers of payments for taxes, properly owing but collection of which was barred by limitation. At the time of the enactment of the controverted statute, the taxpayer had a right to recover the payment. Limitation had been permitted to run in favor of the taxpayer under a mistake of law. This Court upheld the legislation as consistent with due process on the ground that it was a curative act to remedy mistakes in administration where the remedy "can be applied without injustice." [13]

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[10] *Crowell* v. *Benson,* 285 U. S. 22.

[11] See note 5, *supra.*

[12] 282 U. S. 409.

[13] See the cases cited to support the conclusion: *Forbes Boat Line* v. *Board of Comm'rs,* 258 U. S. 338; *United States* v. *Heinszen & Co.,* 206 U. S. 370; *Tiaco* v. *Forbes,* 228 U. S. 549; see also *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 302.

Rights obtained by an attaching creditor were subjected to the equity of a prior mortgage, invalid because improperly recorded, by a subsequent act in *McFaddin* v. *Evans-Snider-Buel Company.*[14] This Court refused to accept the argument that such a retroactive statute deprived the holder of the attachment lien, with notice of the prior equity, of property without due process.[15] Even more recently in *Carpenter* v. *Wabash Railway Company,*[16] we upheld as valid and applicable an act granting priority to railroad employees for damages for personal injuries over other claimants in equity receiverships. The act there in question was passed while certiorari was pending in this Court from a contrary decision upon priority which we assumed to be correct. This ruling resulted from the "superior equities" of the employees.[17]

It is unimportant whether the claim persisted after the bar[18] or ended with the running of limitation.[19] To cure a fault of administration Congress may validly enact this act.

It is urged by appellant, however, that the equal protection clause of the Fourteenth Amendment should be

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[14] 185 U. S. 505, 511.

[15] See *Independent Pier Co.* v. *Norton,* 12 F. Supp. 974, where the amendment of May 26, 1934, 33 U. S. C. § 922, construed as extending the time for review of an award under Longshoremen's and Harbor Workers' Compensation Act for one year retroactively as to a final award, was held within due process. See also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421.

[16] *Ante,* p. 23.

[17] Cf. *Danforth* v. *Groton Water Co.,* 178 Mass. 472; 59 N. E. 1033; *Dunbar* v. *Boston & Providence Railroad,* 181 Mass. 383, 386; 63 N. E. 916; *Robinson* v. *Robins Dry Dock & Repair Co.,* 238 N. Y. 271; 144 N. E. 579. But see for criticism *Woodward* v. *Central Vermont Ry. Co.,* 180 Mass. 599, 603; 62 N. E. 1051; *Ziccardi's Case,* 287 Mass. 588, 591; 192 N. E. 29; *Casieri's Case,* 286 Mass. 50; 190 N. E. 118.

[18] *Campbell* v. *Holt,* 115 U. S. 620.

[19] *William Danzer Co.* v. *Gulf & S. I. R. Co.,* 268 U. S. 633.

read into the due process clause of the Fifth Amendment. If so read, it is argued, this private act violates the rule of equal protection. This conclusion, however, we find untenable. Private acts, as such, are not forbidden by the Constitution. That instrument contains no provision against private acts enacted by the federal government except for a prohibition of bills of attainder and grants of nobility.[20] It took an act of Congress to outlaw them in the territories,[21] even though the Fifth Amendment is applicable to the territories.[22] The states have different situations as to the validity of private acts.[23] The constitutions of many of the states, unlike the federal, forbid private legislation without regard to the Fourteenth Amendment of the Constitution of the United States.[24]

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[20] Art. I, § 9, cls. 3 and 8.

[21] 24 Stat. 170; cf. *Maynard* v. *Hill,* 125 U. S. 190.

[22] *Farrington* v. *Tokushige,* 273 U. S. 284, 299.

[23] State courts have dealt with this question as a matter of the necessity of equality in due process before and after the passage of the Fourteenth Amendment. *Holden* v. *James,* 11 Mass. 396; *State* v. *Industrial Accident Board,* 94 Mont. 386; 23 P. 2d 253; *Matter of Decker* v. *Pouvailsmith Corp.,* 252 N. Y. 1, 7; 168 N. E. 442; *Roles Shingle Co.* v. *Bergerson,* 142 Ore. 131; 19 P. 2d 94; *Reiser* v. *William Tell Saving Fund Assn.,* 39 Pa. 137, 146; *State Bank* v. *Cooper,* 2 Yerg. (Tenn.) 599, 605, 606; *Tate's Executors* v. *Bell,* 4 Yerg. (Tenn.) 202; *Fisher's Negroes* v. *Dabbs,* 6 Yerg. (Tenn.) 119; cf. 2 Cooley, Constitutional Limitations (8th ed.) 809.

[24] There are restrictions against the enactment of special legislation in the constitutions of all the states except Connecticut, Massachusetts, New Hampshire and Vermont. The following are typical provisions: (1) "The legislature shall not pass local or special laws concerning any of the following enumerated cases, . . ."; followed by an enumeration of proscribed subjects which is concluded with the catchall, "where a general law can be made applicable." See

Nor can we say that this legislation is an excursion of the Congress into the judicial function.[25]

Affirmed.

MR. JUSTICE MCREYNOLDS dissents.

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

Cal. Const., art. IV, § 25; Ky. Const., § 59. (2) "All laws, of a general nature, shall have a uniform operation throughout the State. . . ." See Ohio Const., art. II, § 26. (3) "No special, private, or local law . . . shall be enacted in any case which is provided for by a general law. . . ." See Ala. Const., art. IV, § 105. (4) "The legislature shall have no power to suspend any general law for the benefit of any particular individual. . . ." See Tenn. Const., art. XI, § 8. Often there will be more than one provision in a constitution. The various provisions and decisions under them are discussed in Cloe and Marcus, Special and Local Legislation (1936) 24 Ky. L. J. 351, and Binney, Restrictions Upon Local and Special Legislation, p. 127, *et seq.*

[25] *Johannessen* v. *United States,* 225 U. S. 227, 241.

The state cases cited by appellants upon the question of the invasion of judicial authority involve statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable:

Sanders v. *Cabaniss,* 43 Ala. 173; *Trustees Fund* v. *Bailey,* 10 Fla. 238; *Dorsey* v. *Dorsey,* 37 Md. 64; *State ex rel. Flint* v. *Flint;* 61 Minn. 539; 63 N. W. 1113; *Petition of Siblerud,* 148 Minn. 347; 182 N. W. 168; *Merrill* v. *Sherburne,* 1 N. H. 199; *Matter of Greene,* 166 N. Y. 485; 60 N. E. 183; *De Chastellux* v. *Fairchild,* 15 Pa. 18; *Taylor & Co.* v. *Place,* 4 R. I. 324; *In re Handley's Estate,* 15 Utah 212; 49 P. 829; *Ratcliffe* v. *Anderson,* 31 Gratt. 105 (Va.); *Marpole* v. *Cather's Adm'r,* 78 Va. 239; *Davis* v. *Menasha,* 21 Wis. 491.

Compare *Jones* v. *Mehan,* 175 U. S. 1; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421; *Pocono Pines Assembly Hotels Co.* v. *United States,* 73 Ct. Cls. 447.

DICKINSON INDUSTRIAL SITE, INC. *v.* COWAN ET AL.

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

No. 386. Argued February 6, 1940.—Decided March 11, 1940.

1. An appeal taken after the effective date of the "Chandler Act" (September 22, 1938), from an order granting an allowance for services, previously entered in a reorganization proceeding under § 77B of the Bankruptcy Act, is governed by the Chandler Act. P. 383.
2. Section 276 (c) (2) of the Chandler Act which provides that the provisions of Ch. X of that Act (the successor to § 77B of the Bankruptcy Act), shall apply to pending proceedings "to the extent that the judge shall deem their application practicable" relates solely to proceedings in the District Court and has no application to appellate proceedings. P. 383.
3. Appeals from orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals. P. 384.

104 F. 2d 771, affirmed.

CERTIORARI, 308 U. S. 543, to review a decision denying a motion to dismiss an appeal from an order of the District Court granting an allowance for services in a reorganization under the Bankruptcy Act.

Messrs. Benjamin Wham and *Walter A. Wade,* with whom *Mr. George W. Ott* was on the brief, for petitioner.

Mr. Julian H. Levi, with whom *Mr. Samuel E. Hirsch* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

A plan of reorganization of petitioner under § 77B of the Bankruptcy Act (48 Stat. 912) was confirmed on Feb-

ruary 23, 1938. Respondents are members of a bondholders' committee who sought an allowance in those proceedings. On October 26, 1938, they were awarded $2,000 for services rendered, $20,000 having been asked. On November 25, 1938, they petitioned the Circuit Court of Appeals for leave to appeal from that order. The appeal was allowed. Petitioner moved to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction to allow it, the argument being that respondents had an appeal as of right which could only be taken by filing a notice of appeal in the District Court. The Circuit Court of Appeals denied petitioner's motion to dismiss and modified the order by increasing the allowance to $10,000. 104 F. 2d 771. We granted certiorari because of a conflict of that ruling with *London* v. *O'Dougherty*, 102 F. 2d 524, which held that appeals from compensation orders involving $500 or more could be had as a matter of right under the Chandler Act (52 Stat. 840).

First. The Circuit Court of Appeals held that the provisions of the Chandler Act, which became effective on September 22, 1938 (§ 7), were applicable to this appeal. We think that follows from § 6 (b) of the Act which states that "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; . . ." Where, as here, appeal is taken after the effective date of the Act, it is clearly "practicable" to apply the new appeal provisions. Contrary to respondents' contention, § 276 (c) (2) is not applicable to appeals. It provides that the provisions of Ch. X (the successor to § 77B) shall apply to pending proceedings "to the extent that the judge shall deem their application practicable" where the petition in such proceedings was approved more than three months before the effective date of the amendatory Act. But that relates solely to proceedings in the district court. The

"judge" referred to in that section means a "judge of a court of bankruptcy." § 1 (20). Such court does not include the Circuit Court of Appeals. § 1 (10). Hence the application of the new appeal provisions to this type of case is not dependent on a determination of practicability by the district judge under § 276 (c) (2).

Second. Petitioner's argument that the appeal in this case could be taken as a matter of right requires an analysis of § 24 and § 250 of the Chandler Act. Sec. 24 provides in part:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Sec. 250 provides:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Petitioner contends that Congress by § 24 created a single test—the amount of the order appealed from—for determining whether leave to appeal was necessary and that the words "allowed by" in § 250 refer to appeals from orders of allowances of less than $500.

Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals.

Under § 77B (c) (9) it was provided that "appeals from orders fixing such allowances may be *taken to* the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily." And it was held by this Court in *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that those appeals could not be had as a matter of right but only in the discretion of the appellate court as provided in former § 24 (b). That was the way the matter stood when § 250 was drafted. The history of that section [1] shows that it was derived from § 77B (c) (9). But, significantly, the words *"and allowed by"* were added—words not present in § 77B (c) (9). The result plainly was (1) to carry over into the new act the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* and (2) to set apart in a separate section the provisions for appeals from that type of order so as to make those appeals no longer dependent on § 24, which had become a storm center for the revisionists.[2] If the House did not intend the latter result, then the addition of the words "and allowed by" were wholly needless, as under the House revision of § 24 appeals from compensa-

[1] S. Rep. No. 1916, 75th Cong., 3rd Sess., p. 38.

[2] H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong., 1st Sess., pp. 79–80, 213–218, 222–223, 240–241, 405–406; S. Hearings on H. R. 8046, 75th Cong., 2nd Sess., pp. 53–54, 60, 103–108. And see H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 22.

tion orders would have been discretionary with the appellate court.[3]

[3] This is made clear by comparison of § 250 with § 24 as they passed the House.

Sec. 250 then read:

"Appeals in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Sec. 24 a and b then read:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions (1) of controversies arising in the course of proceedings under this Act in the same manner and to the same extent as in suits at law or in equity; (2) to superintend and revise, in matter of law and fact, the proceedings of such inferior courts of bankruptcy in the following cases: (a) A judgment adjudging or refusing to adjudge a person a bankrupt; (b) a judgment approving or dismissing a petition filed by or against a debtor under chapter X of this Act; (c) a judgment granting or denying a discharge; (d) a judgment confirming or refusing to confirm an arrangement or plan; (e) a judgment allowing or rejecting a debt, claim, or interest of $500 or over; and (f) a judgment allowing or dismissing an application for an order upon a bankrupt or other person to deliver or turn over property to the marshal, or to the receiver or trustee of the estate; and (3) to superintendent and revise, in matter of law only, the proceedings in all other cases of such inferior courts of bankruptcy.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal: *Provided,* That in the cases specified in subdivision a (3) of this section, such appeals shall be allowed in the discretion of the appellate court: *And provided further,* That where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed, when taken, and where, within the time

Hence under the House Bill as it reached the Senate, it seems clear that no such appeals could be had as a matter of right. In the Senate the present § 24 was substituted for the House provision; but the present § 250 was not altered in any respect material here. It is clear from the Senate hearings and Committee Report that the Senate was interested only in the elimination from § 24 of the old distinctions between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy.[4] There was not the slightest intimation of any

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limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

[4] S. Rep., *supra* note 1, p. 4, commented as follows on the present § 24:

"The House bill makes certain amendments in the sections of the act (24–25) relative to appeals, but preserves the existing distinction between appeals as of right and appeals by leave of the appellate courts. The amendment presented by the committee practically abolishes this distinction. Under it, appeals may be made as of right in all cases involving $500 or more. In controversies of less than this amount, appeals may be taken only upon allowance by the appellate court. The jurisdiction of the appellate court will extend both to matters of law and of fact, except that in an appeal from a judgment on a verdict rendered by a jury the jurisdiction will extend to matters of law only. The removal of the troublesome distinction will be a service to both bench and bar. It is often difficult to determine the proper procedure under the present law and frequently appeals are taken in both ways in order to be certain. The House bill seeks to remedy this condition by providing that in the event of mistake the appellate court may consider the appeal as properly taken and proceed to a determination of the case. Your committee believes it is much better to eliminate the distinction altogether."

The testimony of Reuben G. Hunt before the Senate Committee is particularly illuminating on this point of controversy. S. Hearings, *supra,* note 2, p. 53. See also Hunt, Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases, 42 Comm. L. Journ. (1937).

dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* or with § 250 as it passed the House. To be sure, the Senate Committee Report is somewhat ambiguous.[5] But it is perhaps significant that that report in commenting on § 24 stated not that it "abolished" but that it "practically abolished" the distinction between appeals as of right and appeals by leave of the appellate courts.

More important, however, is the matter of statutory construction. To hold that an appeal from a compensation order is governed by § 24 the words "taken to *and* allowed by" in § 250 must be read "taken to *or* allowed by." Only then can appeals from compensation orders involving less than $500 be governed by "allowed by" and appeals from all other such orders be governed by "taken to." In the face of the foregoing history we do not believe we are justified in substituting "or" for "and." The inappropriateness of it is somewhat emphasized by the history of *"taken to"* which in *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* was held not to permit an appeal as of right. It is further emphasized by considerations of policy.

The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control.[6] Buttressing that control was § 77B (c) (9) which, together with former § 24 (b), made appeals from compensation orders discretionary with the appellate court.

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[5] That report states that the present § 24 "practically abolishes" the distinction "between appeals as of right and appeals by leave of the appellate courts." *Id., supra,* note 4. And the Committee in commenting on § 250 merely says:

"Section 250, derived from section 77B (c) (9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record." *Id.,* p. 38.

[6] H. R. Rep. No. 194, 73rd Cong., 1st Sess., p. 1.

We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries,[7] such as members of committees, whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate.[8] Allowance or disallowance involves an exercise of sound discretion by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative.

Whether or not the Circuit Court of Appeals erred in modifying the order so as to grant respondents an increased allowance was not raised in the petition for certiorari and hence has not been considered here. *Helis* v. *Ward,* 308 U. S. 365.

Affirmed.

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[7] The fiduciary status of such claimants is expressly recognized in the Chandler Act. Sec. 249 provides in part:

"No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred."

[8] § 243.

SHELDON ET AL. *v.* METRO-GOLDWYN PICTURES CORP. ET AL.

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

No. 482. Argued February 8, 9, 1940.—Decided March 25, 1940.

1. That clause of § 25 (b) of the Copyright Act which authorizes recovery from an infringer, "in lieu of actual damages and profits," of "such damages as to the court shall appear to be just," is inapplicable where the only matter in question is the apportionment of profits established. P. 399.
2. The purpose of § 25 (b) of the Copyright Act, in awarding to a copyright proprietor against an infringer "all the profits which the infringer shall have made from such infringement," is to provide just compensation for the wrong—not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement. P. 399.
3. Where it is clear that the profits made by a copyright infringer are attributable in part to use of copyright material, but in part to what the infringer himself supplied, and where the evidence provides a fair basis of division, so as to give the copyright proprietor all the profits that can be deemed to have resulted from the use that belonged to him, the profits will be apportioned accordingly. *Callaghan* v. *Myers,* 128 U. S. 617, and *Belford* v. *Scribner,* 144 U. S. 488, distinguished. Pp. 399–402.
4. Principles governing apportionment of profits in patent infringement cases apply to cases of copyright infringement. P. 402.
5. In apportionment of profits between copyright proprietor and infringer, where mathematical exactness may be impossible, all that is required is a reasonable approximation, which may be attained with the aid of expert testimony. P. 403.
6. The amendment of the Patent Law (R. S. § 4921; Act of February 18, 1922) which expressly recognizes the use of expert testimony in establishing damages or profits from patent infringement, did not enlarge in that respect the rules already applied in courts of equity; and the fact that the copyright law was not similarly amended does not detract from the jurisdiction to receive evidence of experts in copyright infringement cases whenever found competent. P. 405.

7. Even in a case of deliberate plagiarism, the copyright owner, upon an equitable accounting of profits, can have only such profits as were due to the infringement. To award more would be to inflict an unauthorized penalty. P. 405.
8. Where the evidence showed that in the production of a motion picture, which was exhibited at great profit, material had been deliberately lifted from a copyrighted play, but that much the greater part of the profits was due to the actors, scenery, skill in production, expenses, etc., supplied and paid for by the infringers, an apportionment, with the aid of expert testimony, resulted in awarding one-fifth to the copyright proprietors. P. 406.

106 F. 2d 45, affirmed.

CERTIORARI, 308 U. S. 545, to review the reversal of a decree, 26 F. Supp. 134, which awarded to the present petitioners all of the net profits derived by the respondents from a motion picture infringing the petitioners' copyright. No question of burden of proof was involved.

Mr. Arthur F. Driscoll, with whom *Mr. Edward J. Clarke* was on the brief, for petitioners.

The court below failed to follow the statute. *Callaghan* v. *Myers,* 128 U. S. 617; *Belford* v. *Scribner,* 144 U. S. 488; *Dam* v. *LaShelle,* 175 F. 902. The infringee is entitled to "all the profits."

Apportionment in trademark cases is "inherently impossible." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.,* 240 U. S. 251. See, also, *Graham* v. *Platt,* 40 Cal. 593, 598. This Court refused to apply analogies of patent to trademark cases, notwithstanding *Westinghouse* v. *Wagner,* 225 U. S. 604, or *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641.

Apart from the fact that both a patent and a copyright are statutory monopolies there is nothing in common between them.

Two authors working independently could conceivably write the same work. Both would be entitled to a

valid copyright. There can be a plurality of copyrights. *Dymow* v. *Bolton,* 11 F. 2d 690, 691; *Sheldon* v. *Metro Goldwyn Pictures Corp.,* 81 F. 2d 49, 54.

A patent is invalidated by reason of prior art or anticipation; but a copyright, as provided in § 6, may be had on the rewriting of works in the public domain.

"Public domain," refers to those works upon which copyright has expired or which have been published without its protection, and are therefore open to the public to make copies thereof. The court below confuses this. It says "the plaintiffs worked over old material. The general skeleton was already in the public demesne." It apparently made no express apportionment on the basis of this statement; but if it did the error is aggravated.

Respondents are charged with having copied, not the trial of Madeleine Smith, but our dramatization of it.

The fact that the trial inspired the writing of the play does not diminish petitioners' rights against respondents for having copied. *Emerson* v. *Davies,* 8 Fed. Cas. 615, 620; *Macmillan* v. *Cooper,* 40 T. L. R. 186; *Bleistein* v. *Donaldson,* 188 U. S. 238, 250; *Jewelers' Circular Pub. Co.* v. *Keystone Pub. Co.,* 281 F. 83, 88.

The question in a patent suit is: Does the device impinge upon the bounds of the patent owner's grant? The question in a copyright suit is: Has one work been "copied" from another? If the work is properly protected but copied the recovery follows under the statute. Cf. *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.,* 225 U. S. 604, 614.

If industry can copy the work of an author; escape the hazard of an injunction because the arm of equity is not quick enough to stop the wrong before it has run; and after eight years of crushing litigation retain 80% of the gains, there is little incentive left for industry to consult with or make contracts with authors.

The law was designed as a deterrent to plagiarism—the copyright owner was given "all the profits" be they great or small. The law was not designed with regard to the ultimate position of the copyright owner—his recovery to be varied with the amount of the profits. The design of the law was to deprive the wrongdoer of all profits—not all profits if the infringement is a financial failure, and 20% of the profits if the infringement is a success.

Granting *arguendo* that there should be apportionment, the basis used by the court below has never been recognized even in the field of patents.

Apportionment in patent law can not rest upon the skill, science and endeavor which went into the making of the infringing device but must rest upon some separable item of a distinct and independent character. *Clark* v. *Johnson,* 199 F. 116, 122.

An apportionment on the basis used below is merely an apportionment for labor and materials used in manufacturing the infringing copy, the cost of which has already been allowed as an item of expense.

It is immaterial whether the infringing copy is good, bad or indifferent. Both the infringer and the infringee alike have to abide by the result of the taking. *Tilghman* v. *Proctor,* 125 U. S. 138, 140; *Crosby Valve* v. *Consolidated Valve Co.,* 141 U. S. 441; *Elizabeth* v. *Am. Nicholson Pavement Co.,* 97 U. S. 126, 138; *Livingston* v. *Woodsworth,* 15 How. 559.

The basis of the apportionment below is founded on the brand of talent and skill used by the infringer in the making of the copy. We call this nothing more than an apportionment on a labor and material basis. It is merely an item of cost to be allowed before arriving at the figure of profit, but not a basis upon which to apportion that profit.

But the court below, not only allowed the cost of the labor and material, but allowed respondents to share in the profits to the extent of 80%. Such treatment is never found in patent cases. *Duplate Corporation* v. *Triplex Safety Glass Co.,* 298 U. S. 448, 457; *Conroy* v. *Pennsylvania Electric & Mfg. Co.* 199 F. 427, 430, 431; *Christensen* v. *National Brake & Electric Co.,* 10 F. 2d 856, 866; aff'd 38 F. 2d 721; cert. den. 282 U. S. 864.

If there were to be an apportionment based upon the analogy of patents, it should be by a segregation of the copyrighted material from the added non-copyrighted portion.

In patent cases, the profits may be attributable to other portions of the machine because the unpatented portion may still stand as a useful mass and be viewed in its distinct and independent character. *Clark* v. *Johnson,* 199 F. 116; *Garretson* v. *Clark,* 111 U. S. 120.

The courts do not consider what portion of the profit may be ascribed to the defendant's good workmanship in infringing within the scope of the patent. *Clark* v. *Johnson, supra.*

It follows from the decision below that the right granted to the copyright owner to recover "all the profits" under the Act does not extend to the very good or glorified copies of his work, but only to those inferior or mediocre copies where the profits are not very great. The wrongdoer, if he is skillful, is to be credited with a share of the spoils. See, *Stearns-Roger Mfg. Co.* v. *Ruth,* 87 F. 2d 35, 39; *Christensen* v. *National Brake & Electric Co.,* 10 F. 2d 856, 866.

An infringer in an accounting for profits is viewed as a trustee *ex maleficio. Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.,* 240 U. S. 251, 259; *Westinghouse* v. *Wagner,* 225 U. S. 604, 618, 619; *Root* v. *Railway Co.,* 105 U. S. 189; *Wales* v. *Waterbury Mfg. Co.,* 101 F. 126; *Western Glass Co.* v. *Schmertz Wire Glass Co.,* 226 F. 730, 735.

He may retain no benefit from his wrong. *Duplate Corp.* v. *Triplex Safety Glass Co.,* 298 U. S. 448, 457; *Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.,* 141 U. S. 441.

This Court in softening the previous hard and fast "alternative rule" of *Garretson* v. *Clark,* 111 U. S. 120, as respects burden of proof, by its decisions in *Westinghouse Co.* v. *Wagner,* 225 U. S. 604, and *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641, has restricted its application to those cases where the infringement was not done in bad faith.

See, *Underwood Typewriter Co.* v. *Fox Typewriter Co.,* 220 F. 880, 886; *Brennan & Co.* v. *Dowagiac Mfg. Co.,* 162 F. 472, 476; *Dowagaic Mfg. Co.* v. *Superior Drill Co.,* 162 F. 479; *Hart* v. *Ten Eyck,* 2 Johns Ch. 62, 108; *Lupton* v. *White,* 15 Ves. Jr. 432–440.

The payment of $922,141.09 to Messrs. Mayer, Rubin and Thalberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively in the year 1932, is a distribution of profits and is not properly allowed as cost. *Lee* v. *Malleable Iron Range Co.,* 247 F. 795, 798.

The statute was framed (1) to punish the infringer, and (2) to compensate the copyright owner for his loss. *Providence Rubber Co.* v. *Goodyear,* 76 U. S. 788, 804; *Dean* v. *Mason,* 20 How. 198; *Root* v. *Railway Co.,* 105 U. S. 189, 207; *Ferris* v. *Frohman,* 223 U. S. 424, 437; *Larson Co.* v. *Wrigley Co.,* 277 U. S. 97.

A deliberate trespasser is not entitled to cost. *Bolles Woodenware Co.* v. *United States,* 106 U. S. 432; *Guffey* v. *Smith,* 237 U. S. 101; *Williamson* v. *Chicago Mill & Lumber Corp.,* 59 F. 2d 918; *Pittsburgh & West Virginia Gas Co.* v. *Pentress Gas Co.,* 7 A. L. R. 901; 100 S. E. 296; Restatement of the Law on Restitution, § 158 at page 632.

The "in lieu of" provision in § 25 (b) is not involved here. It means that in the absence of profits the court

has discretion to fix such damages as may be just. *Douglas* v. *Cunningham,* 294 U. S. 207, 209; *Davilla* v. *Brunswick-Balke-Collender Co.,* 94 F. 2d 567; *Hendricks* v. *Thomas,* 242 F. 37, 41; *Dam* v. *LaShelle,* 175 F. 902, 911.

Mr. John W. Davis, with whom *Messrs. J. Robert Rubin, Samuel D. Cohen,* and *Earle L. Beatty* were on the brief, for respondents.

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

The questions presented are whether, in computing an award of profits against an infringer of a copyright, there may be an apportionment so as to give to the owner of the copyright only that part of the profits found to be attributable to the use of the copyrighted material as distinguished from what the infringer himself has supplied, and, if so, whether the evidence affords a proper basis for the apportionment decreed in this case.

Petitioners' complaint charged infringement of their play "Dishonored Lady" by respondents' motion picture "Letty Lynton," and sought an injunction and an accounting of profits. The Circuit Court of Appeals, reversing the District Court, found and enjoined the infringement and directed an accounting. 81 F. 2d 49. Thereupon the District Court confirmed with slight modifications the report of a special master which awarded to petitioners all the net profits made by respondents from their exhibitions of the motion picture, amounting to $587,604.37. 26 F. Supp. 134, 136. The Circuit Court of Appeals reversed, holding that there should be an apportionment and fixing petitioners' share of the net profits at one-fifth. 106 F. 2d 45, 51. In view of the importance of the question, which appears

to be one of first impression in the application of the copyright law, we granted certiorari. December 4, 1939.

Petitioners' play "Dishonored Lady" was based upon the trial in Scotland, in 1857, of Madeleine Smith for the murder of her lover,—a *cause célèbre* included in the series of "Notable British Trials" which was published in 1927. The play was copyrighted as an unpublished work in 1930, and was produced here and abroad. Respondents took the title of their motion picture "Letty Lynton" from a novel of that name written by an English author, Mrs. Belloc Lowndes, and published in 1930. That novel was also based upon the story of Madeleine Smith and the motion picture rights were bought by respondents. There had been negotiations for the motion picture rights in petitioners' play, and the price had been fixed at $30,000, but these negotiations fell through.

As the Court of Appeals found, respondents in producing the motion picture in question worked over old material; "the general skeleton was already in the public demense. A wanton girl kills her lover to free herself for a better match; she is brought to trial for the murder and escapes." But not content with the mere use of that basic plot, respondents resorted to petitioners' copyrighted play. They were not innocent offenders. From comparison and analysis, the Court of Appeals concluded that they had "deliberately lifted the play"; their "borrowing was a deliberate plagiarism." It is from that standpoint that we approach the questions now raised.

Respondents contend that the material taken by infringement contributed in but a small measure to the production and success of the motion picture. They say that they themselves contributed the main factors in producing the large net profits; that is, the popular actors, the scen-

ery, and the expert producers and directors. Both courts below have sustained this contention.

The District Court thought it "punitive and unjust" to award all the net profits to petitioners. The court said that, if that were done, petitioners would receive the profits that the "motion picture stars" had made for the picture "by their dramatic talent and the drawing power of their reputations." "The directors who supervised the production of the picture and the experts who filmed it also contributed in piling up these tremendous net profits." The court thought an allowance to petitioners of 25 per cent. of these profits "could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture." But, though holding these views, the District Court awarded all the net profits to petitioners, feeling bound by the decision of the Court of Appeals in *Dam* v. *Kirk La Shelle Co.*, 175 F. 902, 903, a decision which the Court of Appeals has now overruled.

The Court of Appeals was satisfied that but a small part of the net profits was attributable to the infringement, and, fully recognizing the difficulty in finding a satisfactory standard, the court decided that there should be an apportionment and that it could fairly be made. The court was resolved "to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share." The court would not deny "the one fact that stands undoubted," and, making the best estimate it could, it fixed petitioners' share at one-fifth of the net profits, considering that to be a figure "which will favor the plaintiffs in every reasonable chance of error."

First. Petitioners insist fundamentally that there can be no apportionment of profits in a suit for a copyright infringement; that it is forbidden both by the statute and the decisions of this Court. We find this basic argument to be untenable.

The Copyright Act in § 25 (b) [1] provides that an infringer shall be liable—

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just, . . ."

We agree with petitioners that the "in lieu" clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.

Petitioners stress the provision for recovery of "all" the profits, but this is plainly qualified by the words "which the infringer shall have made from such infringement." This provision in purpose is cognate to that for the recovery of "such damages as the copyright proprietor may have suffered due to the infringement." The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement.

Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been allowed in equity both in copyright and patent cases as appropriate equitable relief incident to a decree for an injunction. *Stevens* v. *Gladding,* 17 How. 447, 455. That relief had been given in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim "that which, *ex aequo et bono,* is theirs, and nothing beyond this." *Livingston* v. *Woodworth,* 15 How. 546, 560. See *Root* v. *Railway Co.,* 105 U. S. 189, 194, 195. Statutory provision for the recovery of profits in patent cases was en-

[1] Act of March 4, 1909, § 25, 35 Stat. 1081, as amended by Act of August 24, 1912, 37 Stat. 489. 17 U. S. C., § 25 (b).

acted in 1870.[2] The principle which was applied both prior to this statute and later was thus stated in the leading case of *Tilghman* v. *Proctor,* 125 U. S. 136, 146:

"The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages."

In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill. As to § 25 (b) the House Committee said: [3]

"Section 25 deals with the matter of civil remedies for infringement of a copyright. . . . The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such a provision was found both in the trade-mark and patent

[2] Act of July 8, 1870, § 55, 16 Stat. 198, 206; R. S. 4921.

[3] House Report No. 2222, 60th Cong., 2d sess., p. 15. See, also, Senate Report No. 1108, 60th Cong., 2d sess., p. 15.

laws, the committee felt that it might be properly included in the copyright laws."

We shall presently consider the doctrine which has been established upon equitable principles with respect to the apportionment of profits in cases of patent infringement. We now observe that there is nothing in the Copyright Act which precludes the application of a similar doctrine based upon the same equitable principles in cases of copyright infringement.

Nor do the decisions of this Court preclude that course. Petitioners invoke the cases of *Callaghan* v. *Myers,* 128 U. S. 617, and *Belford* v. *Scribner,* 144 U. S. 488. In the *Callaghan* case, the copyright of a reporter of judicial decisions was sustained with respect to the portions of the books of which he was the author, although he had no exclusive right in the judicial opinions. On an accounting for the profits made by an infringer, the Court allowed the deduction from the selling price of the actual and legitimate manufacturing cost. With reference to the published matter to which the copyright did not extend, the Court found it impossible to separate the profits on that from the profits on the other. And in view of that impossibility, the defendant, being responsible for the blending of the lawful with the unlawful, had to abide the consequences, as in the case of one who has wrongfully produced a confusion of goods. A similar impossibility was encountered in *Belford* v. *Scribner,* a case of a copyright of a book containing recipes for the household. The infringing books were largely compilations of these recipes, "the matter and language" being "the same as the complainant's in every substantial sense," but so distributed through the defendants' books that it was "almost impossible to separate the one from the other." The Court ruled that when the copyrighted portions are so intermingled with the rest of the piratical work "that they cannot well be distinguished from it,"

the entire profits realized by the defendants will be given to the plaintiff.

We agree with the court below that these cases do not decide that no apportionment of profits can be had where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him. Both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits "which the infringer shall have made from such infringement."

Second. The analogy found in cases of patent infringement is persuasive. There are many cases in which the plaintiff's patent covers only a part of a machine and creates only a part of the profits. The patented invention may have been used in combination with additions or valuable improvements made by the infringer and each may have contributed to the profits. In *Elizabeth* v. *Pavement Co.,* 97 U. S. 126, 142, cited in the *Callaghan* and *Belford* cases, *supra,* it had been recognized that if a separation of distinct profit derived from such additions or improvements was shown, an apportionment might be had. See *Garretson* v. *Clark,* 111 U. S. 120, 121. The subject was elaborately discussed in the case of *Westinghouse Co.* v. *Wagner Co.,* 225 U. S. 604, where it was distinctly ruled that "if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains." There, the Court was concerned with the question of burden of proof. It was said that the plaintiff suing for profits was under the burden of showing that they had been made. The defendant had submitted evidence tending to show that it had added non-infringing and valuable

improvements which had contributed to the making of profits; and the plaintiff in reply had insisted that these additions had made no such contribution. But assuming, as had been found, that the additions were non-infringing and valuable improvements, and a *prima facie* case of contribution to profits thus appearing, the burden of apportionment would rest upon the plaintiff. But in that relation it had still to be considered that the act of the defendant had made it "not merely difficult but impossible to carry the burden of apportionment" and in such case, as the "inseparable profit must be given to the patentee or infringer," the law placed the loss on the wrongdoer.

The question of burden of proof does not arise in the instant case, as here the defendants voluntarily assumed that burden and the court below has held that it has been sustained. What is apposite, however, is the ruling in the *Westinghouse* case as to apportionment and the sort of evidence admissible upon that question. The Court pointed to the difficulties of working out an account of profits and thought that the problem was analogous to that presented where it is necessary to separate interstate from intrastate earnings and expenses in order to determine whether an intrastate rate is confiscatory. The Court observed that "while recognizing the impossibility of reaching a conclusion that is mathematically exact," there has been received, in addition to other relevant evidence, "the testimony of experts as to the relative cost of doing a local and through business." *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167, 178. The Court thought that "What is permissible in an effort to separate costs may also be done in a patent case where it is necessary to separate profits."

The principle as to apportionment of profits was clearly stated in the case of *Dowagiac Co.* v. *Minnesota Co.,* 235

U. S. 641,—a case which received great consideration. The Court there said:

"We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The masters and the courts below so found and we should hesitate to disturb their concurring conclusions upon this question of fact, even had the evidence been less clear than it was.

"In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it, for, as was said in *Westinghouse Co.* v. *Wagner Co., supra* (225 U. S. 615): 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.'" *Id.*, 646.

In the *Dowagiac* case, we again referred to the difficulty of making an exact apportionment and again observed that mathematical exactness was not possible. What was required was only "reasonable approximation" which usually may be attained "through the testimony of experts and persons informed by observation and experience." Testimony of this character was said to be "generally helpful and at times indispensable in the solution of such problems." The result to be accomplished "is a rational separation of the net profits so that neither party may have what rightfully belongs to the other." *Id.*, p. 647.

We see no reason why these principles should not be applied in copyright cases. Petitioners cite our decision in the trade-mark case of *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, but the Court there, recognizing the rulings in the *Westinghouse* and *Dowagiac* cases, found on the facts that an apportionment of profits was "inherently impossible." The burden cast upon the defendant had not been sustained.

In 1922, some years after the *Dowagiac* decision, and in harmony with it, Congress amended § 70 of the patent law [4] so as to provide expressly that if "damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony." The amendment, so far as it relates to the reception of expert testimony, recognized and cannot be deemed to enlarge the rules already applied in courts of equity, and the fact that the copyright law was not similarly amended cannot be considered to detract from the jurisdiction of the court to receive similar evidence in copyright cases whenever it is found to be competent.

Petitioners stress the point that respondents have been found guilty of deliberate plagiarism, but we perceive no ground for saying that in awarding profits to the copyright proprietor as a means of compensation, the court may make an award of profits which have been shown not to be due to the infringement. That would be not to do equity but to inflict an unauthorized penalty. To call the infringer a trustee *ex maleficio* merely indicates "a mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the

[4] Act of February 18, 1922, § 8, 42 Stat. 392, amending R. S. 4921. 35 U. S. C. 70.

proceeds of his wrong." *Larson Co.* v. *Wrigley Co.*, 277 U. S. 97, 99, 100. He is in the position of one who has confused his own gains with those which belong to another. *Westinghouse Co.* v. *Wagner Co., supra,* p. 618. He "must yield the gains begotten of his wrong." *Duplate Corp.* v. *Triplex Co.,* 298 U. S. 448, 457. Where there is a commingling of gains, he must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him. When such an apportionment has been fairly made, the copyright proprietor receives all the profits which have been gained through the use of the infringing material and that is all that the statute authorizes and equity sanctions.

Both courts below have held in this case that but a small part of the profits were due to the infringement, and, accepting that fact and the principle that an apportionment may be had if the evidence justifies it, we pass to the consideration of the basis of the actual apportionment which has been allowed.

Third. The controlling fact in the determination of the apportionment was that the profits had been derived, not from the mere performance of a copyrighted play, but from the exhibition of a motion picture which had its distinctive profit-making features, apart from the use of any infringing material, by reason of the expert and creative operations involved in its production and direction. In that aspect the case has a certain resemblance to that of a patent infringement, where the infringer has created profits by the addition of non-infringing and valuable improvements. And, in this instance, it plainly appeared that what respondents had contributed accounted for by far the larger part of their gains.

Respondents had stressed the fact that, although the negotiations had not ripened into a purchase, the price which had been set for the motion picture rights in "Dis-

honored Lady" had been but $30,000. And respondents' witnesses cited numerous instances where the value, according to sales, of motion picture rights had been put at relatively small sums. But the court below rejected as a criterion the price put upon the motion picture rights, as a bargain had not been concluded and the inferences were too doubtful. The court also ruled that respondents could not count the effect of "their standing and reputation in the industry." The court permitted respondents to be credited "only with such factors as they bought and paid for; the actors, the scenery, the producers, the directors and the general overhead."

The testimony showed quite clearly that in the creation of profits from the exhibition of a motion picture, the talent and popularity of the "motion picture stars" generally constitutes the main drawing power of the picture, and that this is especially true where the title of the picture is not identified with any well-known play or novel. Here, it appeared that the picture did not bear the title of the copyrighted play and that it was not presented or advertised as having any connection whatever with the play. It was also shown that the picture had been "sold," that is, licensed to almost all the exhibitors as identified simply with the name of a popular motion picture actress before even the title "Letty Lynton" was used. In addition to the drawing power of the "motion picture stars," other factors in creating the profits were found in the artistic conceptions and in the expert supervision and direction of the various processes which made possible the composite result with its attractiveness to the public.

Upon these various considerations, with elaboration of detail, respondents' expert witnesses gave their views as to the extent to which the use of the copyrighted material had contributed to the profits in question. The underlying facts as to the factors in successful production and ex-

hibition of motion pictures were abundantly proved, but, as the court below recognized, the ultimate estimates of the expert witnesses were only the expression "of their very decided opinions." These witnesses were in complete agreement that the portion of the profits attributable to the use of the copyrighted play in the circumstances here disclosed was very small. Their estimates given in percentages of receipts ran from five to twelve per cent; the estimate apparently most favored was ten per cent as the limit. One finally expressed the view that the play contributed nothing. There was no rebuttal. But the court below was not willing to accept the experts' testimony "at its face value." The court felt that it must make an award "which by no possibility shall be too small." Desiring to give petitioners the benefit of every doubt, the court allowed for the contribution of the play twenty per cent. of the net profits.

Petitioners are not in a position to complain that the amount thus allowed by the court was greater than the expert evidence warranted. Nor is there any basis for attack, and we do not understand that any attack is made, upon the qualifications of the experts. By virtue of an extensive experience, they had an intimate knowledge of all pertinent facts relating to the production and exhibition of motion pictures. Nor can we say that the testimony afforded no basis for a finding. What we said in the *Dowagiac* case is equally true here,—that what is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment; and the testimony of those who are informed by observation and experience may be not only helpful but, as we have said, may be indispensable. Equity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other. Confronted with the manifest injustice of giving to petitioners all the profits made by the motion picture, the court in making

an apportionment was entitled to avail itself of the experience of those best qualified to form a judgment in the particular field of inquiry and come to its conclusion aided by their testimony. We see no greater difficulty in the admission and use of expert testimony in such a case than in the countless cases involving values of property rights in which such testimony often forms the sole basis for decision.

Petitioners also complain of deductions allowed in the computation of the net profits. These contentions involve questions of fact which have been determined below upon the evidence and we find no ground for disturbing the court's conclusions.

The judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PRICE.

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

No. 559. Argued March 5, 6, 1940.—Decided March 25, 1940.

A taxpayer, keeping accounts upon a cash basis, is not entitled to deduct, as a loss sustained during the taxable year, Revenue Act, 1932, § 23 (e), a payment made in discharge of his liability to a bank on a guaranty, but made by substituting his new note to the bank for his earlier one, of the same amount. P. 412.

106 F. 2d 336, reversed.

CERTIORARI, 308 U. S. 548, to review the reversal of a decision of the Board of Tax Appeals sustaining a deficiency assessment.

Mr. Richard H. Demuth, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs.*

Sewall Key and *Berryman Green* were on the brief, for petitioner.

Mr. George D. Brabson, with whom *Messrs. David H. Blair, C. R. Wharton, Julius C. Smith,* and *J. G. Körner, Jr.* were on the brief, for respondent.

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

Respondent in his income tax return for 1932 claimed a deduction for a loss upon a contract of guaranty. The Board of Tax Appeals sustained the Commissioner in refusing to allow the deduction, and the Circuit Court of Appeals reversed. 106 F. 2d 336. Because of an alleged conflict with *Eckert* v. *Burnet,* 283 U. S. 140, *Jenkins* v. *Bitgood,* C. C. A. 2d, 101 F. 2d 17, and *Ferris* v. *Commissioner,* C. C. A. 2d, 102 F. 2d 985, we granted certiorari, 308 U. S. 548.

The facts as found may be thus summarized: In 1929 the Atlantic Bank and Trust Company of Greensboro, North Carolina, was merged with the North Carolina Bank and Trust Company. The latter accepted conditionally certain assets of the Atlantic Bank called "A" assets, and certain other assets, called "B" assets, were pledged to that Bank with authority to charge against them any losses which might be established in realizing upon the "A" assets. Respondent and three other stockholders of the Atlantic Bank executed an agreement of guaranty, to the effect that if the North Carolina Bank failed to realize a certain sum from the "A" assets within two years they would make up the deficiency in an amount not exceeding $500,000. The agreement provided that any sum realized from the "B" assets was to be applied first to any losses occurring in the "A" assets and then to the reimbursement of the four guarantors. The period for realizing upon the "A" assets was extended until September, 1932.

In June, 1931, the North Carolina Bank advised the guarantors that the "B" assets were not in such shape that the Bank could use them to the extent necessary for banking purposes and requested the guarantors to put their guaranty into a bankable form so that it could be used by the Bank to obtain credit. Respondent accordingly gave to the Bank his note for $125,000 and endorsed the note of C. W. Gold, another guarantor, for a like amount and assigned certain securities to the Bank as collateral for the payment of his guaranty. The Bank agreed that respondent's ultimate liability should not exceed $250,000. At the end of 1931, the guaranty agreement was still in effect. The "B" assets were still in the process of collection. No demand had been made upon respondent. While it was known that there would be some loss to the guarantors, it was not definitely known in 1931 what the loss would be, and the guarantors had reason to believe that there would be a substantial reimbursement from the "B" assets of any losses.

In the early part of 1932, financial conditions being worse, the Bank concluded that it would have to collect upon the guaranty and called upon respondent to make a final settlement of his obligations. Accordingly, in March, 1932, respondent made his note to the Bank for $250,000 and received back the two notes. The Board of Tax Appeals found that both respondent and the Bank considered this to be a final payment of the two notes which had been given under the guaranty. The Bank retained the same collateral for the $250,000 note that it had previously held, and in December, 1932, respondent substituted therefor certain securities of his own.

Respondent claimed a loss in 1932 in the amount of $125,000, that is, for his one-half of the guaranty. He did not then claim a loss on the other one-half because he still had a claim against the estate of Gold (who had died in 1932) for reimbursement. For that one-half, representing Gold's part of the guaranty, respondent

claimed a loss in 1933 and that deduction is not here involved.

Respondent kept his accounts upon a cash basis. The Board of Tax Appeals ruled that respondent was not entitled to the deduction of $125,000 in 1932, upon the ground that "he made no outlay of cash" in the purported payment; he had satisfied his liability as guarantor "by a shifting of the form of his liability." His loss would be deductible "in the year in which he pays the note."

Respondent insists initially that the transaction in 1932 was considered by the parties as constituting a payment of respondent's liability under the guaranty, and that this payment is a fact found by the Board of Tax Appeals and is not open to review. But the findings of the Board disclose the entire transaction, and its legal effect in the application of § 23 (e) of the Revenue Act of 1932, as to the deduction of losses sustained during the taxable year, was reviewable by the Circuit Court of Appeals. Its decision on that point is reviewable here.

Both the Commissioner and the Board of Tax Appeals relied upon our decision in *Eckert* v. *Burnet, supra.* In that case, the taxpayer's return was on the cash basis, and the question was as to a claim of deduction for the year 1925. The taxpayer and his partner were joint endorsers of notes issued by a corporation they had formed. In 1925, in settlement of their liability for an ascertained amount, they made a joint note for the amount due to the bank that held the corporation's paper, "received the old notes, marked paid, and destroyed them." We affirmed the ruling that the deduction should not be allowed.

The court below considered that decision as definite authority only for the holding that a loss of the sort set forth was not deductible under the "bad debt" provision of the statute. That indeed was stated in the opinion as

the taxpayer's claim. But the taxpayer had also presented here as an alternative ground the theory of a loss sustained during the taxable year, a ground which the Board of Tax Appeals had considered and held to be untenable. 17 B. T. A. 263, 265, 266. And the Government argued both questions. The Government did not contend that the taxpayer might not at some time be entitled to a deduction "either on account of a bad debt or for a business loss"; the "sole question in dispute was whether he was entitled to the deduction in 1925, the year in which his note was given, or in the later year in which the taxpayer's liability on the note is actually liquidated by payment."

The reasoning of this Court was broad enough to cover both aspects of the case. We said:

"For the purpose of a return upon a cash basis, there was no loss in 1925. As happily stated by the Board of Tax Appeals, the petitioner 'merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or property having a cash value.' A deduction may be permissible in the taxable year in which the petitioner pays cash. The petitioner says that it was definitely ascertained in 1925 that the petitioner would sustain the losses in question. So it was, if the petitioner ultimately pays his note."

We think that this decision is controlling in the instant case. As the return was on the cash basis, there could be no deduction in the year 1932, unless the substitution of respondent's note in that year constituted a payment in cash or its equivalent. There was no cash payment and under the doctrine of the *Eckert* case the giving of the taxpayer's own note was not the equivalent of cash to entitle the taxpayer to the deduction.

Respondent urges that his note was secured, but the collateral was not payment. It was given to secure re-

spondent's promise to pay, and if that promise to pay was not sufficient to warrant the deduction until the promise was made good by actual payment, the giving of security for performance did not transform the promise into the payment required to constitute a deductible loss in the taxable year. See *Jenkins* v. *Bitgood,* 101 F. 2d 17, 19.

The judgment of the Circuit Court of Appeals is reversed and the decision of the Board of Tax Appeals is affirmed.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* GULF OIL CORP.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 473. Reargued February 27, 1940.—Decided March 25, 1940.

1. The tax imposed by § 601 of the Revenue Act of 1932 on importation of crude petroleum is by force of the provisions of that section to be treated as a duty imposed by the Tariff Act of 1930, which in turn incorporated, by reference, customs regulations relating to the entry of merchandise in bonded manufacturing warehouses for exportation or disposition as ships' stores; section 630 of the Revenue Act (amendment of 1933) exempts from tax any article sold for use as fuel, ships' stores, etc., on vessels actually engaged in foreign trade, and, read in conjunction with the Tariff Act, provides that articles manufactured from imported articles and laden for use on vessels engaged in foreign commerce under customs regulations are to be duty free and considered or held to be exported for the purpose of drawback provisions of § 601 of the Revenue Act and § 309 [b] of the Tariff Act. P. 423.
2. Under these provisions, oil imported in bond in the crude form into a State, converted into fuel oil in a bonded warehouse, and withdrawn duty free for sale for fuel to a vessel engaged in foreign trade, is from the time of importation until the moment of lading on the vessel, segregated from the common mass of

property within the State and subject to the supervision and control of federal customs officials. P. 425.

3. A customs regulation providing that "imported goods in a bonded warehouse are exempt from taxation under the general laws of the several States" was incorporated in the Tariff Act of 1930 by reference, and when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. Pp. 426, 429.
4. The provisions of the Revenue Act of 1932, read with those of the Tariff Act of 1930 and with other statutes and regulations, afford a comprehensive scheme for the regulation of the importation of crude petroleum and of its control while in the course of manufacture in bond into fuel oil and its delivery as ships' stores to vessels in foreign commerce, all calculated to insure the devotion of the manufactured oil exclusively to that purpose. P. 426.
5. The statutes and regulations taken together operate as regulations of foreign commerce. P. 427.
6. The purpose of the exemption from the tax laid upon importation of crude petroleum when it or its product is used as ships' stores by vessels engaged in foreign commerce is, first, to encourage importation of crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax, and, secondly, to promote foreign commerce through the sale of tax-free fuel to vessels engaged in it. P. 427.
7. The adoption of these means of regulating and promoting foreign commerce was within the Congressional power. P. 427.
8. The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce. The exemption of imports from the duty or the allowance of a drawback when they are devoted to particular purposes or uses, or when they are exported or otherwise sent out of the country, is likewise a regulation of foreign commerce. P. 428.
9. New York City sales tax imposed on sales to vessels engaged in foreign commerce of fuel oil manufactured from imported crude petroleum in bond, *held* invalid as an infringement of the Congressional regulation of the commerce. Pp. 423–428.

281 N. Y. 647; 22 N. E. 2d 480, affirmed.

CERTIORARI, 308 U. S. 545, to review the affirmance of a judgment reversing a ruling of the Comptroller of the City of New York which applied the city sales tax to

fuel oil sold in bond to vessels engaged in foreign commerce. The writ of certiorari was dismissed, *ante,* p. 2, because it did not appear that the judgment below did not rest upon an adequate non-federal ground. A petition for rehearing based on an amended remittitur of the New York Court of Appeals, 282 N. Y. 612; 25 N. E. 2d 392, was granted, the judgment of dismissal vacated, and the cause restored to the docket for reargument, *post,* p. 692. See 256 App. Div. 207, 9 N. Y. S. 2d 544.

Mr. Paxton Blair, with whom *Messrs. William C. Chanler* and *Sol Charles Levine* were on the brief, for petitioner.

The constitutional provision against state taxation of imports is not contravened by a sales tax (1) imposed after the imported goods have, through processing, undergone a radical change, and (2) imposed not on the importer but on the purchaser after the goods have left the bonded warehouse. *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124; *H. P. Hood & Sons* v. *Commonwealth,* 235 Mass. 572, 576–577; *Standard Oil Co.* v. *Combs,* 96 Ind. 179; *Atlantic Coast Line* v. *Standard Oil Co.,* 275 U. S. 257, 267; *Waring* v. *Mayor of Mobile,* 8 Wall. 110; *Low* v. *Austin,* 13 Wall. 29; *May* v. *New Orleans,* 178 U. S. 496; dist'g *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 526.

Does removing petroleum from an ocean-going tanker and storing it on shore break the original package? See: *Mexican Petroleum Corp.* v. *South Portland,* 121 Me. 128, 134–135; *Mexican Petroleum Corp.* v. *Louisiana Tax Comm'n,* 173 La. 604, 616; *Philippine Refining Corp.* v. *Contra Costa,* 24 Cal. App. 2d 665, 669; *Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208.

When the imported product has been processed and broken down into divers products and sold, it is no longer an import. *New York ex rel. Burke* v. *Wells,* 208 U. S. 14, 24.

The circumstances under which § 630 was added to the Revenue Act of 1932 support the conclusion, inferable from the text itself, that Congress did not intend to interfere with state powers of taxation.

Section 630 has none of the attributes of a regulatory measure. It confers an exemption, and reflects the conclusion of Congress that the original 1932 Act did more harm than good. In rescinding its former action, Congress has simply refrained from taxing this particular commodity. How can imposing and then lifting a tax be regulation, when nonaction *ab initio* would not be such?

Legislative history of a statute can not affect its interpretation when the meaning is clear. *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 449. Extraneous aids are only admissible to solve doubt. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 589. Moreover, the congressional documents relied on by respondent give no hint of intent to affect state taxation.

An intention to supersede state tax laws is not to be left to inference and conjecture. *Savage* v. *Jones*, 225 U. S. 501, 533; *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 479–480; *Palmer* v. *Massachusetts*, 308 U. S. 79, 83–84. See also *Federal Housing Administration* v. *Burr*, 309 U. S. 242.

The fact that Congress has extended the federal regulatory power to a given industry will not support an inference of intention to remove it from the state taxing power. *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 22–23; *Minnesota* v. *Blasius*, 290 U. S. 1; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 35.

The proposition that Congress can declare a local transaction to be a part of foreign commerce, and compel the State to keep hands off, is unsanctioned by the Con-

stitution and the decisions of this Court. See *Pipe Line Cases,* 234 U. S. 548, 560–561.

"Exports" is a constitutional term and is to be given its ordinary meaning. Congress can not enlarge the concept and thereby curtail the taxing powers of the States. Cf., *Thompson* v. *United States,* 142 U. S. 471, 477; Ribble, State and National Control over Commerce, p. 232.

The immunity from state taxation enjoyed by bonded goods is no greater than that which such goods enjoy by virtue of the Import-Export clause of the Constitution.

States furnish police and fire protection to goods in bonded warehouses, and the owners of such goods remain under a correlative duty to pay state taxes,—excepting goods in the original packages. See *Thompson* v. *Kentucky,* 209 U. S. 340, 347.

The owner could have paid the tax, and on proof that the oil had been sold as sea stores could have applied for a drawback. That would not have interfered with the state's power. It is unreasonable to regard that power as present or absent according to the method of gaining federal tax exemption selected by the owner.

The language of Art. 942 (d) as to state taxation is an elliptic and infelicitous abstract of the original package doctrine. Note the marginal citations accompanying it. *Low* v. *Austin,* 13 Wall. 29; *Blount* v. *Munroe,* 60 Ga. 61; *Clarke* v. *Clarke,* 3 Woods 408; *State* v. *Pinckney,* 44 So. Car. Law 474.

The oil came to such a stop as subjected it to state taxation. *Coe* v. *Errol,* 116 U. S. 517, 527, 528; *General Oil Co.* v. *Crain,* 209 U. S. 211, 230–231; *Bacon* v. *Illinois,* 227 U. S. 504, 515–516; *Susquehanna Coal Co.* v. *South Amboy,* 208 U. S. 665, 669; *Minnesota* v. *Blasius,* 290 U. S. 1, 9. Cf., *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

The tax is not a forbidden burden on foreign commerce, since (1) the fuel oil does not become an instrument of

commerce until after the incidence of the tax, and (2) the tax is non-discriminatory. Moreover, since the fuel oil came into existence in New York City and passed into the ultimate consumer's hands in New York City, the possibility of multiple taxation is absent.

The status of the oil is similar to that of gasoline sold to interstate airplanes. *Eastern Air Transport, Inc.* v. *Tax Commission,* 285 U. S. 147; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 267.

That the oil was to be used eventually to propel vessels in foreign commerce is immaterial, for at the moment of taxation that commerce had not yet begun. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33. Cf., *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167. Dist'g *Helson* v. *Kentucky,* 279 U. S. 245.

Goods taken on board as ships' stores are not deemed "exported." *Swan & Finch Co.* v. *United States,* 190 U. S. 143. See also *United States* v. *Chavez,* 228 U. S. 525; *Dooley* v. *United States,* 183 U. S. 151; *United States* v. *Hill,* 34 F. 2d 133; *Kennedy* v. *United States,* 95 F. 127; *West India Oil Co.* v. *Sancho,* 108 F. 2d 144.

If sea stores were exports, the addition of § 630 to the Revenue Act would have been unnecessary, exemption having been conferred by § 313 of the Tariff Act of 1930.

The tax is not selective, but equal. It does not aim at or discriminate against any phases of the export trade. In *Peck & Co.* v. *Lowe,* 247 U. S. 165, 173, the Court upheld a tax on an exporter's net income.

The tax is based on the sale of something which never was either an export, or a symbol for an export, or part of the processes of exportation. Cf., *Turpin* v. *Burgess,* 117 U. S. 504, 507.

The exemption attaches to the export and not to the article before its exportation.

The tax affects foreign commerce only incidentally and remotely.

The vice of the argument for statutory ratification of Art. 942 (d) of the Regulations is that the allusions in the statutes to the regulations are specific rather than general, and evidence no intent to ratify a regulation like Art. 942 (d).

Congress itself must have regarded fuel oil sold for ships' stores as not an export, for it has imposed taxes thereon, though having no more power than the States to tax exports.

Mr. Matthew S. Gibson for respondent.

By leave of Court, *Messrs. George deForest Lord* and *Woodson D. Scott,* as *amici curiae,* filed a brief on behalf of the Cunard White Star, Ltd., challenging the validity of the tax.

Mr. Justice Stone delivered the opinion of the Court.

The Comptroller of the City of New York determined that respondent was subject to a New York City tax laid upon sales in 1934 and 1935 of fuel oil manufactured in New York City, from crude petroleum, which had been imported from a foreign country to New York, and there sold and delivered as ships' stores to vessels engaged in foreign commerce. Upon certiorari to review the Comptroller's determination, the Appellate Division of the New York Supreme Court held that the taxing statute as applied infringed the power of Congress to regulate foreign commerce which it had exercised by statutes regulating the control and disposition of the imported oil. 256 App. Div. 207; 9 N. Y. S. 2d 544.

The New York Court of Appeals affirmed without opinion, 281 N. Y. 647; 22 N. E. 2d 480, but by its amended remittitur declared that the affirmance was upon the ground, and none other, that the tax as applied

violated the commerce clause of the Federal Constitution, Article I, § 8, Clause 3, Article I, § 10, Clause 2, which commands that no state shall lay any imposts or duties on imports or exports, and Article VI, Clause 2, making the "Constitution and laws of the United States which shall be made in pursuance thereof . . . the supreme law of the land."[1] We granted certiorari upon a petition which challenged the several grounds of decision as defined by the amended remittitur of the Court of Appeals, the questions presented being of public importance.

The taxing enactment, Local Law No. 24 of 1934 (published as Local Law No. 25) is that of the municipal assembly of the City of New York, adopted pursuant to authority of Chapter 815 of the New York Laws of 1933, as amended by Chapter 873 of New York Laws of 1934. Its details were recently discussed in our opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33, and it is unnecessary to repeat them here. It suffices to say that it lays a tax on purchasers for consumption of tangible personal property at the rate of 2 per cent. of the sales price. The tax is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated there" for the transfer of title or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller,

[1] Certiorari which had been allowed by the Supreme Court of the United States December 4, 1939, 308 U. S. 545, before the amendment of the remittitur by the New York Court of Appeals, was dismissed January 15, 1940, *ante,* p. 2, on the ground that in the absence of an explicit statement by the Court of Appeals that it had annulled the assessment of the tax solely because of the violation of the Federal Constitution, the Court was unable to find that the decision of the highest court of the state did not rest upon an adequate non-federal ground. On motion for rehearing, based on the amended remittitur of the Court of Appeals, the order of dismissal was, on February 5, 1940, vacated and the cause restored to the docket, *post,* p. 692.

who must pay it whether he collects it or not, in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected.

The material facts are not in dispute. In 1934 and 1935 respondent's predecessor imported crude petroleum from Venezuela and made customs entry of it for its own manufacturing warehouse in New York City, pursuant to its bonds known as "Proprietor's Manufacturing Warehouse Bond, Class 6," given to the United States under the warehouse laws of the United States and treasury regulations. The bonds were given for the purpose of enabling the importer, under statutes of the United States and treasury regulations, to bring the petroleum into the United States, to manufacture it while in bond into fuel oil and then to withdraw it for export or other lawful purpose free of the import duty which would otherwise be payable. The bonds were conditioned, among other things, upon compliance with laws and regulations relating to the custody and safekeeping of the imported merchandise and its products held in bond, and to its lawful withdrawal from the warehouse under permit of the collector of the customs within the time permitted by law.

The tax in question was laid on the sale of bunker "C" fuel oil, manufactured in respondent's bonded warehouse from the imported oil and delivered alongside foreign bound vessels in New York City which purchased the oil as ships' stores for consumption as fuel in propelling them in foreign commerce.

Petitioner argues that the tax imposed on the purchaser for consumption of the fuel oil after it had been changed radically by manufacture from the imported oil, and after it had been withdrawn from the bonded warehouse, is not a prohibited tax on imports and does not contravene any policy which the laws of the United States have sanctioned.

For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation. See *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124, 126; *Waring* v. *The Mayor,* 8 Wall. 110; *May* v. *New Orleans,* 178 U. S. 496; *New York ex rel. Burke* v. *Wells,* 208 U. S. 14. Respondent rests its argument on different considerations growing out of the control over the foreign commerce involved in the importation of the oil and its ultimate disposition as ships' stores of vessels engaged in foreign commerce, which Congress has exercised in pursuance of a national policy with which, it is insisted, the tax conflicts. Expression of this policy, it is urged, is to be found in the statutes of the United States, read in light of their legislative history, exempting the imported oil from federal taxation, otherwise imposed, if it is sold for use as fuel on vessels engaged in the foreign trade, and in the measures taken in statutes and regulations to make that policy effective by segregating the oil under the direction of customs officers of the United States from the time of its importation until it is delivered to the purchasing vessel.

The provisions of the Revenue Act of 1932 laying a tax on the importation of crude petroleum and granting exemptions, and the related provisions of the Tariff Act of 1930 and the applicable treasury regulations support this contention.

Section 601 (a), (c) (4) of the Revenue Act of 1932, 47 Stat. 169, 260, lays a tax "with respect to the importation" of crude petroleum of one-half cent per gallon unless otherwise provided by treaties of the United States, and § 601 (b) declares that the tax imposed "shall be levied, assessed, collected, and paid in the same

manner as a duty imposed by the Tariff Act of 1930 and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act. . . ." Section 630 of the Revenue Act of 1932, added by amendment of June 16, 1933, 48 Stat. 256, declares that no tax under § 601 shall be laid "upon any article sold for use as fuel supplies, ships' stores . . . or . . . equipment on vessels . . . actually engaged in foreign trade . . ." and provides that "articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels shall be held to be exported for the purposes" of the drawback provision of § 601 (b).

Section 309 (a) of the Tariff Act of 1930, 46 Stat. 590, 690, authorizes the withdrawal, duty free, under regulations of the Secretary of the Treasury of articles from bonded manufacturing warehouses, for supplies to vessels of the United States engaged in foreign trade and directs that no such article shall be landed at any port or place in the United States or its possessions. By virtue of the terms already noted of §§ 601 and 630 of the Revenue Act of 1932, these provisions were extended to articles sold for fuel to vessels engaged in foreign trade, and the provisions of statutes and regulations relating to withdrawal from manufacturing bonded warehouses [2] for export were thus extended to similar withdrawals of fuel oil for disposition as ships' stores.[3]

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[2] Article 829 of the Customs Regulations of 1929, in force when the Tariff Act of 1930 was enacted and continued as Article 921 of Customs Regulations of 1931, and as Article 919 of Customs Regulations of 1937, defines Class 6 warehouses as those "for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials. . . ."

[3] Section 311 of the Tariff Act of 1930, 46 Stat. 691, under which respondent's Class 6 bonded warehouse was established and operated, provided for the manufacture in such warehouse of articles made from

It will be noted that the tax imposed on importation of crude petroleum by § 601 of the Revenue Act of 1932 is, by force of its own provisions to be treated as a duty imposed by the Tariff Act of 1930, which, in turn, has incorporated, by reference, customs regulations relating to the entry of merchandise in bonded manufacturing warehouses, its manufacture there and its withdrawal from bonded warehouses for exportation or disposition as ships' stores; [4] that § 630, read in conjunction with § 601 (b) and the related provisions of the Tariff Act of 1930 (§ 309 [b]) provides that articles manufactured from imported articles and laden for use on vessels engaged in foreign commerce under customs regulations are to be duty free and considered or held as exported for the purpose of the drawback provisions of both § 601 of the Revenue Act of 1932 and § 309 (b) of the Tariff Act of 1930.

From the time of importation until the moment when the bunker "C" oil is laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and

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imported materials and intended for exportation free of duty under such regulations as the Secretary of the Treasury might prescribe, and also declared that the provisions of § 1351 of Title 26, U. S. C. (§ 3433 of the Revised Statutes) should, so far as practicable, apply to such bonded manufacturing warehouses. Section 1351 provides for the manufacture in bonded warehouse of articles from imported materials under such rules as the Secretary may prescribe and under the direction of the proper customs officer, and directs that no article so manufactured in a bonded warehouse "shall be taken therefrom except for exportation under the direction of the proper officer having charge thereof . . . whose certificate describing the articles . . . shall be received by the Collector of Customs in cancellation of the bonds, or return of the amount of foreign import duties." See Articles 455, 457, and 960 of the 1931 Customs Regulations.

[4] See Articles 455 to 461, Customs Regulations of 1931, cf. Articles 410–414, Regulations of 1915; Articles 433–437, Regulations of 1923 and Articles 464–470 of the 1937 Regulations.

property within the state, and is subject to the supervision and control of federal customs officers.[5] It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and use and cannot, after delivery to the vessel, be landed in the United States. Throughout, the oil is subject to the obligation of respondent's bonds that it shall remain under such supervision and control and shall not be diverted from its ultimate destination as ships' stores.

Article 942 of the Customs Regulations of 1931 provides that "merchandise in bonded warehouse is not subject to levy, attachment, or other process of a State court . . ." and that "imported goods in bonded warehouse are exempt from taxation under the general laws of the several States." These regulations, continued in Customs Regulations of 1937, Art. 940, appeared as Art. 731, Regulations of 1915, and Art. 850 of Regulations of 1923. They were thus in force when the Tariff Act of 1930 was adopted and were incorporated by reference, cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492, by the provisions of §§ 309, 311, already noted, which also adopted the earlier provisions of § 1351, Title 26, U. S. C., R. S. § 3433, and declared that articles manufactured from imported materials in bonded warehouse should be placed there under regulations prescribed by the Secretary of the Treasury.

The provisions of the Revenue Act of 1932, read with those of the Tariff Act of 1930 and with the statutes and regulations which we have mentioned, thus afford a comprehensive scheme for the regulation of the importation of the crude petroleum and of its control while in the

[5] See Ch. 16, Transportation in Bond and Merchandise in Transit; Ch. 17, Customs Warehouses and Control of Merchandise Therein, 1931 Customs Regulations.

course of manufacture in bond into fuel oil and its delivery as ships' stores to vessels in foreign commerce, all calculated to insure the devotion of the manufactured oil exclusively to that purpose.

The statutes and regulations taken together operate as regulations of foreign commerce, as the legislative history shows they were intended to do. The Tariff Act of 1930, of which § 601 of the Revenue Act of 1932 is in effect a part, is entitled, "An Act to provide revenue, to regulate commerce with foreign countries, to encourage industries of the United States, to protect American labor, and for other purposes." The obvious tendency of the exemption, from the tax laid upon importation of crude petroleum, when it or its product is used as ships' stores by vessels engaged in foreign commerce is to encourage importation of the crude oil for such use and thus to enable American refiners to meet foreign competition and to recover trade which had been lost by the imposition of the tax. That tendency, and the tendency of the sale of tax-free fuel to vessels engaged in foreign commerce to promote the commerce, were considerations to be taken into account by Congress in fixing the terms of the statute, and its adoption as a means of regulating and promoting foreign commerce was within the Congressional power. *Board of Trustees* v. *United States,* 289 U. S. 48.

That such was the purpose of the present legislation is confirmed by its history. Senate Report No. 58, 73d Cong., 1st Sess., on the bill which was enacted as § 630 of the Revenue Act of 1932, exempting fuel placed on vessels engaged in foreign commerce from the tax, declared, page 3: "It is believed that this amendment will enable the American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue, since the effect of the present law is to force purchases abroad." It

added that the provisions for drawback of the tax on importation "also relieves American manufacturers from a competitive disadvantage." From statements made on the floor of the Senate by the sponsor of the bill it appears that one purpose of the exemption was to increase the trade in fuel oil in American ports which had been lost through purchase of fuel in foreign ports by vessels engaged in foreign commerce following the imposition of the tax by § 601 (c) (4). 77 Cong. Rec., Part III, 3212–3214.

The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce, *Hampton & Co.* v. *United States,* 276 U. S. 394, 411; *Board of Trustees* v. *United States, supra,* 58. The exemption of imports from the duty or the allowance of a drawback when they are devoted to particular purposes or uses, or when they are exported or otherwise sent out of the country, is likewise a regulation of foreign commerce, see *Gibbons* v. *Ogden,* 9 Wheat. 1, 201, 202; *Groves* v. *Slaughter,* 15 Pet. 449, 505. Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce by insuring that the particular class of exempted imports are used for the purposes for which the exemption is allowed.

The question remains, whether the present tax conflicts with the Congressional policy adopted by the Acts of Congress which we have discussed. As we have seen, the exemption and drawback provisions were designed, among other purposes, to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores. In furtherance of that end Congress provided for the segregation of the imported mer-

chandise from the mass of goods within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation. It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. See, *People* v. *Compagnie Generale Transatlantique,* 107 U. S. 59, 63. The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce. *Sinnot* v. *Davenport,* 22 How. 227; *People* v. *Compagnie Generale Transatlantique, supra,* 63; cf. *Kelly* v. *Washington,* 302 U. S. 1, 9, 10.

It is unnecessary to consider whether the tax upon the sale of the oil as ships' stores to vessels engaged in foreign commerce is in the circumstances of this case an impost on imports or exports, or a duty of tonnage prohibited by Article I, § 10, Clauses 2 and 3 of the Constitution.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* COMPAGNIE GENERALE TRANSATLANTIQUE.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 44. Argued January 2, 1940.—Decided March 25, 1940.

1. Application of the New York City sales tax to sales of fuel oil, contracted for in New York City and performed after shipment from New Jersey by delivery to the purchaser's vessels in New York Harbor, *held* not to have imposed an unconstitutional burden on interstate commerce. *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33. P. 431.
2. Upon review of a decision of a state court adjudging a statute of the State invalid by an erroneous construction of the Federal Constitution, this Court will not entertain other constitutional objections against the statute and in support of the judgment, which were not presented to or considered by the state court; but will reverse the judgment, leaving the state courts free to decide any federal question remaining undecided here which may be raised in conformity with their own procedure. P. 433.

279 N. Y. 192; 280 *id.* 691; 18 N. E. 2d 28; 21 N. E. 2d 199, reversed.

CERTIORARI, 307 U. S. 620, to review the affirmance of judgments, 254 App. Div. 237, 4 N. Y. S. 2d 661, setting aside as in violation of the commerce clause of the Federal Constitution a tax levied by the City of New York on sales of fuel oil.

Mr. William C. Chanler, with whom *Messrs. Sol Charles Levine* and *Jerome R. Hellerstein* were on the brief, for petitioner.

Mr. Harold S. Deming, with whom *Mr. Donald Havens* was on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Cletus Keating, H. Maurice Fridlund, Richard*

Sullivan, and *Earl Q. Kullman,* representing certain taxpayers; and by *Messrs. George deForest Lord* and *Woodson D. Scott,* on behalf of the Cunard White Star, Ltd., challenging the validity of the tax.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a companion case to *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33, brought here to review a judgment of the New York State Supreme Court that the New York City tax laid upon sales of goods for consumption, is an unconstitutional burden on interstate commerce.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to a New York City tax upon sales to it of fuel oil in 1934 and 1935, the Appellate Division of the New York Supreme Court held that the taxing statute as applied did so infringe. 254 App. Div. 237; 4 N. Y. S. 2d 661. The Court of Appeals affirmed, 279 N. Y. 192; 18 N. E. 2d 28, with opinion, on the single ground that the tax was unconstitutional by reason of its effect on interstate commerce, and by its amended remittitur the court stated that the affirmance was on the sole ground that the tax violated the commerce clause. 280 N. Y. 691; 21 N. E. 2d 199. We granted certiorari, 307 U. S. 620, upon a petition which assailed the determination of the state court that the tax was a prohibited burden on interstate commerce, the question being of public importance.

The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Coal Mining Company* case, and need not be repeated here. The Appellate Division found facts not challenged here as follows: Appellant, a corporation of the Republic of France, owns vessels and operates them in the transportation of pas-

sengers and freight between the Port of New York and France, and other foreign countries. It is authorized to do business and maintains an office in New York City, where in the course of its business it makes purchases of fuel oil for consumption in the operation of its vessels, from the Standard Oil Company of New Jersey, which also maintains an office and carries on business in the City. That company enters into long-term contracts with the respondent, negotiated and signed in the City, for the sale to respondent of its requirements of fuel oil as ordered, to be delivered alongside respondent's vessels in New York Harbor. All the sales presently involved were of oil stored by the Standard Oil Company in its tanks in New Jersey, which as ordered was transported by barge to respondent's vessels in New York City where it was delivered.

The oil thus transported and delivered to respondent was of two types. One, "bonded fuel oil," is refined oil imported by the Standard Oil Company from foreign countries and stored in bond in New Jersey without payment of import duties, pursuant to the revenue laws of the United States which authorize release from the bond upon delivery of the oil to a foreign steamship for export or use as fuel by the vessel. The other type, known as "drawback oil," is the product of crude oil imported from foreign countries by the Standard Oil Company and refined at its New Jersey plant. An import duty is paid upon the oil, but upon delivery of the refined oil to a foreign steamship for export, or for use as fuel on the vessel, the importer is entitled under the revenue laws to a refund or drawback on the duty paid. 19 U. S. C. §§ 1309, 1313, 46 Stat. 690, 693.

So far as the validity of the tax with respect to the interstate commerce is concerned, our decision sustaining it in the *Berwind-White Coal Mining Company* case is controlling, and the judgment must be reversed, unless

the state of the record is such as to entitle respondent to assail the tax upon constitutional grounds not urged or decided in the state courts.

Respondent's petition to the New York Supreme Court to review the determination of the Comptroller set out that the tax "was assessed upon the purchase price paid on transactions in interstate and foreign commerce" and that the City was "without power to impose said tax on said transactions by virtue of the provisions of the Constitution and the laws of the United States," specifying the commerce clause and Article I, § 10, Clause 2, prohibiting "imposts or duties on imports or exports." No mention was made of any applicable statute of the United States.

Respondent's brief and argument here advance as reasons in support of the judgment of the state court in its favor that the bonded oil and drawback oil, at the time of delivery to respondent, retained their character as imports, and that they were then in process of being exported, so that the tax imposed upon the delivery to the purchaser is a prohibited impost or duty on imports and exports.

Respondent concedes by its brief that the contentions it now makes were not argued in the New York Court of Appeals, and does not deny petitioner's assertion here that respondent stated in its brief in the Appellate Division, "The court need give no attention to them," and that by its brief in the Court of Appeals respondent explicitly limited its presentation of the case to the interstate commerce point. Whether, under the practice of the Court of Appeals, respondent was in the circumstances free to ask decision of these questions there, we are not advised. But in any event the record does not disclose that they were presented to the Court of Appeals, the highest court of the state in which decision could have been had whose decision we review, and it shows

that that court considered and passed upon only the interstate commerce question.

By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the cause. And respondent, in urging decision here of the constitutional questions not pressed in the state court, relies on the familiar rule of appellate court procedure in federal courts that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435; *Langnes* v. *Green,* 282 U. S. 531. See *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 269.

But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlein Co.,* 275 U. S. 220, 225; *Duignan* v. *United States,* 274 U. S. 195, 200. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

Dewey v. *Des Moines,* 173 U. S. 193; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Whitney* v. *California,* 274 U. S. 357, 362, 363; *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 317.

Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned.

Upon the remand of this cause for further proceedings not inconsistent with this opinion, the state courts will be free to decide any federal question remaining undecided here which, in conformity with their own procedure, may be raised for decision there, and the remand will be without prejudice to the further presentation of any such question to this Court.

Reversed.

The Chief Justice and Mr. Justice Roberts concur in the view that the questions relating to foreign commerce are not properly before us in this case, but think that the judgment of the state court, holding that the tax as here laid places an unconstitutional burden upon interstate commerce, should be affirmed upon the grounds stated in the dissenting opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 59.

Mr. Justice McReynolds and Mr. Justice Murphy took no part in the consideration or decision of this case.

ETHYL GASOLINE CORPORATION ET AL. *v.* UNITED STATES.

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

No. 536. Argued March 1, 4, 1940.—Decided March 25, 1940.

A corporation owning a patent for a poisonous fluid compound containing lead, which, when mixed with the gasoline used as fuel in high compression internal combustion engines, adds greatly to their efficiency, and owning also a patent claiming the fuel mixture and another claiming a method of using it, manufactured the fluid and sold it, without royalty, under a licensing system, to nearly all of the leading manufacturers of gasoline in the country, one of which owned half of the patentee's capital stock. These refiners mixed the fluid with their gasoline and sold the resulting patented fluid in great quantities to jobbers, who in turn sold it to retailers and consumers. Under the license system: Refiners could not sell to jobbers other than those licensed by the patentee, and must maintain a certain price differential; they must conform to public health regulations in mixing the fuel and to conditions touching their use of the patentee's corporate name and trademark or trade-names; a jobber could sell, within a specified territory only, the lead-treated gasoline sold him by a designated licensed refiner, generally the one through whom he must apply for his license; he must make monthly reports to the patentee, with a list of all places of sale; must comply with health regulations as to the handling of the fuel; must post and distribute notices concerning such handling as required by the patentee; must permit physical examination of employees; must abstain from adulteration or dilution of the fuel; and must comply with requirements as to the use of the patentee's name or trade-name. The patentee reserved the right to cancel jobbers' licenses at will. This licensing system affected and controlled the business of most of those engaged in manufacturing motor fuel in the country, including nearly all the leading oil companies and most of the jobbers. The greater part of the treated gasoline was sold and transported in interstate commerce, much of it being distributed through the licensed jobbers. The patentee made a practice of ascertaining, through investigations by its agents, what jobbers failed to comply with the market policies and posted prices of the major oil companies, and by rejection of applications for licenses,

and in other ways, created a belief among refiners and jobbers that under its licensing system, jobbers must yield such compliance. The patentee thus built up a combination capable of use, and actually used, as a means of suppressing competition among jobbers and controlling their prices. It was conceded that if this control of the market had been acquired without aid of the patents, but wholly by contracts with refiners and jobbers, it would involve violation of the Sherman Act. *Held:*

(1) A patentee may not, by attaching a condition to his license, enlarge his monopoly and thus acquire some other which the statute and the patent together did not give. P. 455.

(2) By the authorized sales of the fuel by refiners to jobbers, the patent monopoly over it is exhausted, and after the sale neither the patentee nor the refiners may longer rely on the patents to exercise any control over the price at which the fuel may be resold. P. 457.

(3) Agreements for maintaining prices of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition; and agreements which create power of such price maintenance, exhibited by its actual exertion for that purpose, are in themselves unlawful restraints within the meaning of the Sherman Act. P. 458.

(4) The use by the corporation of the jobber licensing system in building up a combination capable of use and actually used as a means of controlling jobbers' prices and of controlling competition among them, for which it could not lawfully contract, extends beyond its patent monopoly and is a violation of the Sherman Act. P. 458.

(5) The patent monopoly of one invention may no more be enlarged for the exploitation of the monopoly of another than for the exploitation of an unpatented article, or for the exploitation or promotion of a business not embraced within the patent. P. 459.

(6) Such interest as the patentee in this case has in protecting the health of the public in connection with the distribution of the fuel, and in preventing adulteration, deterioration and dilution of the fuel in the hands of the jobbers, may be adequately protected without resort to the jobber license device. P. 459.

(7) Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the trial court properly suppressed it, even though it had been, or might be, used for some lawful purposes. P. 461.

27 F. Supp. 959, affirmed.

APPEAL from a decree of the District Court enjoining the appellant corporation and its officers from granting licenses to jobbers, to sell and distribute its patented lead-treated motor fuel, and from enforcing provisions in licenses to oil refiners restricting their sale of the fuel to licensed jobbers. The suit was by the Government, under the Sherman Anti-Trust Act.

Mr. Dean G. Acheson, with whom *Mr. H. Thomas Austern* was on the brief, for appellants.

Appellant has the right under its product and method patents to license jobbers handling its patented fuel. A patentee may impose any conditions upon the sale of the patented product by its licensees which are reasonably necessary for its commercial development and for securing financial return from the patent. *Rubber Co.* v. *Goodyear,* 9 Wall. 788, 799; *Bement* v. *National Harrow Co.,* 186 U. S. 70; *Aspinwall Mfg. Co.* v. *Gill,* 32 F. 697; *Mitchell* v. *Hawley,* 16 Wall. 544; *United States* v. *General Electric Co.,* 272 U. S. 476, 490; *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175; 305 U. S. 124; *Straight Side Basket Corp.* v. *Webster Basket Co.,* 4 F. Supp. 644; 10 F. Supp. 171; 82 F. 2d 245; *Vulcan Mfg. Co.* v. *Maytag Co.,* 73 F. 2d 136.

Where, as in this case, the public interest and that of the patentee combine to require the early, economical, and widespread use of the invention through the licensing of others to manufacture, any reasonable conditions imposed by the licensor to ensure the quality of the patented product made by his licensees, to achieve its ready identification and acceptance by the public, and to prevent its use in a dangerous manner, are proper. Reasonableness is determined not by hindsight but by the facts confronting the patentee in the beginning. *United States* v. *General Electric Co.,* 272 U. S. 476, 490; *Bement* v. *National Harrow Co.,* 186 U. S. 70.

Measured by these criteria, the securing of compliance with the Surgeon General's health regulations was a *sine qua non* to marketing the patented product. And protection of quality—through trademark identification and prevention of adulteration, dilution, or deterioration of the specified standard—was essential to securing wide public acceptance. There appears to be no dispute that appellant may lawfully restrict its refiner-licensees to selling only to jobbers who comply with precisely the same conditions specified in the separate jobber licenses. The only question is whether there is illegality in appellant, through licensing jobbers, doing directly what it can admittedly do indirectly.

Under its method patent appellant has an unquestionable right to license jobbers. It has a like right under its product patent as well. *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, and *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458, distinguished. The conditions in the jobber licenses are reasonable and related to securing return from these patents. Their use may be questioned only as to whether they were necessary or whether they were abused. By any realistic appraisal of the commercial situation they were clearly necessary. Cf., *Coca-Cola Co.* v. *The Koke Co.*, 254 U. S. 143, 146; *Coca-Cola Co.* v. *Bennett*, 238 F. 513; *Coca-Cola Co.* v. *Butler & Sons*, 229 F. 224; *Standard Oil Co.* v. *Federal Trade Comm'n*, 273 F. 478, 482; aff'd 261 U. S. 463; *Menendez* v. *Holt*, 128 U. S. 514, 520; *Ralston Purina Co.* v. *Sani-wax Paper Co.*, 26 F. 2d 941, 943, 944; *Yale Electric Corp.* v. *Robertson*, 26 F. 2d 972, 974.

The record does not support the charge that through threat of cancellation they were used to secure maintenance of refiners' prices.

Refusal in a few cases to license price-cutting jobbers to handle the patented product are not shown to have had any actual effect upon trade—they did not result in

price maintenance, in lessening the number of jobbers, or in any effect upon any jobber, community, or the public. Justification of such refusal is found in the patentee's interest in preventing the patented product being dealt in by those who will impair its good will and who are more likely to dilute, adulterate, or substitute. Even on unpatented articles this justification has been judicially sanctioned, and the public interest in permitting a manufacturer by express contract to protect himself against price cutters has come to be widely recognized by federal and state enactments. See, *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183. The interest of a non-manufacturing patentee is as great. The circumstances surrounding the development of these patents, particularly in the light of the history of the petroleum industry, make clear the reasonableness of appellant's action. Since its justification in refusing to permit its product to be handled by a few notorious price cutters was reasonable, its occasional refusals of a license for this reason were not an unlawful restraint of trade. *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588, 605; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 179; *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Eastern States Retail Lumber Dealers Assn.* v. *United States*, 234 U. S. 600, 604. Cf., *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *American Tobacco Co.* v. *Federal Trade Commission*, 9 F. 2d 570; aff'd 274 U. S. 543; *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild*, 90 F. 2d 556; *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373, 412; *Meyerson* v. *Hurlbut*, 98 F. 2d 232; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 27–28; *Palmolive Co.* v. *Freedman*, [1928] Ch. 264; *Columbia Graphophone Co.* v. *Thomas*, 41 Rep. Pat. Cas. 294; *Dunhill, Ltd.* v. *Griffiths Bros.*, 51 Rep. Pat. Cas. 93.

Even if appellant's refusal to license a few jobbers were unjustified, the decree entered was improper and an

abuse of discretion. *Sugar Institute* v. *United States,* 297 U. S. 553, 602. Cf., *United States* v. *Standard Oil Co.,* 173 F. 177, 192. The lower court recognized appellant's legitimate interest in insuring compliance with the Surgeon General's health regulations and in protecting the trademark, good will, and reputation of the patented product. The only practice it found unlawful was the exclusion of price cutters.

Abolishing the whole system of jobber licenses was not necessary to enjoin this practice since an adequate, self-policing decree could have readily been entered. The scope of the decree thus exceeded the proof of any unlawful activity. See, *Bliss Co.* v. *United States,* 248 U. S. 37, 48; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184; *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526. Cf., *Hague* v. *C. I. O.,* 307 U. S. 496. Moreover, its drastic provisions will foreclose the protection of appellant's admittedly legitimate and essential interests. Cf., *Coca-Cola Co.* v. *Bennett,* 238 F. 513. The district court's conclusion that jobber licenses were not necessary is based on assumptions unwarranted and contradicted by the record. Dist'g *International Business Machines* case, 298 U. S. 131, 140. There is no support for its view that the mere reporting of violation to refiner licensees will be effective. Nor is there any evidence as to what other methods are possible to prevent dilution, adulteration, or substitution, or to insure compliance with health regulations. The decree, therefore, drastically impairs appellant's present ability safely and efficiently to market its patented product. More than this, it seriously hampers the development of the patents and limits the return from them during their remaining life. For it is now clear that in the immediate future the importance of quality controls and public health safeguards will be far greater. As it stands, even upon the view taken by the lower court that jobbers may not be refused licenses

because of a prior history of price cutting, the decree is a cumbersome, drastic, and unjustifiable solution.

Assistant Attorney General Arnold, with whom *Solicitor General Biddle* and *Messrs. Hugh B. Cox, James C. Wilson, John Henry Lewin,* and *Samuel E. Darby, Jr.* were on the brief, for the United States.

Appellant, through the use of its licensing system, has combined with 123 refiners producing all of the lead-treated gasoline sold in the United States to exclude from the business of handling such gasoline all jobbers except those licensed by appellant. It is conceded that appellant has, in the exercise of its uncontrolled discretion, excluded jobbers from the market and has fixed the terms and conditions which must be met by those jobbers who have been given permission to enter the market. The combination restrains trade because it empowers appellant to decide who shall be allowed to enter the market and on what terms and conditions the permission to do so shall be granted. *Paramount Famous Pictures Corp.* v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44; *Interstate Circuit* v. *United States,* 306 U. S. 208, 226–229. See, also, *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 408; *United States* v. *Brims,* 272 U. S. 549; *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600.

Appellant's licensing system also violates the antitrust laws because its basic purpose has been to compel jobbers to maintain resale prices of gasoline. Appellant refuses licenses to jobbers who, in its judgment, are not likely to maintain the marketing policies and price policies of the major oil companies. Licensees believe they must comply with such policies in order to retain their licenses. Appellant, through its field representatives, investigates the marketing practices of jobbers whom it licenses and has exerted direct, substantial, and extraordinary influ-

ence over the price policies of the individual jobbers. This kind of arrangement is clearly illegal under the anti-trust laws. *Dr. Miles Medical Co.* v. *Park & Sons.*, 220 U. S. 373; *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Federal Trade Comm'n* v. *Beech-Nut Co.,* 257 U. S. 44; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392; *Interstate Circuit* v. *United States,* 306 U. S. 208.

Appellant's licensing system must be justified on the basis of its ownership of patents. However, an analysis of appellant's business demonstrates that appellant is not entitled to assume complete control over the marketing of lead-treated gasoline through the use of its patents. Appellant's business is the manufacturing of the patented fluid which is used in the production of such motor fuel. When it sells the fluid to refiners it receives all the pecuniary reward which it seeks for the exploitation of its patent rights. Having thus chosen to obtain the reward for its invention through the manufacture and sale of the fluid, appellant has no right to control the marketing by its customers of motor fuel containing the fluid. *Adams* v. *Burke,* 17 Wall. 453; *Hobbie* v. *Jennison,* 149 U. S. 355. See also *Kendall* v. *Winsor,* 21 How. 322, 327–328; *Motion Picture Co.* v. *Universal Film Co.,* 243 U. S. 502, 510–511; *Keeler* v. *Standard Folding Bed Co.,* 157 U. S. 659; *Bauer* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8. Cf., *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 404–405.

The appellant is not attempting to obtain any financial return from the mixing and use patents. It is attempting to use them solely for the purpose of dominating the marketing of lead-treated gasoline in the United States. This is an improper use of the patent privilege. The rule is well established that a patentee can not extend his

control over subject matter which lies outside of the patent privilege by merely including such subject matter in his patent claims. *Motion Picture Co.* v. *Universal Film Co.,* 234 U. S. 502; *Carbice Corp.* v. *American Patents Corp.,* 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.,* 302 U. S. 458; *American Lecithin Co.* v. *Warfield Co.,* 105 F. 2d 207; *Philad Co.* v. *Lechler Laboratories,* 107 F. 2d 747.

A patentee is entitled only to impose such restrictions in connection with the sale of a patented article as are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. *United States* v. *General Electric Co.,* 272 U. S. 476. Restrictions imposed under this rule must be tested by an objective standard of reasonableness. *General Electric* case, *supra,* 489, 490; *Kendall* v. *Winsor,* 21 How. 322, 327–328; *Motion Picture Co.* v. *Universal Film Co.,* 243 U. S. 502, 510–511.

Protection of the public health is not the real reason for the licensing scheme. It is not to be assumed that refiners and jobbers are not as zealous to protect the public health as is appellant or that they would behave in a reckless or improper manner in the absence of the licensing scheme.

The licensing system is not necessary to prevent the dilution, adulteration, and deterioration of motor fuel containing the fluid. Ethyl gasoline constitutes only about 6 per cent of all lead-treated motor fuel. Furthermore, the product which appellant fears may be adulterated is in reality the product of the refiners. The latter have a direct interest in maintaining the quality of this product and appellant's interest is too remote to justify its licensing system. See, *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 407.

The privileges flowing from the ownership of the trademark can be no greater than those covered by appellant's patents, and cannot justify the licensing system. *Coca-*

Cola Co. v. *Bennett,* 238 F. 513; *Coca-Cola Co.* v. *Butler & Sons,* 229 F. 224; and *Coca-Cola Co.* v. *Koke Co.,* 254 U. S. 143, distinguished. See *Manufacturing Co.* v. *Trainer,* 101 U. S. 51; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.,* 138 U. S. 537; *Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460; *Bourjois & Co.* v. *Katzel,* 260 U. S. 689; *Dover Stamping Co.* v. *Fellows,* 40 N. E. 105.

That it is necessary for appellant to maintain resale prices of motor fuel, cannot justify the licensing system, for that is the very thing which makes its scheme illegal. *United States* v. *General Electric Corp.,* 272 U. S. 476, is inapplicable because appellant does not manufacture the product upon which it seeks to fix the price.

In striking down the entire jobber licensing scheme the court below granted proper and effective relief. No other decree would suffice to assure jobbers that they were completely free of domination and free to engage in the competition which is protected by the antitrust laws. A decree which permitted appellant to retain the licensing system in any form would invite abuses through secrecy and concealment. The government should not be required continually to police a licensing plan which presents inherent opportunities for misuse. *Local 167* v. *United States,* 291 U. S. 293, 299; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 438–439; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201.

Mr. Justice Stone delivered the opinion of the Court.

The Government brought this suit in the District Court for Southern New York, to restrain appellant, Ethyl Gasoline Corporation, a Delaware corporation, and the other appellants, who are its officers, from granting licenses, under patents controlled by it, to jobbers to sell and distribute lead-treated motor fuel, and from enforcing

provisions in licenses to oil refiners which restrict their sale of the motor fuel to the licensed jobbers, as violations of the Sherman Anti-trust Act. 26 Stat. 209, 15 U. S. C. § 1, as amended August 17, 1937, 50 Stat. 693. The trial court granted the relief sought and from its decision in favor of the Government the case comes here on direct appeal under the provisions of § 2 of the Expediting Act of February 11, 1903, as amended 36 Stat. 1167, 15 U. S. C. § 29; § 238 of the Judicial Code, as amended 43 Stat. 938, 28 U. S. C. § 345.

The case was tried on an agreed statement of facts which was incorporated in the findings of the trial court and, except as noted, there is no dispute as to the facts. The appellant corporation is engaged in the manufacture and sale of a patented fluid compound containing tetraethyl lead, a poisonous substance, which, when added to gasoline used as a motor fuel, increases the efficiency of high pressure combustion engines in which the fuel is consumed. The Ethyl Corporation owns two patents covering the composition of the fluid, No. 1,592,954 of July 20, 1926, and No. 1,668,022 of May 1, 1928. It has a third patent, No. 1,573,846 of February 23, 1926, claiming a motor fuel produced by mixing gasoline with the patent fluid compound, which is claimed also by the two patents first mentioned. It also has a patent, No. 1,787,419, of December 30, 1930, claiming a method of using fuel containing the patented fluid in combustion motors. The corporation manufactures and sells the patented fluid to oil refiners, solely for use in the production of the improved type of motor fuel. It issues licenses under its patents to refiners and to jobbers of motor fuel on terms and conditions presently to be noted, but it does not charge or receive any royalty for its licenses. It derives its profit solely from the sale of the patented ethyl fluid to its refiner licensees.

The Licensing Agreements.

Appellant grants licenses under its patents to most of the large oil refining companies in the United States, to manufacture, sell and distribute motor fuel containing the patented fluid. The licenses provide that appellant will sell to the licensees their requirements of the patented fluid. They prohibit the licensees from selling the manufactured product to any except to other licensed refiners, to jobbers licensed by appellant and to retail dealers and consumers. They require the licensed refiners to mix the patented fluid with the gasoline at their refineries with equipment approved by appellant and in conformity to regulations promulgated by the Surgeon General of the United States and any other governmental body having jurisdiction. The refiners agree to impose obligations on all purchasers to conform to such health regulations and to require them to impose like obligations on those to whom they sell. The refiners agree, upon notice by appellant, to discontinue sales to other refiners or jobbers whose licenses appellant has cancelled. The licenses also provide for the maximum amount of the fluid to be used in the gasoline; and that, within that limit, the licensees' regular or "best non-premium" gasoline shall have a maximum octane rating of 70 [1] and shall be sold as the next highest priced motor fuel of the

[1] The utility of lead-treated gasoline for use in high compression engines is expressed in terms of octane numbers, an arbitrary scale of measurement indicating the relative degree of compression to which the fuel may be subjected without causing "knock" in the engine, which is prevented or reduced by the use of the fuel. The octane rating of motor fuel increases with the amount of the patented fluid added to the gasoline which, in any case, is small. Appellant's licenses to refiners authorize the manufacture of gasoline of high octane rating, 68 or more, of two classes, "regular," in which there is one part of tetraethyl lead to 4200 parts of gasoline, and "ethyl gasoline," in which there is one part of tetraethyl lead to 1700 parts of gasoline.

licensee below the licensee's ethyl gasoline, which shall have a minimum octane rating of 76 and shall be sold at a certain fixed price differential above the average net sales price of the licensees' best non-premium grade of commercial gasoline. The licenses further provide the conditions under which the name of the Ethyl Corporation and its trademark or trade names may be used in connection with the advertising and sale of the patented motor fuel.[2]

Jobbers are generally required by appellant to apply for licenses through the refiners from whom they expect to purchase the motor fuel. The licenses to jobbers purport to grant the right to sell and deliver to retail dealers and consumers within a specified territory regular and ethyl gasoline, manufactured and sold by a designated licensed refiner.[3] The licensed jobbers are required to furnish appellant monthly with a list of all places at which the motor fuel is sold under the licenses. They agree to comply with health regulations relating to the handling of the motor fuel promulgated by the Surgeon General or other governmental agency; to post and distribute any notices concerning the handling of such fuel as required by the appellant; to permit physical examination of employees, and to require customers purchasing for resale to assume similar obligations. Adulteration and dilution of motor fuel distributed under the licenses is prohibited, and requirements similar to those contained in refiner licenses are imposed with respect to the use of

[2] The name of the Ethyl Corporation and its trademark or trade names "Ethyl" and "Q" may not be used in connection with the advertising and sale of regular gasoline. All the licensees, with the exception of the Standard Oil Company of New Jersey, which markets the product under the name "Esso," are required to used the word "Ethyl" in connection with the sale and distribution of the Ethyl gasoline.

[3] The only obligation which the licensor assumes toward the jobbers is to defend them against patent and trademark infringement suits.

appellant's corporate name and trade names in connection with the advertising and sale of the motor fuel. Appellant is given the right to cancel the jobbers' licenses at any time for failure to comply with their terms, and either party may cancel, with or without cause, on thirty days' written notice.

Effect of the Licensing Agreements on the Oil Industry.

The licensing system established by appellant affects and controls the business of the major part of those engaged in manufacturing and distributing motor fuel oil in the United States. Appellant issues licenses to 123 refiners, including every leading oil company, except one, the Sun Oil Company, which does not generally do business through jobbers. They refine 88% of all gasoline sold in the United States, and the gasoline processed by them under the license agreements is 70% of all the gasoline thus sold, and 85% of all gasoline processed to obtain a high octane rating.

Any jobber in the United States desiring to sell lead-treated gasoline must secure a license from the Ethyl Corporation, revocable at its will, before it can procure the gasoline from licensed refiners. Of the 12,000 jobbers doing business in the United States approximately 11,000 are licensed by appellant. The jobber must procure a new license on changing his source of supply. The greater part of all gasoline treated with the patented fluid is sold and transported in interstate commerce. It is sold in part through wholesale and retail outlets owned and controlled by the refiners and in part to individual retailers and consumers. A large volume and a substantial part of the whole is distributed through licensed jobbers to whom it is delivered at their bulk storage plants through the channels of interstate commerce.

By their terms, the licensing agreements serve to exclude all unlicensed jobbers from the market, and in the

particulars already mentioned, and in others presently to be discussed, they control the conduct of the business of licensed jobbers in the distribution of the patented motor fuel and enable appellant at will to exclude others from the business. The refiners' licenses also in terms place restraints on the sales price of refiners by establishing the prescribed differential between regular and ethyl gasoline. From this and from the other stipulated facts the Government argues that the control acquired through the licensing agreements over the refiners and jobbers has been used by appellants to control the business practices of the jobbers and particularly to maintain resale prices of the patented motor fuel in unlawful restraint of interstate commerce. In support of this contention it relies upon the long established practice of appellant to refuse to grant licenses to jobbers who cut prices or refuse to conform to the marketing policies and posted prices of the major refineries or the market leaders among them.

Decision Below and Contentions of Appellants.

The trial court concluded that in view of the indefinite language of the stipulation it was perhaps a permissible, though not a necessary, conclusion that an agreement or understanding for the maintenance of prices existed between the appellant and the jobber licensees. But it considered it unnecessary to decide this issue, since it found that the appellant's licensing practices affecting the jobbers, in conjunction with the agreements and coöperation of the licensed refiners, had been used by appellant as the means of excluding from the market the unlicensed jobbers who do not conform to the market policies and posted gasoline prices adopted by the major oil companies or the market leaders among them, and that appellant uses the control thus established to coerce adherence to those policies and prices generally by the licensed jobbers, and that this restriction upon the industry effected

through the license contracts with refiners and jobbers was not within appellant's patent monopoly, and operated unreasonably to restrain interstate commerce in the processed gasoline.

It concluded that the licensing system was not, as appellant argues, necessary for the protection of such legitimate interests as the patentee had in the protection of the quality of the treated gasoline sold upon the market, and its use by the jobbers with safety to the public health. Appellants were accordingly enjoined from enforcing or attempting to enforce, or including in any subsequent agreement, provisions that refiners shall sell lead-treated gasoline only to licensed jobbers, and from requiring or attempting to require jobbers to secure licenses, and from enforcing or attempting to enforce the provisions of any outstanding jobber licenses. The decree also declared the jobber licenses illegal and required appellant to notify the jobbers that the licenses have been cancelled.

Appellant, insisting that it does not use the jobbers' licensing system to maintain prices, makes two principal attacks on the decree. It urges that the licensing of the refiners and jobbers, the restraints upon the sale of the patented fuel by the refiners, and the restrictions placed upon the jobbers, are all reasonably necessary for the commercial development of appellant's patents and for insuring a financial return from them, and are therefore within its patent monopoly. In any case, it is said that the conditions attached to the refiners' and jobbers' licenses are appropriate and reasonably adapted to the maintenance of the quality of the product and for the protection of the public in its use of a product containing a dangerous poison, and both are essential to the maintenance of the market for the patented fuel, on which the market for appellant's patented fluid depends. And since the jobbers' licenses are a necessary or appropriate

means of protecting the interests of appellant and the public in the quality and safe use of the patented product, it is argued that the decree abolishing the whole system of jobbers' licenses went further than was necessary or proper to prevent such restraint as there may have been exerted on the jobbers with respect to prices and marketing policies.

Relation of the Licensing Agreements to Price Maintenance.

For the moment we may lay to one side the particular restrictions enumerated in the contracts of the refiners with jobbers, and turn to the relation of appellant's licensing policy to the maintenance of price policies by the jobbers. While the trial court found no contract or agreement which purports to prescribe resale prices or to exact any price policy of the jobbers, the stipulation of facts shows that appellant, through its patents, its contracts, and its licensing policy, has acquired the power to exclude at will from participation in the nationwide market for lead-treated motor fuel all of the 12,000 motor fuel jobbers of the country, by refusing to license any of the 1,000 unlicensed jobbers, or by cancelling, as it may at will, the licenses of any of the 11,000 licensed jobbers. This we assume, for present purposes, it could lawfully do by virtue of the power conferred by its patent to exclude any or all others from selling the patented product. But it does not follow that it can lawfully exercise that power in such manner as to control the patented commodity in the hands of the licensed jobbers who had purchased it, or their actions with respect to it in ways not within the limits of the patent monopoly; and conspicuous among such controls which the Sherman law prohibits and the patent law does not sanction is the regulation of prices and the suppression of competition among the purchasers of the patented articles. That appellant, by the plan

and scope of its licensing policy, has acquired vast potential power to accomplish that end cannot be doubted. And we think the record supports the finding of the trial court that appellant has exercised that power continuously for a considerable period as a means of control over the price policies of the licensed jobbers.

From the stipulation of facts, it appears that since 1929 appellant has pursued the practice of investigating, through field agents, the "business ethics" of jobbers applying for licenses, and of rejecting such applications upon the adverse report of the agent. Appellant admits that the phrase "business ethics" is used to denote compliance with "marketing policies and prevailing prices of the petroleum industry," which are the "marketing policies and posted prices of the major oil companies or the market leaders among them." Among these is the Standard Oil Company of New Jersey which owns one-half of the capital stock of the appellant.[4] While not all applicants who have failed to maintain prices and marketing policies have been rejected, the record leaves no doubt that appellant has made use of its dominant position in the trade to exercise control over prices and marketing policies of jobbers in a sufficient number of cases and with sufficient continuity to make its attitude toward price cutting a pervasive influence in the jobbing trade.

In many instances, although not in all, an adverse report by the investigator as to the applicant's business ethics has been the sole ground for rejecting his application, and appellant admits that the greater number of applications for licenses which have been denied were rejected because of such an adverse report. In the cases in which licenses have been refused, something less than one-half of the rejected applicants were later granted licenses on their assurance that their marketing practices

[4] The remainder is owned by General Motors Corporation and E. I. du Pont de Nemours Company.

would be changed. The total number of rejections for failure to comply with that standard does not appear, for appellant has failed to keep any record of the ground of rejection of applications for licenses, admittedly because it is reluctant to preserve in its records "the extent to which maintenance of prices and marketing policies by jobbers entered into the granting of licenses."

Jobbers' licenses do not appear to have been cancelled because of failures to maintain policies or prices of the major oil companies whenever they have occurred, but it is an established practice of appellant to investigate the business ethics of licensed jobbers in order to ascertain whether they maintain the marketing prices, policies and practices prevailing or ostensibly prevailing in the industry. Representatives of appellant have from time to time, but not in every case, reported a jobber to his supplier or refiner for not maintaining the marketing policies of the latter, and in some cases they have united in persuading the jobber to mend his ways. Appellant has generally required each licensed jobber to purchase all his treated fuel from a single refiner and in some instances has refused a license to jobbers who wished to change their source of supply from one licensed refiner to another.

These long-continued practices have had the effect upon the industry naturally to be expected. Large numbers of refiners and the majority of jobbers believe that the jobbers must maintain the required business ethics in order to obtain licenses, and a number of licensed jobbers believe that they are required by appellant's licensing practices to maintain prices and abide by the marketing practices of the major oil companies. Appellant, in its printed instructions to field representatives as to the manner of conducting investigations of licensed jobbers, after pointing out that one of the reasons for the investigation of the jobber before the issuance of the license

is to insure that he "will not resort to unethical methods in competing with our other licensed jobbers and refiners," and after describing the methods of conducting the investigation,[5] sums up the result as follows: "We have, through these supplemental investigations, been able to correct the ethyl picture to a considerable extent, and have succeeded in eliminating from our jobber lists some of our former accounts who were not a credit to us as licensees of the Ethyl Gasoline Corporation."

Scope of the Patent Monopoly.

It is not denied, and could not well be, that if appellant's comprehensive control of the market in the distribution of the lead-treated gasoline, as disclosed by the record, had been acquired without aid of the patents, but wholly by the contracts with refiners and jobbers, such control would involve a violation of the Sherman Act. *Paramount Famous Corp.* v. *United States,* 282 U. S. 30, 43; *United States* v. *First National Pictures,* 282 U. S.

[5] The investigator is reminded in the *Field Representative Manual* that the question as to "business ethics" "can be answered only if the field representative has obtained sufficient information to be sure of his opinion." "Ethics of the jobber is based on the territory in which he is marketing and the conditions surrounding the sale of gasoline by other ethyl gasoline distributors. Care should be taken, if possible, to find out the instigator of any practices which tend to unfair competition. Business ethics is a relative quality and no hard and fast rule can be given to govern all cases. Information given to field representatives and picked up in the various contacts should be weighed carefully before a final decision is reached. One of the three words, 'good,' 'questionable,' or 'unethical' is to be used in answering this question."

In January, 1935 the question as to "business ethics" was eliminated from the form report of field agents. But business ethics has since continued to be one of the principal subjects of investigation and, as before, the result of the field agent's investigation has been included in his report and his recommendations have been generally accepted and acted upon by his superiors.

44. Cf. *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. And so we turn to the consideration of the patents and the patent law to ascertain whether the monopoly which they have given appellant affords a lawful basis for the control over the marketing of motor fuel which the record discloses. Cf. *United States* v. *General Electric Co.*, 272 U. S. 476. In considering that question we assume the validity of the patents, which is not questioned here.

The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention. R. S. § 4884, 35 U. S. C. § 40. The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and claims of the patent. *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 510. He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give.

He may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes or materials which lie outside of the monopoly of the patent licensed; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co., supra; Carbice Corporation* v. *American Patents Corp.*, 283 U. S. 27, 31; *Leitch Manufacturing Co.* v. *Barber Co.*, 302 U. S. 458; cf. *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 462; *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 140; or condition the license so as to control conduct by the licensee not embraced in the patent monopoly, *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Interstate Circuit*

v. *United States,* 306 U. S. 208, 228–230; or upon the maintenance of resale prices by the purchaser of the patented article. *Adams* v. *Burke,* 17 Wall. 453; *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8; cf. *United States* v. *General Electric Co., supra,* 485.

Appellant, as patentee, possesses exclusive rights to make and sell the fluid and also the lead-treated motor fuel. By its sales to refiners it relinquishes its exclusive right to use the patented fluid; and it relinquishes to the licensed jobbers its exclusive rights to sell the lead-treated fuel by permitting the licensed refiners to manufacture and sell the fuel to them. And by the authorized sales of the fuel by refiners to jobbers the patent monopoly over it is exhausted, and after the sale neither appellant nor the refiners may longer rely on the patents to exercise any control over the price at which the fuel may be resold. *Adams* v. *Burke, supra; Bobbs-Merrill Co.* v. *Straus, supra; Bauer & Cie* v. *O'Donnell, supra; Motion Picture Patents Co.* v. *Universal Film Co., supra.*

The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price-cutters. Compare *United States* v. *Colgate & Co.,* 250 U. S. 300 with *United States* v. *A. Schrader's Son,* 252 U. S. 85. A very different scene is depicted by the record. It is one in which appellant has established the marketing of the patented fuel in vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contracts resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them. It

seems plain that this attempted regulation of prices and market practices of the jobbers with respect to the fuel purchased, for which appellant could not lawfully contract, cannot be lawfully achieved by entering into contracts or combinations through the manipulation of which the same results are reached by the exercise of the power which they give to control the action of the purchasers. Such contracts or combinations which are used to obstruct the free and natural flow in the channels of interstate commerce of trade even in a patented article, after it is sold by the patentee or his licensee, are a violation of the Sherman Act. *Federal Trade Commission* v. *Beech-Nut Co., supra,* 453; *United Shoe Machinery Co.* v. *United States, supra; Victor Talking Machine Co.* v. *Kemeny,* 271 F. 810, 817; cf. *United States* v. *A. Schrader's Son, supra.* Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, which is not only a prohibition against the infliction of a particular type of public injury but "a limitation of rights which may be pushed to evil consequences and therefore restrained." *Standard Sanitary Mfg. Co.* v. *United States, supra,* 49; *American Column Co.* v. *United States,* 257 U. S. 377, 400; *United States* v. *American Linseed Oil Co.,* 262 U. S. 371; *United States* v. *Trenton Potteries Co., supra,* 397, 398.

The extent to which appellant's dominion over the jobbers' business goes beyond its patent monopoly, is emphasized by the circumstances here present that the prices and market practices sought to be established are not those prescribed by appellant-patentee, but by the

refiners. Appellant neither owns nor sells the patented fuel nor derives any profit through royalties or otherwise from its sale. It has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see *Standard Sanitary Mfg. Co.* v. *United States, supra,* than for the exploitation of an unpatented article, *United Shoe Machinery Co.* v. *United States, supra; Carbice Corporation* v. *American Patents Corp., supra; Leitch Manufacturing Co.* v. *Barber Co., supra; American Lecithin Co.* v. *Warfield Co.,* 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. *Interstate Circuit* v. *United States, supra,* 228–230.

Protection of Health and Quality of Product.

The trial court was of opinion that such interest as appellant has in protecting the health of the public in connection with the distribution of the fuel, and in preventing adulteration, deterioration and dilution of the motor fuel in the hands of the jobbers may be adequately protected without resort to the jobber license device which has been and is capable of being used for other and illicit purposes. Compare *International Business Machines Corp.* v. *United States, supra,* 139, 140. This

conclusion is, we think, amply supported by the record. The precautions taken to protect the public health in the handling of the motor fuel by jobbers and service stations include the health restrictions imposed on jobbers by the refiners included in their contracts with jobbers, inspections, more or less perfunctory, by representatives of appellant, and the posting by jobbers and distributors of notices supplied by appellant stating that the fuel contains lead and is for use as a motor fuel only. These activities are not interfered with by the decree.

There is no authentic instance of injury resulting from the handling of lead-treated gasoline, after its manufacture, attributable to its lead content. Extensive expert study, carried on under direction of appellant over a period of years, detailed in the record, resulted in a report that the risk arising from the absorption of lead through the skin in the handling of the lead-treated fuel is so small as to be negligible, and that the use of the fuel made in conformity to the refiners' licenses has not caused or produced any dangers or hazards to health.

The avoidance of such dangers as there may be in the handling of the motor fuel by jobbers and distributors is plainly not beyond control by public health regulations, and would seem, as the district court thought, to be amply secured, in any case, through the self-interest of the refiners in requiring the purchasers of their gasoline to take proper health precautions including the posting of notices which appellant supplies and by the continuance of appellant's inspection, all of which are permissible under the decree. It is likewise apparent that the interest the appellant has in preventing dilution, adulteration and deterioration of the treated gasoline in the hands of the jobbers may be similarly protected without continued resort to jobber licenses, which is precluded by reason of their use and the danger of their continued use for other and illegal purposes.

Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival. *Local 167* v. *United States,* 291 U. S. 293; *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526, 532. It could, in the exercise of its discretion, consider whether that could be accomplished effectively without disestablishing the licensing system, and whether there were countervailing reasons for continuing it as a necessary or proper means for appellant to carry out other lawful purposes. Since the court rightly concluded that these reasons were without substantial weight, it properly suppressed the means by which the unlawful restraint was achieved. *Local 167* v. *United States, supra,* 299, 300; cf. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 513.

Affirmed.

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

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BRUUN.

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

No. 479. Argued February 28, 1940.—Decided March 25, 1940.

1. Where, upon termination of a lease, the lessor repossessed the real estate and improvements, including a new building erected by the lessee, an increase in value attributable to the new building was taxable under the Revenue Act of 1932 as income of the lessor in the year of repossession. P. 467.

2. *Hewitt Realty Co.* v. *Commissioner,* 76 F. 2d 880, and decisions of this Court dealing with the taxability *vel non* of stock dividends, distinguished. P. 468.
3. Even though the gain in question be regarded as inseparable from the capital, it is within the definition of gross income in § 22 (a) of the Revenue Act of 1932; and, under the Sixteenth Amendment, may be taxed without apportionment amongst the States. P. 468.

105 F. 2d 442, reversed.

CERTIORARI, 308 U. S. 544, to review the affirmance of a decision of the Board of Tax Appeals overruling the Commissioner's determination of a deficiency in income tax.

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

Mr. John H. McEvers for respondent.

That gain from capital be taxable as income, it is essential that there be a growth or increment of value which is separable from the capital and available for the owner's benefit and disposal. *Eisner* v. *Macomber,* 252 U. S. 189, 207; *United States* v. *Phellis,* 257 U. S. 156, 168–169; *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 519–520; *Taft* v. *Bowers,* 278 U. S. 470, 482; *United States* v. *Safety Car Heating & L. Co.,* 297 U. S. 88, 99. It must be cash or readily reducible to cash. *Burnet* v. *Logan,* 283 U. S. 404, 413–414; *Commissioner* v. *Wood,* 107 F. 2d 390, 395; *Champlin* v. *Commissioner,* 71 F. 2d 23, 29; *Schoenheit* v. *Lucas,* 44 F. 2d 476, 479–480; *Mount* v. *Commissioner,* 48 F. 2d 550, 552; *Bourn* v. *McLaughlin,* 19 F. 2d 148, 150. Otherwise, a capital tax and not an income tax results. *Koshland* v. *Helvering,* 298 U. S. 441, 445–446; *Goodrich* v. *Edwards,* 255 U. S. 527, 535.

A building erected upon the premises by the lessee attaches to and becomes a part of the realty either at

the time of its erection, *Holtgreve* v. *Sobolewski,* 326 Mo. 412, 422; see, *Havens* v. *Fire Ins. Co.,* 123 Mo. 403, 419; *Climer* v. *Wallace,* 28 Mo. 556–559, or upon termination of the lease, *Shelton* v. *Jones,* 66 Okla. 83; *Hughes* v. *Kershow,* 42 Colo. 210. It is simply an increment of value in the property, not unlike the result of a good bargain, and does not constitute taxable income. *Palmer* v. *Commissioner,* 305 U. S. 63, 68–69; *Rose* v. *Trust Co.,* 28 F. 2d 767, 776, 778; *Commissioner* v. *VanVorst,* 59 F. 2d 677, 680; *Taplin* v. *Commissioner,* 41 F. 2d 454; *Rossheim* v. *Commissioner,* 92 F. 2d 247, 249; *Omaha National Bank* v. *Commissioner,* 75 F. 2d 434, 436; Everhart *v.* Commissioner, 26 B. T. A. 318; Geeseman *v.* Commissioner, 38 B. T. A. 258, 264, acquiesced in by the Commissioner, C. B. 1939–1, p. 13.

These principles have often been accepted and applied adversely to the government's contention. *M. E. Blatt Co.* v. *United States,* 305 U. S. 267; *Commissioner* v. *Center Investment Co.,* 108 F. 2d 190; *Commissioner* v. *Wood,* 107 F. 2d 869; *Helvering* v. *Bruun,* 105 F. 2d 442; *Nicholas* v. *Fifteenth Street Investment Co.,* 105 F. 2d 289; *Dominick* v. *United States,* 24 F. Supp. 829; *English* v. *Bitgood,* 21 F. Supp. 641; *Staples* v. *United States,* 21 F. Supp. 737; *Hilgenberg* v. *United States,* 21 F. Supp. 453; *Hewitt Realty Co.* v. *Commissioner,* 76 F. 2d 880; *Cryan* v. *Wardell,* 263 F. 248; *Miller* v. *Gearin,* 258 F. 225. Contra, the Court of Claims in *M. E. Blatt Co.* v. *United States,* 23 F. Supp. 461, and the District Court for the Western District of Kentucky in *Kentucky Block Coal Co.* v. *Lucas,* 4 F. Supp. 266, both of which were overruled by this Court in *M. E. Blatt Co.* v. *United States, supra.*

The Board of Tax Appeals has also consistently held likewise.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The controversy had its origin in the petitioner's assertion that the respondent realized taxable gain from the forfeiture of a leasehold, the tenant having erected a new building upon the premises. The court below held that no income had been realized.[1] Inconsistency of the decisions on the subject led us to grant certiorari.

The Board of Tax Appeals made no independent findings. The cause was submitted upon a stipulation of facts. From this it appears that on July 1, 1915, the respondent, as owner, leased a lot of land and the building thereon for a term of ninety-nine years.

The lease provided that the lessee might, at any time, upon giving bond to secure rentals accruing in the two ensuing years, remove or tear down any building on the land, provided that no building should be removed or torn down after the lease became forfeited, or during the last three and one-half years of the term. The lessee was to surrender the land, upon termination of the lease, with all buildings and improvements thereon.

In 1929 the tenant demolished and removed the existing building and constructed a new one which had a useful life of not more than fifty years. July 1, 1933, the lease was cancelled for default in payment of rent and taxes and the respondent regained possession of the land and building.

The parties stipulated "that as at said date, July 1, 1933, the building which had been erected upon said premises by the lessee had a fair market value of $64,245.68 and that the unamortized cost of the old building, which was removed from the premises in 1929 to make way for the new building, was $12,811.43, thus leaving a net fair market value as at July 1, 1933, of $51,434.25, for

[1] *Helvering* v. *Bruun,* 105 F. 2d 442.

the aforesaid new building erected upon the premises by the lessee."

On the basis of these facts, the petitioner determined that in 1933 the respondent realized a net gain of $51,-434.25. The Board overruled his determination and the Circuit Court of Appeals affirmed the Board's decision.

The course of administrative practice and judicial decision in respect of the question presented has not been uniform. In 1917 the Treasury ruled that the adjusted value of improvements installed upon leased premises is income to the lessor upon the termination of the lease.[2] The ruling was incorporated in two succeeding editions of the Treasury Regulations.[3] In 1919 the Circuit Court of Appeals for the Ninth Circuit held in *Miller* v. *Gearin,* 258 F. 225, that the regulation was invalid as the gain, if taxable at all, must be taxed as of the year when the improvements were completed.[4]

The regulations were accordingly amended to impose a tax upon the gain in the year of completion of the improvements, measured by their anticipated value at the termination of the lease and discounted for the duration of the lease. Subsequently the regulations permitted the lessor to spread the depreciated value of the improvements over the remaining life of the lease, reporting an aliquot part each year, with provision that, upon premature termination, a tax should be imposed upon the excess of the then value of the improvements over the amount theretofore returned.[5]

In 1935 the Circuit Court of Appeals for the Second Circuit decided in *Hewitt Realty Co.* v. *Commissioner,*

[2] T. D. 2442, 19 Treas. Dec. Int. Rev. 25.

[3] Regulations 33 (1918 Ed.) Art. 4, ¶ 50; Regulations 45 (2d 1919 Ed.) Art. 48.

[4] This court denied certiorari, 250 U. S. 667.

[5] T. D. 3062, 3 Cum. Bull. 109; Regulations 45 (1920 Ed.), Art. 48; Regulations 62, 65, and 69, Art. 48; Regulations 86, 94, and 101, Art. 22 (a) —13.

76 F. 2d 880, that a landlord received no taxable income in a year, during the term of the lease, in which his tenant erected a building on the leased land. The court, while recognizing that the lessor need not receive money to be taxable, based its decision that no taxable gain was realized in that case on the fact that the improvement was not portable or detachable from the land, and if removed would be worthless except as bricks, iron, and mortar. It said (p. 884): "The question as we view it is whether the value received is embodied in something separately disposable, or whether it is so merged in the land as to become financially a part of it, something which, though it increases its value, has no value of its own when torn away."

This decision invalidated the regulations then in force.[6]

In 1938 this court decided *M. E. Blatt Co.* v. *United States,* 305 U. S. 267. There, in connection with the execution of a lease, landlord and tenant mutually agreed that each should make certain improvements to the demised premises and that those made by the tenant should become and remain the property of the landlord. The Commissioner valued the improvements as of the date they were made, allowed depreciation thereon to the termination of the leasehold, divided the depreciated value by the number of years the lease had to run, and found the landlord taxable for each year's aliquot portion thereof. His action was sustained by the Court of Claims. The judgment was reversed on the ground that the added value could not be considered rental accruing over the period of the lease; that the facts found by the Court of Claims did not support the conclusion of the Commissioner as to the value to be attributed to the im-

[6] The *Hewitt* case was followed in *Hilgenberg* v. *United States,* 21 F. Supp. 453; *Staples* v. *United States,* 21 F. Supp. 737, and *English* v. *Bitgood,* 21 F. Supp. 641.

provements after a use throughout the term of the lease; and that, in the circumstances disclosed, any enhancement in the value of the realty in the tax year was not income realized by the lessor within the Revenue Act.

The circumstances of the instant case differentiate it from the *Blatt* and *Hewitt* cases; but the petitioner's contention that gain was realized when the respondent, through forfeiture of the lease, obtained untrammeled title, possession and control of the premises, with the added increment of value added by the new building, runs counter to the decision in the *Miller* case and to the reasoning in the *Hewitt* case.

The respondent insists that the realty,—a capital asset at the date of the execution of the lease,—remained such throughout the term and after its expiration; that improvements affixed to the soil became part of the realty indistinguishably blended in the capital asset; that such improvements cannot be separately valued or treated as received in exchange for the improvements which were on the land at the date of the execution of the lease; that they are, therefore, in the same category as improvements added by the respondent to his land, or accruals of value due to extraneous and adventitious circumstances. Such added value, it is argued, can be considered capital gain only upon the owner's disposition of the asset. The position is that the economic gain consequent upon the enhanced value of the recaptured asset is not gain derived from capital or realized within the meaning of the Sixteenth Amendment and may not, therefore, be taxed without apportionment.

We hold that the petitioner was right in assessing the gain as realized in 1933.

We might rest our decision upon the narrow issue presented by the terms of the stipulation. It does not appear what kind of a building was erected by the tenant or whether the building was readily removable from the

land. It is not stated whether the difference in the value between the building removed and that erected in its place accurately reflects an increase in the value of land and building considered as a single estate in land. On the facts stipulated, without more, we should not be warranted in holding that the presumption of the correctness of the Commissioner's determination has been overborne.

The respondent insists, however, that the stipulation was intended to assert that the sum of $51,434.25 was the measure of the resulting enhancement in value of the real estate at the date of the cancellation of the lease. The petitioner seems not to contest this view. Even upon this assumption we think that gain in the amount named was realized by the respondent in the year of repossession.

The respondent can not successfully contend that the definition of gross income in § 22 (a) of the Revenue Act of 1932[7] is not broad enough to embrace the gain in question. That definition follows closely the Sixteenth Amendment. Essentially the respondent's position is that the Amendment does not permit the taxation of such gain without apportionment amongst the states. He relies upon what was said in *Hewitt Realty Co.* v. *Commissioner, supra,* and upon expressions found in the decisions of this court dealing with the taxability of stock dividends to the effect that gain derived from capital must be something of exchangeable value proceeding from property, severed from the capital, however invested or employed, and received by the recipient for his separate use, benefit, and disposal.[8] He emphasizes the necessity that the gain be separate from the capital and separately disposable. These expressions, however,

[7] c. 209, 47 Stat. 169, 178.

[8] See *Eisner* v. *Macomber,* 252 U. S. 189, 207; *United States* v. *Phellis,* 257 U. S. 156, 169.

were used to clarify the distinction between an ordinary dividend and a stock dividend. They were meant to show that in the case of a stock dividend, the stockholder's interest in the corporate assets after receipt of the dividend was the same as and inseverable from that which he owned before the dividend was declared. We think they are not controlling here.

While it is true that economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction.[9] The fact that the gain is a portion of the value of property received by the taxpayer in the transaction does not negative its realization.

Here, as a result of a business transaction, the respondent received back his land with a new building on it, which added an ascertainable amount to its value. It is not necessary to recognition of taxable gain that he should be able to sever the improvement begetting the gain from his original capital. If that were necessary, no income could arise from the exchange of property; whereas such gain has always been recognized as realized taxable gain.

Judgment reversed.

The CHIEF JUSTICE concurs in the result in view of the terms of the stipulation of facts.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

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[9] *Cullinan* v. *Walker,* 262 U. S. 134; *Marr* v. *United States,* 268 U. S. 536; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Kirby Lumber Co.,* 284 U. S. 1; *Helvering* v. *American Chicle Co.,* 291 U. S. 426; *United States* v. *Hendler,* 303 U. S. 564.

FEDERAL COMMUNICATIONS COMMISSION *v.* SANDERS BROTHERS RADIO STATION.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 499. Argued February 9, 1940.—Decided March 25, 1940.

1. A fundamental question as to the function and powers of the Federal Communications Commission was raised in this case and, on the record, is open here. P. 473.
2. Resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element which the Federal Communications Commission must weigh, and as to which it must make findings, in passing on an application for a broadcasting license. P. 473.
3. A licensee of a broadcasting station, over whose objection—of economic injury to his station—the Communications Commission granted a permit for the erection of a rival station, is, under § 402 (b) (2) of the Act, a "person aggrieved or whose interests are adversely affected" by the decision of the Commission, and entitled to appeal therefrom. P. 476.
4. An order of the Communications Commission granting a permit to erect a broadcasting station held supported by the findings. P. 477.
5. The conclusion of the appellate court that the Communications Commission had not used as evidence certain data and reports in its files—which an intervening party had been denied an opportunity to inspect—accepted here. P. 478.

70 App. D. C. 297; 106 F. 2d 321, reversed.

CERTIORARI, 308 U. S. 546, to review a judgment which set aside an order of the Federal Communications Commission granting a permit to erect a broadcasting station.

Mr. William J. Dempsey, with whom *Solicitor General Biddle* and *Messrs. Richard H. Demuth, William C. Koplovitz, Robert M. Cooper,* and *Benedict P. Cottone* were on the brief, for petitioner.

Mr. Louis G. Caldwell, with whom *Messrs. Reed T. Rollo, Donald C. Beelar,* and *Percy H. Russell, Jr.* were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended.[1]

January 20, 1936, the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed with the petitioner an application for a construction permit to erect a broadcasting station in that city. May 14, 1936, the respondent, who had for some years held a broadcasting license for, and had operated, Station WKBB at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to move its transmitter and studios to the last named city and instal its station there. August 18, 1936, respondent asked leave to intervene in the Telegraph Herald proceeding, alleging in its petition, *inter alia,* that there was an insufficiency of advertising revenue to support an additional station in Dubuque and insufficient talent to furnish programs for an additional station; that adequate service was being rendered to the community by Station WKBB and there was no need for any additional radio outlet in Dubuque and that the granting of the Telegraph Herald application would not serve the public interest, convenience, and necessity. Intervention was permitted and both applications were set for consolidated hearing.

The respondent and the Telegraph Herald offered evidence in support of their respective applications. The respondent's proof showed that its station had operated

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064; Act of June 5, 1936, c. 511, 49 Stat. 1475; Act of May 20, 1937, c. 229, 50 Stat. 189, 47 U. S. C. 151, *et seq.*

at a loss; that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the respondent and that, of the advertisers relied on to support the Telegraph Herald station, more than half had used the respondent's station for advertising.

An examiner reported that the application of the Telegraph Herald should be denied and that of the respondent granted. On exceptions of the Telegraph Herald, and after oral argument, the broadcasting division of petitioner made an order granting both applications, reciting that "public interest, convenience, and necessity would be served" by such action. The division promulgated a statement of the facts and of the grounds of decision, reciting that both applicants were legally, technically, and financially qualified to undertake the proposed construction and operation; that there was need in Dubuque and the surrounding territory for the services of both stations, and that no question of electrical interference between the two stations was involved. A rehearing was denied and respondent appealed to the Court of Appeals for the District of Columbia. That court entertained the appeal and held that one of the issues which the Commission should have tried was that of alleged economic injury to the respondent's station by the establishment of an additional station and that the Commission had erred in failing to make findings on that issue. It decided that, in the absence of such findings, the Commission's action in granting the Telegraph Herald permit must be set aside as arbitrary and capricious.[2]

The petitioner's contentions are that under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved, or whose interests were adversely affected, by the Com-

[2] *Sanders Brothers Radio Station* v. *Federal Communications Commission,* 70 App. D. C. 297; 106 F. 2d 321.

mission's action, within the meaning of § 402 (b) of the Act which authorizes appeals from the Commission's orders.

The respondent asserts that the petitioner in argument below contented itself with the contention that the respondent had failed to produce evidence requiring a finding of probable economic injury to it. It is consequently insisted that the petitioner is not in a position here to defend its failure to make such findings on the ground that it is not required by the Act to consider any such issue. By its petition for rehearing in the court below, the Commission made clear its position as now advanced. The decision of the court below, and the challenge made in petition for rehearing and here by the Commission, raise a fundamental question as to the function and powers of the Commission and we think that, on the record, it is open here.

First. We hold that resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.

Section 307 (a) of the Communications Act directs that "the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." This mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals.[3] The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station. Whether the Commission should consider the subject must depend

[3] *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

upon the purpose of the Act and the specific provisions intended to effectuate that purpose.

The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission,[4] the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.[5] Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads,[6] in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures

[4] See Title II, §§ 201–221, 47 U. S. C. §§ 201–221.

[5] See § 3 (h), 47 U. S. C. § 153 (h).

[6] Compare *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277; *Chicago Junction Case*, 264 U. S. 258.

which are unnecessary if free competition is to be permitted.

An important element of public interst and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia,* into an applicant's financial qualifications to operate the proposed station.[7]

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

This is not to say that the question of competition between a proposed station and one operating under an

[7] See § 308 (b), 47 U. S. C. § 308 (b).

existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives,[8] which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.

Second. It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application.

Section 402 (b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) "by any other person aggrieved or whose interests are adversely affected

[8] See § 311, 47 U. S. C. § 311, relating to unfair competition and monopoly.

by any decision of the Commission granting or refusing any such application."

The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission it is impossible that § 402 (b) was intended to give the respondent standing to appeal, since absence of right implies absence of remedy. This view would deprive subsection (2) of any substantial effect.

Congress had some purpose in enacting § 402 (b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.[9]

We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission.

Third. Examination of the findings and grounds of decision set forth by the Commission discloses that the findings were sufficient to comply with the requirements of the Act in respect of the public interest, convenience, or necessity involved in the issue of the permit. In any event, if the findings were not as detailed upon this subject as might be desirable, the attack upon them is not that the public interest is not sufficiently protected but only that the financial interests of the respondent have not been considered. We find no reason for abrogating the Commission's order for lack of adequate findings.

Fourth. The respondent here renews a contention made in the Court of Appeals to the effect that the Com-

[9] Compare *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 23–25.

mission used as evidence certain data and reports in its files without permitting the respondent, as intervenor before the Commission, the opportunity of inspecting them. The Commission disavows the use of such material as evidence in the cause and the Court of Appeals has found the disavowal veracious and sufficient. We are not disposed to disturb its conclusion.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

THOMPSON, TRUSTEE, *v.* MAGNOLIA PETROLEUM CO. ET AL.

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

No. 481. Argued February 28, 1940.—Decided March 25, 1940.

In a railroad reorganization proceeding under § 77 of the Bankruptcy Act in the federal court for Missouri, rights in oil underlying the right of way of the railroad in Illinois were claimed by the trustee and by others adversely. The trustee had possession of the right-of-way lands under claim of fee simple ownership. *Held:*

1. The bankruptcy court had summary jurisdiction to adjudicate the question of title. P. 481.

2. The bankruptcy court did not abuse its discretion in ordering that the underlying oil be extracted and marketed, to prevent irreparable loss to the estate by its being drained off through wells on adjacent lands, and that the net proceeds thereof be impounded, pending determination as to the rightful owner. P. 482.

3. Under the circumstances, the ownership of the fee to the right-of-way lands should be determined by the state courts of Illinois, and the bankruptcy court should order the trustee to proceed accordingly. P. 483.

106 F. 2d 217, reversed.

CERTIORARI, 308 U. S. 630, to review a decree which reversed an order of the District Court and directed dis-

missal of a petition to that court by a trustee in a proceeding under § 77 of the Bankruptcy Act.

Mr. Thomas T. Railey for petitioner.

Messrs. Craig Van Meter and *Thomas H. Cobbs,* with whom *Messrs. Fred H. Kelly, Wm. H. Armstrong,* and *Walace Hawkins* were on the brief, for respondents.

Mr. Justice Black delivered the opinion of the Court.

A rich oil field was discovered in Illinois in 1938. Thereupon, this dispute arose between a trustee of a railroad in reorganization under § 77 of the Bankruptcy Act (11 U. S. C. 205) and other claimants as to the legal right to drill for and capture fugitive oil under the railroad's right of way traversing the newly discovered field. The trustee asserts fee simple ownership of the right of way lands with consequent right to reduce the underlying oil to possession. Respondents deny the trustee's alleged title or that he has any interest in the land beyond a mere easement—a limited right to use the surface for railroad purposes only. They allege that ownership of the fee is in others, from whom they have obtained oil leases. This determinative question of fee simple ownership can be decided only by interpretation, under Illinois law, of instruments granting the railroad its right of way.

The questions here are whether the bankruptcy court has summary jurisdiction to adjudicate ownership of the right of way lands, and whether that court abused its discretion in ordering the fugitive oil captured and its proceeds impounded pending adjudication of the ownership.

Petitioner is trustee of the Missouri-Illinois Railroad Co., a subsidiary of the Missouri-Pacific Railroad Co., in process of reorganization in the same proceeding with the parent company in the United States District Court

for the Eastern District of Missouri. The trustee petitioned the bankruptcy court ". . . for determination of title and for advice and directions respecting certain proposed oil operations on right-of-way near Salem, Illinois." And his petition alleged that the right of way lands had been "fenced and used by Trustee and his predecessors in interest without interruption, and with actual visible and exclusive possession acquired under claim of title inconsistent with the claims of title of any other owner for at least twenty years prior to institution of these proceedings"; that by reason of this adverse possession and various conveyances and decrees of record, the trustee had title to the lands and a right to the oil thereunder; that numerous wells had been dug in close proximity to the right of way and without prompt action to remove the oil under the right of way it would be drained into wells on adjacent lands and its value forever lost to the stockholders and creditors of the railroad. The prayer sought notice to claimants of rights to the oil to appear and show cause why they should not be "estopped and enjoined from asserting any further title in and to the land . . . upon which said right-of-way is located or to the mineral, oil or gas deposits in and under . . . [the] right-of-way or extracted therefrom"; and that, pending "determination of adverse claims to title," the trustee be authorized to have wells drilled, oil captured and sold, and the proceeds, less cost of production, impounded and held for the account of the rightful owner as might be thereafter determined by the bankruptcy court.

Although they admitted that the railroad "had been in possession of the . . . premises" using them for right of way and tracks, respondents denied both that the trustee owned the fee and that the railroad had been, or that the trustee was, in adverse possession of the oil and other minerals under the right of way.

The bankruptcy court found that the trustee was in "actual possession of the property . . . ., under assertion

of claim to fee simple title thereto"; that the court accordingly had jurisdiction; and that immediate action was necessary "to conserve the oil supply underlying the property for the benefit of the parties in interest as their rights, title, and interest thereto may hereafter be determined by this Court." The trustee was therefore directed to provide for wells, production and sale of oil, with the proceeds—less expenses—to be impounded pending adjudication of ownership.

Upon consideration of Illinois law, which admittedly must govern, the Court of Appeals reversed with instructions to dismiss the trustee's petition, concluding that, as interpreted under Illinois law, the instruments relied on by the trustee conveyed an easement only and that the trustee's possession of the right of way lands under an erroneous claim of fee simple ownership was not such possession of the oil and gas as to give the bankruptcy court summary jurisdiction to determine fee simple ownership.[1] Conveyances of rights of way in Illinois substantially similar to those here in dispute have been held by the Court of Appeals for the Seventh Circuit, in which Illinois is located, to convey a fee simple title under that state's law.[2] Because of this conflict and the importance of the question of the bankruptcy court's asserted summary jurisdiction, we granted certiorari.[3]

First. Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy.[4] Here, the trustee succeeded to the physical pos-

[1] 106 F. 2d 217.

[2] *Carter Oil Co.* v. *Welker,* 112 F. 2d 299.

[3] 308 U. S. 630.

[4] *Harris* v. *Avery Brundage Co.,* 305 U. S. 160, 162, 163 and notes 4, 5 and 6.

session, custody and control of the right of way lands which the railroad had enjoyed at the time of bankruptcy. In fact, however, no one had, when the petition was filed, physical possession of the fugitive oil apart from the lands under which it lay. The Supreme Court of Illinois has said, "The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found." [5] And this entire controversy can only be resolved by solution of the primary question of fee simple ownership. The parties agree that if ownership of the right of way lands is in the trustee he has the right to capture the underlying oil, and if not, that the trustee has no such right. Thus, the right to the disputed oil necessarily hinges upon where the ownership of the fee to these lands lies. And possession of those lands under claim of fee simple ownership by the railroad and later by the trustee was an adequate basis for the District Court's summary jurisdiction. As previously determined in litigation involving another aspect of this same reorganization, the jurisdiction thus acquired by the bankruptcy court "extends . . . to the adjudication of questions respecting the title." *Ex parte Baldwin,* 291 U. S. 610, 616.

Second. We are of opinion that it was not an abuse of discretion for the bankruptcy court to authorize the trustee to protect all interests—so far as it appeared possible to do so—by preserving the oil, from waste and depletion, through its extraction and sale with the net proceeds to be impounded until final determination of the controversy over title to the right of way lands.

The verified petition and supporting evidence offered a basis for the District Court's finding that such steps were necessary to protect the estate's possible interest in the oil under the right of way. No other method has been suggested whereby such protection against ir-

[5] *Poe* v. *Ulrey,* 233 Ill. 56, 62; 84 N. E. 46, 48.

reparable loss to the estate of the wandering and vagrant oil[6] could have been better afforded. The ". . . malleable processes of courts in bankruptcy give assurance of a remedy that can be moulded and adjusted to the needs of the occasion." *Steelman* v. *All Continent Co.*, 301 U. S. 278, 290.

Third. A court of bankruptcy has an exclusive and nondelegable control over the administration of an estate in its possession.[7] But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration.[8] And, under the circumstances of this case, we conclude that it is desirable to have the litigation proceed in the state courts of Illinois.[9] An order to the trustee to proceed in the Illinois courts for a decision on the ownership of the fee to the right of way lands will be comparable to one in which the bankruptcy court, preserving the status quo the while, orders a trustee to determine in a plenary state court suit the legal right to property alleged by the trustee to have been fraudulently transferred by the bankrupt.[10] Decision with which the

[6] See *Poe* v. *Ulrey, supra,* 62.

[7] *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734.

[8] *Id.*, 739; see, *In re Schulte United, Inc.*, 49 F. 2d 264; see, e. g., *Foust* v. *Munson Lines,* 299 U. S. 77 (bankruptcy court's denial of permission for suit in admiralty against debtor in 77B, held abuse of discretion); *Texas* v. *Donoghue,* 302 U. S. 284 (refusal of permission for a State to try in a state court its claim—based on alleged forfeiture—to oil held by trustee in 77B, abuse of discretion). 5 Remington on Bankruptcy, 4th Ed., §§ 2045, 2370.

[9] Cf. *Ex parte Baldwin, supra,* 619.

[10] Cf. *Steelman* v. *All Continent Co.*, 301 U. S. 278. See *Scott* v. *Gillespie,* 103 Kan. 745; 176 P. 132, cert. den. 249 U. S. 606 (trustee ordered into state court for construction of will to determine estate, if any, taken thereunder by bankrupt).

federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme.[11]

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed except insofar as it provides for adjudication of the disputed ownership in the bankruptcy court. The cause is remanded to the District Court with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois state courts.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

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[11] Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

KERSH LAKE DRAINAGE DISTRICT ET AL. *v.* JOHNSON.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 595. Argued March 8, 1940.—Decided March 25, 1940.

1. A decision by the highest court of a State as to the jurisdiction, under the state law, of an inferior court of the State, is binding here. P. 489.
2. In a suit in a state court of Arkansas brought by the commissioners of a drainage district of that State to collect drainage taxes, the suit having been instituted pursuant to a federal court decree compelling extension and collection of such taxes to satisfy certificates of indebtedness issued by the district, prior state chancery court decrees adjudging a landowner's drainage taxes fully paid and his lands free from any further liability therefor were treated as *res judicata*. *Held:*

(1) Certificate holders were not deprived of their property without due process of law in violation of the Fourteenth Amendment, even though they were not parties to and had no notice of the chancery court proceedings. Pp. 490–491.

The certificate holders were charged with notice of and bound by relevant statutes of the State in existence when the certificates were issued. Those statutes provided for determination of proportionate liabilities of lands in the district by chancery proceedings between the commissioners and landowners, with no requirement of notice to creditors of the district. The commissioners as parties to the proceedings in the chancery court had appropriately asserted the lien for benefit of the certificate holders, and the latter are bound by the decrees.

(2) Issues of fraud and collusion in this case raise no questions which the highest court of the State was not competent finally to decide; and the decision of that court that no fraud or collusion was shown is accepted here. P. 492.

(3) Irrespective of whether the drainage district was empowered to represent the landowners when the extension of taxes as a whole was ordered, the federal court judgment did not foreclose personal defenses which individual landowners might plead in suits for collection; and the refusal of the state court to accept the federal court judgment as determinative of the individual land-

owner's liability did not deny full faith and credit to such judgment. P. 492.

198 Ark. 743; 131 S. W. 2d 620, affirmed.

CERTIORARI, *post*, p. 642, to review the reversal of a decree against a landowner in a suit to enforce collection of drainage district taxes.

Messrs. George B. Rose and *George Rose Smith* for petitioners.

A state court may not enjoin the collection of a tax ordered by a federal court to be levied and collected for the purpose of paying a judgment rendered therein. *Riggs* v. *Johnson County*, 6 Wall. 166; *United States* v. *Council of Keokuk*, 6 Wall. 514; *Supervisors* v. *Durant*, 9 Wall. 415; *Mayor* v. *Lord*, 9 Wall. 409; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Gaines* v. *Springer*, 46 Ark. 502.

The court below denied full faith and credit to the judgment of the federal court. The plea that the state court injunctions barred the collection of the taxes had been overruled by the federal court. Art. IV, § 1; paragraph 2 of Art. VI of the Const.; R. S. § 905; *Chandler* v. *Peketz*, 297 U. S. 609; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Knights of Pythias* v. *Meyer*, 265 U. S. 30–33; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Metcalf* v. *Watertown*, 153 U. S. 671; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Crescent City Co.* v. *Butchers' Union*, 120 U. S. 141, 146; *Pittsburgh Railway Co.* v. *Long Island L. & T. Co.*, 172 U. S. 493, 507; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 559; *Embry* v. *Palmer*, 107 U. S. 3, 10.

The plaintiffs were deprived of their property without due process of law by the ruling that judgments in suits of which the creditors had no notice could be pleaded in bar of the judgment of the federal court. Moreover, the suits in the state court were collusive. The chief beneficiaries were the Commissioners themselves, who took

no appeal, although the state supreme court had many times decided that the benefits bore interest, and would certainly have reversed. *Windsor* v. *McVeigh,* 93 U. S. 274; *Hagar* v. *Reclamation Dist. No. 108,* 111 U. S. 701; *Ochoa* v. *Hernandez,* 230 U. S. 139; *Scott* v. *McNeal,* 154 U. S. 34; *Hale* v. *Finch,* 104 U. S. 261; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 39; *Empire* v. *Darlington,* 101 U. S. 87; *Brooklyn* v. *Insurance Co.,* 99 U. S. 362.

Mr. Walter G. Riddick, with whom *Mr. Charles T. Coleman* was on the brief, for respondent.

Mr. Justice Black delivered the opinion of the Court.

Kersh Lake Drainage District was organized, in 1912, under the general drainage law of Arkansas.[1] An assessment of the value of benefits to accrue to each of the tracts of land embraced in the District was duly made, upon the basis of which annual levies were extended against each tract. And the District issued interest bearing certificates of indebtedness in payment of construction work done for it by contract.

Respondent Johnson, a landowner in the District, brought suit against the District and its Commissioners in the Lincoln Chancery Court of the State of Arkansas in order to establish that he had fully paid the share of benefit taxes apportioned to his land and was therefore entitled under Arkansas law to have his land declared free from any further drainage tax liability. In 1931, that state court rendered its final decree to the effect that the lien of the District for such taxes had already been "fully satisfied and released," and enjoined further extension of drainage taxes against his lands. In 1932, the same state court rendered a like decree in favor of W. A. Fish and other named landowners of the District.

[1] Acts of Ark. 1909, p. 829.

November 1, 1935, a judgment against the District was obtained by certificate holders in the federal court for the Eastern District of Arkansas. The Circuit Court of Appeals affirmed.[2] To enforce their judgment, these creditors then instituted proceedings in the same Federal District Court, for mandatory injunction to require the appropriate county clerks to extend drainage benefit taxes for the District upon their tax books; to require county officials to collect these taxes; and to provide that "if any property owners fail to pay their drainage tax the defendant, Kersh Lake Drainage District, and its Commissioners be required to institute suit for the collection of the delinquent taxes, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decrees of foreclosure, . . ." Answering, the District set up among other defenses that "a large number of tracts of land in the District have fully paid the entire value of assessed benefits against said lands and that said property owners obtained a decree in the Lincoln Chancery Court in the case of W. A. Fish, et al. v. Kersh Lake Drainage District on June 15, 1932, enjoining and restraining the Commissioners of the defendant District from levying or extending any tax against those lands, the assessed benefits of which have been fully paid."

The District Court decreed that a mandatory injunction issue compelling the "County Clerks and County Collectors to perform their duties in the collection of the drainage taxes upon the lands in suit"; that there be extended taxes "of six and one-half per cent of the benefits assessed against each tract of land . . . until the whole of this decree has been satisfied"; that the "Commissioners . . . be required to institute suits for the collection of all delinquent taxes of said District, and to prosecute the same with due diligence to a conclusion, . . ."; and

[2] 85 F. 2d 643.

that "the said Commissioners are deemed receivers of this court . . ." And the Circuit Court of Appeals affirmed.[3]

Pursuant to this mandatory injunction, the drainage taxes were extended on the tax books but respondent Johnson and other landowners in whose favor the decrees of the Lincoln Chancery Court had been rendered, refused to pay. Suit for collection was filed against their lands in the Lincoln Chancery Court by the Commissioners. In reliance upon the 1931 and 1932 State Chancery Court decrees as final determinations that the assessments apportioned to their respective tracts of lands had been discharged, pleas of *res judicata* were interposed by the landowners. Referring to this answer of the landowners, the Commissioners amended their complaint and alleged (1) that the state court decrees of 1931 and 1932 were void because certificate holders had not been made parties, and (2) that the certificate holders' judgment against the District and the mandatory injunction decree of the federal court were "*res judicata* of all the questions . . . raised by the" landowners. The trial court decided against the landowners, but the Supreme Court of Arkansas reversed and held that the unappealed Chancery Court decrees in 1931 and 1932 amounted to conclusive adjudications that the particular lands here involved were responsible for no further benefit taxes, thus sustaining the landowners' pleas of *res judicata*.[4]

First. The unappealed 1931 and 1932 Decrees of the Lincoln Chancery Court of the State of Arkansas.

As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the state law, to render the 1931 and 1932 decrees is "acknowledged," [5] and this determination by the state's highest court is binding upon us. However, petitioners' argu-

[3] 92 F. 2d 783.

[4] 198 Ark. 743; 131 S. W. 2d 620; 132 S. W. 2d 658.

[5] Cf. *Protho* v. *Williams*, 147 Ark. 535, 547; 229 S. W. 38.

ment is that these decrees were void because certificate holders were not made parties in and had no notice of the Chancery proceedings. Therefore, they contend that in giving effect to the state court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment.[6] Petitioners also add the contention that the 1932 state court decree was "collusive as a matter of law."

Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors.[7] Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District.[8] And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

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[6] Because of this and the further contention that the Supreme Court of Arkansas had denied full faith and credit to the judgments of the Federal District Court, certiorari was granted.

[7] See, e. g., reference to "the board of directors," Acts of Ark. 1909, p. 849.

[8] The Act of 1909 set up detailed standards for creation and control of the District; provided for management of District affairs by a Board of Commissioners under outlined supervision by Arkansas courts; and intrusted the Commissioners with the conduct and control of litigation for the collection and enforcement of unpaid benefits against lands in the District. Such litigation was required to be conducted in the State Chancery Court having jurisdiction in the County where the particular lands were located; and the lands covered by the 1931–1932 Lincoln Chancery Court decrees were located in Lincoln County. Arkansas Acts 1909, p. 829.

When these certificates were issued, purchasers were charged with notice of and bound by Arkansas statutes in existence when, and pursuant to which, the debt was contracted and which provided for determination of the proportionate liabilities of lands in the District by Chancery proceedings between the Commissioners and landowners with no requirement of notice to creditors of the District.[9] Thus, the very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District, in litigation between the District and a landowner involving matters personal to the landowner.

These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings, just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue.[10] And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.

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[9] *Rees* v. *City of Watertown*, 19 Wall. 107, 120; *United States* v. *County of Macon*, 99 U. S. 582, 590.

[10] *Elwell* v. *Fosdick*, 134 U. S. 500, 512, 513; *Richter* v. *Jerome*, 123 U. S. 233, 246–7.

It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide. And the Supreme Court of Arkansas points out that under controlling Arkansas law the Chancery decrees "could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record." [11]

But petitioners nevertheless insist that the state court's chancery decrees cannot avail the landowners because of the subsequent judgments of the Federal District Court.

Second. The Judgments of the Federal District Court. Petitioners pleaded the final judgments of the Federal District Court as conclusive adjudications of the issues raised by the landowners' defense based upon the Chancery decrees. The refusal of the court below to accept the District Court's judgments as determinative of the individual landowners' liabilities constituted, petitioners claim, a denial of full faith and credit to those federal judgments. With this contention we do not agree.

In order that the District might be afforded a basis for suits in the state courts to recover taxes with which to pay the judgment against it, the District Court ordered a mandatory injunction requiring county officials to extend on their books drainage taxes against all the lands in the District as a whole, including those here involved. This preliminary to state court suits in which the actual respective liabilities of the individual landowners could be determined was performed, and thereby this provision of the injunction was carried out. The Commissioners were also enjoined to file and prosecute suits in the state

[11] 198 Ark. 743, 753; 131 S. W. 2d 620, 625; 132 S. W. 2d 658.

courts to collect all such taxes that were delinquent. This was done. Irrespective of whether the District was empowered to represent the landowners when the extension of taxes as a whole was ordered, by its mandatory injunction the District Court did not attempt to foreclose the state court from hearing all matters of personal defense which individual landowners might plead in the suits for collection. Instead, the District Court appropriately left for the state court's determination any such personal defenses available under Arkansas law.[12] And here the Supreme Court of Arkansas has sustained as personal defenses the decrees of payment and discharge obtained by individual landowners in Arkansas courts of competent jurisdiction. Accordingly, petitioners misconstrue entirely the decree of the District Court in arguing that unless its injunction is carried out without any reference to the prior state court decrees, injunctions by a state court will be permitted to obstruct the execution of a federal court's judgment.[13] In view of our construction of the mandatory injunction and the fact that its mandates have been fully carried out, it is unnecessary for us to consider the existence or present vitality of the doctrine said to be established by the cases relied upon by petitioners.[14]

The substantial effect of the District Court's judgments was no more than a determination that a total balance was still due the complaining certificate holders by the District; that drainage taxes sufficient to discharge this

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[12] Cf. *Arkansas* v. *St. Louis-San Francisco Ry. Co.*, 269 U. S. 172, 176; *Chandler* v. *Peketz*, 297 U. S. 609, 611.

[13] Petitioners rely upon *Riggs* v. *Johnson County*, 6 Wall. 166; *United States* v. *Council of Keokuk, Id.*, 514; *The Mayor* v. *Lord*, 9 Wall. 409; *The Supervisors* v. *Durant, Id.*, 415; *Hawley* v. *Fairbanks*, 108 U. S. 543.

[14] But see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 and *Ruhlin* v. *New York Life Ins. Co., Id.*, 202, 205.

balance should be extended on the proper county tax books in accordance with Arkansas law; and that suits against individual landowners be filed for judicial ascertainment of their proportionate shares of the total. Neither the adjudication of the total liability nor the order for extension of drainage taxes on the local tax books was an adjudication of the varying proportionate liabilities of the respective landowners. Determination of these liabilities was properly left for the state court. A decreed total liability for the District was still consistent with the principle that "when the proportion [taxable against a particular tract] is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources." [15]

These landowners were neither served with process nor heard in either the certificate holders' suit against the District or the mandatory injunction proceeding. No relief against them as individuals was either sought or adjudged. The Commissioners did represent all landowners in unsuccessfully defending the certificate holders' suit for an adjudication of the total collective corporate obligation of the District as an entity. In the present suit the landowners have not asserted, and the Supreme Court of Arkansas has not upheld, any attack upon that judgment, which might be valid although uncollectible against the District or any individual landowners.[16] The fact that the Commissioners, in the injunction proceedings against the District, unsuccessfully attempted to interpose defenses peculiar and personal to the individual landowners cannot foreclose the individual landowners, who were not present, from thereafter pleading a defense otherwise valid. Certainly, the decree in the injunction suit in the federal court would not prevent an individual property owner from subsequently interposing the de-

[15] *Rees* v. *City of Watertown, supra,* 119–20.

[16] *Barkley* v. *Levee Commission,* 93 U. S. 258, 265–6.

fense that his property was not in fact included within the Drainage District.[17] Cognate personal defenses, such as the one that a landowner's proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been "ascertained and paid," were not foreclosed by the Federal District Court's judgments.

The judgments of the federal court were not denied full faith and credit by the Supreme Court of Arkansas.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

UNITED STATES *v.* SHAW, ADMINISTRATOR DE BONIS NON.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 570. Argued February 27, 1940.—Decided March 25, 1940.

1. A suit against the United States may be brought only with consent given, and in the courts designated, by statute. P. 500.
2. The United States, by filing a claim against an estate in a state probate proceeding, does not subject itself to a binding, though not enforcible, ascertainment and allowance of a cross-claim against itself, in excess of set-off. *The Thekla,* 266 U. S. 328, distinguished. Pp. 501–504.
3. By taking over the assets of the Fleet Corporation and assuming its obligations, the United States did not waive its immunity from suit in a state court on a counter-claim based on the corporation's breach of contract. P. 505.

290 Mich. 311; 287 N. W. 477, reversed.

CERTIORARI, 308 U. S. 548, to review the affirmance of a decree in probate holding the United States indebted to a decedent's estate on a counter-claim.

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[17] *Ocean Beach Heights, Inc.* v. *Brown-Crummer Investment Co.,* 302 U. S. 614. Cf. *Normandy Beach Dev. Co.* v. *United States,* 69 F. 2d 105.

Solicitor General Biddle, with whom *Assistant Attorney General Shea* and *Messrs. Melvin H. Siegel, Paul A. Sweeney,* and *Thomas E. Harris* were on the brief, for the United States.

Messrs. Eugene F. Black and *Shirley Stewart,* with whom *Mr. Howell Van Auken* was on the brief, for respondent.

The probate court's order is a judicial ascertainment or determination of the amount owing and does not constitute a money judgment against the United States. *United States* v. *Eckford,* 6 Wall. 487; *The Gloria,* 286 F. 188. Cf., *United States* v. *National City Bank,* 83 F. 2d 236, cert. den. 299 U. S. 563; s. c. 4 F. Supp. 417.

The order was proper under the decisions of this Court. *United States* v. *The Thekla,* 266 U. S. 328.

The United States voluntarily entered a state court having jurisdiction *in rem* over the *res* of an estate and asserted, in accordance with the local statutory practice, a claim against the *res.* In accordance with the mandatory requirements of the same local practice, a counterclaim was duly asserted and it was thereafter upheld on the merits. There is no essential difference between the act of joining in suit in the one case and the act of entry into court for assertion of claim in the present case. The principle of *The Thekla* is applicable to proceedings instituted by the Government in modern courts of law, equity and admiralty. See *American Propeller Co.* v. *United States,* 300 U. S. 475; *United States* v. *National City Bank,* 83 F. 2d 236; cert. den. 299 U. S. 563; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126; *The Gloria,* 286 F. 188, 200; *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrellsen,* 43 F. 2d 708; *United States* v. *American Ditch Assn.,* 2 F. Supp. 868; *United States* v. *Standard Oil Co.,* 21 F. 2d 655; *The Barbara Cates,* 17 F. 244; *United States* v. *East,* 80 F. 2d 134; *United States* v.

Moscow-Idaho Seed Co., 14 F. Supp. 135; *United States* v. *Equitable Trust Co.,* 283 U. S. 745.

Cf., *Danforth* v. *United States,* 102 F. 2d 5; 308 U. S. 271.

For the purposes of the jurisdictional question dealt with in *The Thekla,* a libel in admiralty is like a bill for an account, *Goldthwait* v. *Day,* 149 Mass. 185, 187; and even more like a claim against the *res* of an estate in charge of a court, *Foote* v. *Foote,* 61 Mich. 192.

The doctrine of *The Thekla* has since aided decision in *United States* v. *National City Bank,* 83 F. 2d 236; cert. den. 299 U. S. 563; *American Propeller Co.* v. *United States,* 300 U. S. 476; *Guaranty Trust Co.* v. *United States,* 304 U. S. 134; *United States* v. *U. S. Fidelity & Guaranty Co.,* 106 F. 2d 804. See *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381.

Immunity from affirmative judgment or judicial ascertainment in this case, if any, was waived when the United States, having already taken a general assignment of assets and receivables from the Fleet Corporation, dissolved the latter and assumed its obligations, by the Act of June 29, 1936.

Mr. Justice Reed delivered the opinion of the Court.

In 1918 Sydney C. McLouth contracted to construct nine tugs for the United States Shipping Board Emergency Fleet Corporation. On May 24, 1920, the contract was cancelled and the parties entered into a settlement agreement providing that McLouth was to keep as bailee certain materials furnished him for use in building the tugs and that the Fleet Corporation was to assume certain of McLouth's subcontracts and commitments. Among the commitments assumed was a contract of Mc-

Louth's to purchase lumber from the Ingram-Day Lumber Company. The Lumber Company obtained a judgment against McLouth for $42,789.96 for breach of this contract,[1] and, McLouth having died in 1923, filed its claim on the judgment in the probate court of St. Clair County, Michigan. Subsequently the United States obtained a judgment of $40,165.48 against McLouth's administrator,[2] representing damages for the conversion of the materials left with McLouth as bailee, and claim on this judgment was filed in the probate court. The administrator, respondent here, having presented without success the Lumber Company's judgment to the General Accounting Office,[3] sought to set off that judgment against the judgment of the United States. The probate court allowed the claim of the United States and denied the set-off, but its ruling as to the set-off was reversed on appeal to the Michigan Supreme Court.[4] The administrator then petitioned the probate court to grant statutory judgment of the balance due the estate. The court found that the claim of the United States, with interest, amounted to $49,442.41 and the Lumber Company's claim to $73,071.38 and "ordered, adjudged and ascertained" that the United States was indebted to the estate for the difference, $23,628.97, "and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America." The probate court's judgment was affirmed on appeal.[5]

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[1] *Ingram-Day Co.* v. *McLouth*, 275 U. S. 471.

[2] *Shaw* v. *United States*, 75 F. 2d 175.

[3] The Act of March 3, 1797, 1 Stat. 512, 514, as amended, 28 U. S. C. § 774, provides that in "suits brought by the United States against individuals, no claim for a credit shall be admitted . . . except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed. . . ."

[4] *In re McLouth's Estate*, 281 Mich. 191; 274 N. W. 759.

[5] 290 Mich. 311; 278 N. W. 477.

On this certiorari we are concerned with the question whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to a binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself.

Because of different views of other federal courts as to the decisions of this Court in the important federal field of cross-claims against the United States,[6] we granted certiorari.[7] *United States* v. *United States Fidelity & Guaranty Company*[8] involves this question.

The statute of Michigan under which this ascertainment of indebtedness was made, so far as pertinent, is set out in the footnote.[9] There is no contention on the part of respondent that the judgment is enforceable against the United States even in the limited sense of statutory direction to report the judgment to Congress as in the Court

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[6] Cf. *United States* v. *Eckford,* 6 Wall. 484; *The Thekla,* 266 U. S. 328. *In re Patterson-MacDonald Shipbuilding Co.,* 293 F. 192 (C. C. A. 9), certiorari denied, *sub nom. McLean* v. *Australia,* 264 U. S. 582. *Roumania* v. *Guaranty Trust Co.,* 250 F. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; *United States* v. *Nipissing Mines Co.,* 206 F. 431, 434 (C. C. A. 2); *Adams* v. *United States,* 3 Ct. Cls. 312, 333; *Peterson* v. *United States,* 26 Ct. Cls. 93, 98. *United States* v. *National City Bank,* 83 F. 2d 236 (C. C. A. 2), certiorari denied, 299 U. S. 563; *American Propeller Co.* v. *United States,* 300 U. S. 475; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126.

[7] 308 U. S. 548.

[8] *Post,* p. 506.

[9] Compiled Laws of Michigan (1929), c. 266, § 15682:

"Set-offs in settlement of claims. Sec. 9. When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise."

of Claims Act[10] or the Merchant Marine Act.[11] Execution against property of governmental agencies subjected to such procedure by statute is sometimes allowed.[12] The position taken is that the probate court judgment is a "final determination" of the rights of the litigants, howsoever such rights may later become important. We are not here concerned with the manner of collection. Such was the holding of the Supreme Court of Michigan.[13]

The state procedure for the determination of the balance against or in favor of an estate, which was employed here, was the recognized method of closing an estate at the time of the probate judgment. The probate judge was empowered to act as commissioner under the statute quoted above.[14] His decision unreviewed was considered final.[15] The determination of the probate court between private parties was enforceable without reëxamination in the circuit court.[16] Even the right to execution is not essential to a complete judicial process.[17] The order entered was a final determination of the amounts due the estate by the United States on this claim and cross-claim if the probate court had jurisdiction to render the order against the petitioner.

Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United

[10] 31 U. S. C. § 226.

[11] 46 U. S. C. § 1113.

[12] *Federal Housing Administration* v. *Burr, ante,* p. 242.

[13] 290 Mich. 311; 287 N. W. 477.

[14] 3 Comp. Laws Mich. (1929), § 15681.

[15] *Flynn* v. *Lorimer's Estate,* 141 Mich. 707; 105 N. W. 37.

[16] *Shurbun* v. *Hooper,* 40 Mich. 503.

[17] *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 263; *Flynn* v. *Lorimer's Estate,* 141 Mich. 707; 105 N. W. 37.

States.[18] No officer by his action can confer jurisdiction.[19] Even when suits are authorized they must be brought only in designated courts.[20] The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of March 3, 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues.[21] Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act.[22] Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed.[23] As to these matters no controversy exists.

Respondent contends this immunity extends, however, only to original suits; that when a sovereign voluntarily seeks the aid of the courts for collection of its indebted-

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[18] *Kansas* v. *United States,* 204 U. S. 331; *United States* v. *Thompson,* 98 U. S. 486, 489, 490; *Buchanan* v. *Alexander,* 4 How. 20.

[19] *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *Carr* v. *United States,* 98 U. S. 433, 437.

[20] *Minnesota* v. *United States,* 305 U. S. 382, 388.

[21] 1 Stat. 512, 514; R. S. § 951; 28 U. S. C. § 774. *United States* v. *Wilkins,* 6 Wheat. 135, 144.

[22] 28 U. S. C. §§ 41 (20), 250.

[23] *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381; *Federal Housing Administration* v. *Burr, supra.*

ness it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court. The principle of a single adjudication is stressed, as is the necessity for a complete examination into the cross-claim, despite attendant dislocation of government business by the appearance of important officers at distant points and the production of documents as evidence, to justify the allowance of an offset to the government's claim.[24] It is pointed out that surprise is not involved as no cross-claim may be proven until after submission to and refusal by the government accounting officers.[25] Respondent further insists that his position is supported by *The Thekla*[26] and subsequent decisions quoting its language.[27] Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem[28] as were the libels in admiralty in *The Thekla*.

It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.

The Thekla turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one

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[24] *United States* v. *Wilkins, supra.*

[25] 28 U. S. C. § 774.

[26] 266 U. S. 328.

[27] See note 33, *infra.*

[28] *United States* v. *Bank of New York Co.*, 296 U. S. 463, 477; *Montgomery* v. *Wayne Circuit Judge,* 284 Mich. 430.

liability.[29] In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages. In *The Thekla* opinion the cases of *Illinois Central R. Co.* v. *Public Utilities Commission* [30] and *Nassau Smelting Works* v. *United States* [31] were cited in support of the statement that ". . . generally speaking a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim." This Court then said: "We do not qualify the foregoing decisions in any way." In the *Smelting* case this Court had said, two weeks before, on a certificate as to the jurisdiction of the district court to consider a counterclaim:

"The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. Nor is there doubt that the question is one which involves the jurisdiction of the District Court as a federal court under the statutes of the United States, for the jurisdiction of the District Court in this regard is wholly dependent on such statutes." [32]

There is little indication in the facts or language of *The Thekla* to indicate an intention to permit generally unlimited cross-claims. Quotations from *The Thekla* in later opinions of this Court are used to illustrate prob-

[29] *Bowker* v. *United States,* 186 U. S. 135, 139.
[30] 245 U. S. 493, 504, 505.
[31] 266 U. S. 101.
[32] *Id.,* 106.

lems entirely apart from the one under consideration here.[33]

The suggestion that the order of the probate court is in reality not a judgment but only a "judicial ascertainment" of credits does not affect our conclusion. No judgment against the United States is more than that. But such an entry, if within the competence of the court passing the order, would be res judicata of the issue of indebtedness.[34] The suggestion springs from the opinion in *United States* v. *Eckford.*[35] These words there appear:

"Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States,* (5 Wall. 432) decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount."

The Court had just written that no action could be sustained against the government without consent and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit.[36] The language quoted above means no more than that no judgment may be entered against the government even though the court has ascertained, through its processes, that the government is actually indebted to the defendants. The judgment should be limited to a dismissal of the government's claim.

In the *Eckford* case this Court was dealing with the litigation at a more advanced stage than the present liti-

[33] *American Propeller Co.* v. *United States,* 300 U. S. 475, 478; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 134.

[34] *Williams* v. *United States,* 289 U. S. 553, 564.

[35] 6 Wall. 484, 491.

[36] Cf. *Reeside* v. *Walker,* 11 How. 272, 290.

gation has reached. The United States had sued Eckford's executors on his bond in the District Court for the Southern District of New York. They pleaded a set-off, a balance was found in their favor and a judgment entered that the executors were entitled to be paid the amount found. Suit in the Court of Claims was instituted by the executors, the record was proven, over objection, and judgment entered accordingly. Consequently a reversal of the Court of Claims was the only step necessary. This Court did not deal with the New York judgment.[37]

We have considered respondent's further argument that sovereign immunity was waived when the United States took possession of the assets of its agent the Fleet Corporation prior to the institution of this action, and later, but prior to the entry of the probate judgment appealed from, assumed the Corporation's obligations by the act of June 29, 1936.[38] We see nothing in these transactions which indicates an intention to waive the immunity of the United States in the state courts.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

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[37] Cf. *Schaumburg* v. *United States*, 103 U. S. 667.

[38] 49 Stat. 1987:

"SEC. 203. The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers, and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission upon behalf of the United States, under the supervision of the Attorney General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in section 226, title 31, United States Code, for reporting judgments against the United States in the Court of Claims."

UNITED STATES *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL.

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

No. 569. Argued February 27, 1940.—Decided March 25, 1940.

In a reorganization proceeding in the District Court for the Western District of Missouri under § 77B of the Bankruptcy Act, the United States filed a claim in behalf of the Choctaw and Chickasaw Nations. The court allowed it but allowed the debtor's cross-claim for a larger amount and decreed the balance in favor of the debtor against the Nations to be "collected in the manner provided by law." The validity of the judgment to the extent that it satisfied the principal claim was conceded. In another suit in Oklahoma by the United States for the Indian Nations against the surety on a bond given by the debtor, the debtor pleaded the former judgment as *res judicata* and asked for a determination of accounts. *Held:*

1. The Indian Nations and the United States acting for them are exempt from suits and also from cross suits, except when authorized, and in the courts designated, by Act of Congress. P. 512.

2. The judgment, in so far as it undertakes to fix a credit against the Indian Nations, is void and can not be given the effect of *res judicata* in other litigation. P. 512.

3. The immunity from suit of the United States and of Indian Nations in tutelage can not be waived by official failure to object to the jurisdiction or to appeal from the judgment. In the absence of statutory consent to the suit, the judgment is subject to collateral attack. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371, distinguished. P. 513.

4. Where a judgment in the District Court was entered before the effective date of the Rules of Civil Procedure, questions as to parties are governed by the Conformity Act. P. 516.

Semble that under the procedure of Oklahoma a principal in a bond, though he can not compel his admission as a party defendant in a suit against the surety, becomes such, in effect, if allowed without objection to file his intervening petition.

5. Under the Act of April 26, 1906, which provided that where suit is brought in any United States court in the Indian Territory by or on behalf of any of the Five Civilized Tribes to recover

moneys claimed to be due and owing such Tribe, the party defendants shall have the right to set up and have adjudicated claims against the Tribe, and that any balance that may be found due by the Tribe shall be paid by the Treasurer of the United States out of its funds, etc., the question who are "defendants" is a federal question. P. 516.

106 F. 2d 804, reversed.

CERTIORARI, 308 U. S. 548, to review the affirmance of a judgment of the District Court for the Eastern District of Oklahoma, 24 F. Supp. 961, which, in reliance upon a judgment of the District Court for the Western District of Missouri, rejected a claim made by the United States on behalf of the Choctaw and Chickasaw Nations and allowed against them a counter-claim of interveners.

Solicitor General Biddle, with whom *Assistant Attorney General Littell* and *Mr. Thomas E. Harris* were on the brief, for the United States.

Messrs. Bower Broaddus and *Julian B. Fite* for respondents.

The counterclaim is not against the United States but the Tribes. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415; *Folk* v. *United States,* 233 F. 177; *United States* v. *Ft. Smith & Western Ry. Co.,* 195 F. 211.

The federal court in Missouri had jurisdiction to render an affirmative judgment against the Tribes. Act of April 26, 1906, § 18; c. 1876, 34 Stat. 137, 144, considered with statutes conferring jurisdiction on the District Courts.

A transitory action in the name of the United States must be brought in the district in which the defendant resides.

Congress has consented to an affirmative judgment against the Tribes, and any right to have the claim confined in the federal courts of Oklahoma was waived by contesting the claim in Missouri. Dist'g *Illinois Cen-*

tral R. Co. v. *Public Utilities Comm'n,* 245 U. S. 493. See, *Peoria & Pekin Union R. Co.* v. *United States,* 263 U. S. 528, 535; *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44, 47.

The determination of the question of jurisdiction by the court in Missouri may not be assailed collaterally. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371; *Stoll* v. *Gottlieb,* 305 U. S. 165.

When the claim of the Tribes was submitted to the Missouri court the United States and the Tribes were litigants like any other suitor. *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44; *Porto Rico* v. *Ramos,* 232 U. S. 627; *Folk* v. *United States,* 233 F. 177. The Tribes as now constituted are not sovereigns immune from suit. The defense of sovereign immunity was waived.

As the court in Missouri had jurisdiction, its judgment was binding in the Oklahoma suit. Dist'g *United States* v. *Eckford,* 6 Wall. 484. When suing on behalf of the Tribes, the United States has no greater right than they. *Folk* v. *United States,* 233 F. 177; *United States* v. *Ft. Smith & Western Ry. Co.,* 195 F. 211.

The matter before the court in Missouri was one to which its jurisdiction would extend between ordinary litigants, as the suit arose under the laws and treaties of the United States, Jud. Code 24 (1), 28 U. S. C. § 41 (1).

The case was in equity, so whether the right to counterclaim be procedural or substantive (see *The Gloria,* 286 F. 188), the defendant could interpose it and obtain an affirmative judgment. Equity Rule 30.

The trend of modern authorities is to differentiate between the authority to render a judgment and the authority to order its enforcement. *The Gloria,* 286 F. 188; *The Newbattle,* 10 Prob. Div. 33; *United States* v. *Nuestra Señora De Regla,* 108 U. S. 92; *The Paquete Habana,* 189 U. S. 453; *United States* v. *The Thekla,* 266 U. S.

328; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126; *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrellsen,* 43 F. 2d 705; *Russia* v. *Bankers' Trust Co.,* 4 F. Supp. 417, affirmed *United States* v. *National City Bank of New York,* 83 F. 2d 236, cert. den. 299 U. S. 563.

When the judgment was rendered in Missouri the claim theretofore existing was merged in it. *Wycoff* v. *Epworth Hotel Co.,* 146 Mo. App. 554.

The interveners came in as party defendants, without objection, and their claim was properly allowed under the Act of 1906.

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

Certiorari was granted [1] because of probable conflict, on the first question, between the judgment below and *Adams* v. *United States* [2] and because of the importance of clarifying the meaning of the language in *United States* v. *Eckford* [3] relating to the judicial ascertainment

[1] 308 U. S. 548.
[2] 3 Ct. Cls. 312.
[3] 6 Wall. 484.

of the indebtedness of the Government on striking a balance against the United States where cross-claims are involved. A somewhat similar question arises in *United States* v. *Shaw*.[4] The second question was taken because its solution is involved in certain phases of this litigation.

The United States, acting for the Choctaw and Chickasaw Nations, leased some coal lands to the Kansas and Texas Coal Company, with the respondent United States Fidelity and Guaranty Company acting as surety on a bond guaranteeing payment of the lease royalties. By various assignments the leases became the property of the Central Coal and Coke Company, as substituted lessee, the Guaranty Company remaining as surety. The Central Coal and Coke Company went into receivership in the Western District of Missouri, and the United States filed a claim for the Indian Nations for royalties due under the leases. Answering this claim, the Central Coal and Coke Company denied that any royalties were owing and claimed credits against the Nations for $11,060.90. By order of the court, reorganization of the Coal Company under § 77B of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the Nations was allowed for $2,000, the debtor's cross-claim was allowed for $11,060.90, and the court on February 19, 1936, decreed a balance of $9,060.90 in favor of the debtor, to be "collected in the manner provided by law." No review of this judgment of the Missouri district court was ever sought.

On December 24, 1935, the United States, on its own behalf and on behalf of the Indian Nations, filed the present suit in the Eastern District of Oklahoma against the Guaranty Company, as surety on the royalty bond, for the same royalties involved in the Missouri proceed-

[4] *Ante*, p. 495.

ings. After the judgment of the Missouri district court, the Guaranty Company pleaded that judgment as a bar to recovery by the United States. The trustee of Central Coal and Coke Company, and the Central Coal and Coke Corporation, which had taken over certain interests in the assets of the Coal Company, alleged by a petition for leave to intervene, and, upon its allowance without objection, by an intervening petition, that they were necessary and proper parties because each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as determinative and pleaded the merits of the counterclaims by setting up the facts which supported the judgment; they asked for a decree that the Missouri judgment was valid, for a determination of accounts between themselves and the Indian Nations, and for all other proper relief. Replying to the answer of the surety and the petition of the interveners, the United States pleaded that the Missouri judgment was void as to the interveners' cross-claims because the court was "without jurisdiction to render the judgment" against the United States and denied the cross-claims on the merits. The district court concluded that the Missouri judgment barred the claim against the surety and entitled the interveners to a judgment against the Indian Nations in the amount of the balance found by the Missouri court. This judgment the Circuit Court of Appeals affirmed.[5]

A.—By concession of the Government the validity of so much of the Missouri judgment as satisfies the Indian Nations' claim against the lessee is accepted. This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.[6]

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[5] 106 F. 2d 804.

[6] *Bull* v. *United States*, 295 U. S. 247, 261.

B.—We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States* v. *Shaw* [7] we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.[8] No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States.[9] The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent [10] continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.[11] It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

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[7] *Ante,* p. 495.

[8] *Heckman* v. *United States,* 224 U. S. 413, 442; *Mullen* v. *United States,* 224 U. S. 448, 451; *United States* v. *Rickert,* 188 U. S. 432. These cases discuss, also, the relationship between the United States and the Choctaw and Chickasaw Nations. See also *United States* v. *Choctaw etc. Nations,* 179 U. S. 494, 532; *Choctaw Nation* v. *United States,* 119 U. S. 1, 28.

Act of June 7, 1897, 30 Stat. 62, 83; Atoka Agreement, 30 Stat. 495, 505; Act of March 3, 1901, 31 Stat. 1447; Act of April 26, 1906, 34 Stat. 137, 144. Under § 28 of the Act of April 26, 1906, the tribal existence of the Chickasaw and Choctaw Nations is continued as modified by that and other acts.

[9] Cf. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415.

[10] Cf. *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

[11] *Turner* v. *United States,* 248 U. S. 354, 358; *Adams* v. *Murphy,* 165 F. 304, 308; *Thebo* v. *Choctaw Tribe of Indians,* 66 F. 372.

Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants.[12] This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding.[13] The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.

But, it is said that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.[14]

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[12] Act of April 26, 1906, § 18, 34 Stat. 137, 144, 148.

[13] Cf. *Fidelity Ins., Trust and S. D. Co.* v. *Mechanics' Sav. Bank,* 97 F. 297, 303.

[14] *Minnesota* v. *United States,* 305 U. S. 382, 388 and cases cited; *Munro* v. *United States,* 303 U. S. 36, 41; *Finn* v. *United States,* 123 U. S. 227, 232.

The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.[15] *Chicot County Drainage District* v. *Baxter State Bank*[16] is inapplicable where the issue is the waiver of immunity.

In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy.[17] To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status,[18] extra-territorial action of courts,[19] or strictly jurisdictional and quasi-jurisdictional facts.[20] No solution was attempted of the legal results of a collision between the desirable principle that rights may be ade-

[15] *Kalb* v. *Feuerstein*, 308 U. S. 433.

[16] 308 U. S. 371.

[17] See the last paragraph of the opening statement and the first paragraph of division *Second*. 308 U. S. 374, 376.

[18] *Andrews* v. *Andrews*, 188 U. S. 14.

[19] *Fall* v. *Eastin*, 215 U. S. 1.

[20] *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; cf. *Johnson* v. *Zerbst*, 304 U. S. 458.

quately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

C.—The conclusion that the Missouri judgment is void determines this review. There is left in the case, however, an issue which requires brief reference to the second question upon which certiorari was granted. The intervening petition set up the facts supporting the claim of the interveners against the Indian Nations. An issue was made and the evidence of the Missouri controversy stipulated for consideration in the present case. As the district court determined that the Missouri judgment was valid, no finding or conclusion appeared in the judgment of the district court upon the merits. Respondents made no objection to this omission but call attention to it in their brief. On a new trial this issue obviously will be important.

It is the contention of the Government that the cross-claim cannot be liquidated in this proceeding for the reason that by the statute under which this suit is brought, the right to set up a cross-claim is limited to "party defendants." [21] Respondents' reply that as they were admitted as interveners without objection, as they have an interest in cross-claims arising from the same transactions which form the basis of the principal suit, and as one of them is a principal liable for any judgment against

[21] 34 Stat. 137, § 18:

. . . . . .

"Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him."

the defendant surety, they are to all intents and purposes defendants under § 18 of the Act of April 26, 1906.

As this judgment was entered before the effective date of the Civil Rules, procedure as to parties was governed by the Conformity Act.[22] Apparently under Oklahoma law the principal in the bond could not compel its admission as a party defendant.[23] As the Government did not object to the order filing the intervening petition, we assume it properly filed and that the trustee for the Coal Company was actually a defendant. The name used is immaterial.

Whether the Coal Company was such a defendant as was meant by § 18 raises other questions. Since they depend upon an interpretation of the federal statute they are to be determined by federal, not Oklahoma, law.[24] As the extent and character of the interest of the assignee Coal Corporation in the unliquidated claims of the Company do not appear from the record, we do not pass upon the question of whether the Company defendant has any cross-claim against the Indian Nations, after satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned jointly with the Corporation, it is a claim the Company may enforce as defendant under § 18.

The cause is reversed and remanded to the district court for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

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[22] R. S. 914; *Sawin* v. *Kenny*, 93 U. S. 289; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 382.

[23] *Fidelity & Deposit Co.* v. *Sherman Machine & Iron Works*, 62 Okla. 29.

[24] *Board of County Commissioners* v. *United States*, 308 U. S. 343, and *Deitrick* v. *Greaney*, *ante*, p. 190.

INLAND WATERWAYS CORP. ET AL. *v.* YOUNG, RECEIVER.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 6. Argued October 11, 1939.—Decided March 25, 1940.

A national bank may pledge assets to secure deposits of government funds made by governmental agencies even though the deposits may not be "public money" within § 45 of the National Bank Act. P. 523.

The power is to be implied in accordance with traditional government policy and is supported by administrative practice.

69 App. D. C. 268; 100 F. 2d 678, reversed.

CERTIORARI, 306 U. S. 626, to review the affirmance of judgments recovered by the receiver of a national bank against certain public agencies and officials.

Assistant Attorney General Shea, with whom *Solicitor General Jackson* and *Mr. Paul A. Sweeney* were on the brief, for petitioners.

Messrs. Swagar Sherley and *George B. Springston,* with whom *Messrs. Charles F. Wilson* and *George P. Barse* were on the brief, for respondent.

National banks have no power to pledge their assets to secure deposits unless specifically authorized by an Act of Congress. *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 253; *Marion* v. *Sneeden,* 291 U. S. 262; *Lewis* v. *Fidelity & Deposit Co.,* 292 U. S. 559.

The only pledges which the Act of 1864 permits are pledges exacted by and made to the Secretary of the Treasury to secure deposits of public money under his control. And if public money is deposited in a national bank designated as a Government depository, and insufficient security taken, the Government has no priority upon insolvency of the bank, but shares in its liquidation

equally with other depositors. *Cook County National Bank* v. *United States,* 107 U. S. 445, 448.

The deposits were not public money within § 75 of the National Bank Act. There has been no compliance with the provisions of § 45 of the National Bank Act. *O'Connor* v. *Rhodes,* 79 F. 2d 146, 150. The pledge is not authorized by the Act of February 16, 1933.

Administrative practice can not supply lack of specific statutory authority to legalize the pledge. *Marion* v. *Sneeden,* 291 U. S. 262, 269. Nor can custom or usage. See *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 255.

The attempted pledge of the bank's assets to secure Canal Zone deposits was void, and no title passed thereby to the intended pledgee. Respondent therefore may recover the property from the person in possession, since there is no lawful statutory authority for its retention. The right to recover can not be defeated on the ground that the property has been transferred to the Secretary's successor.

National banks have no power to pledge their assets to secure deposits of the Merchant Fleet Corporation or the Inland Waterways Corporation. There has been no compliance by those agencies with § 45 of the National Bank Act. The deposits were lawful and no relationship of trustee and *cestui que trust* was created.

Mr. Justice Frankfurter delivered the opinion of the Court.

The question before us is whether a national bank may pledge assets to secure deposits of funds made by governmental agencies, even though they may not be "public money" within the scope of § 45 of the National Banking Act, 13 Stat. 99, 113, 12 U. S. C. § 90.

The deposits in question were made with the Commercial National Bank by three separate governmental agencies—by the Inland Waterways Corporation and the

United States Shipping Board Merchant Fleet Corporation,[1] and by the Secretary of War on behalf of the Panama Canal Zone. After the bank's insolvency the present suit was instituted by the receiver, respondent here, for the recovery of the pledged assets or their proceeds to the extent of the amount in excess of the dividends paid to the general depositors. The District Court granted respondent's motion to strike out portions of the petitioners' answers asserting the validity of the pledges. The petitioners stood their ground, and decrees *pro confesso* for the respondent followed. The Court of Appeals for the District of Columbia affirmed, 69 App. D. C. 268; 100 F. 2d 678, and we granted certiorari, 306 U. S. 626, because the controversy raised matters of importance in the administration of the National Banking Act.

At the threshold we are met by two recent decisions of this Court, *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245, and *Marion* v. *Sneeden,* 291 U. S. 262. In view of the thorough consideration which these two cases received and the added weight which they derive from the authority, in the field of banking, of Mr. Justice Brandeis, the writer of the opinions, we start with full acceptance of what they decided.

The *Pottorff* case held that a national bank was without authority to pledge its assets as security for private deposits. In the absence of specific authority to make such pledges, the general policy of the Act and principles of sound banking practice were drawn upon to establish the prohibition. To allow the withdrawal of assets of the bank from general availability would impair the bank's liquidity—its ability to meet unexpected demands by depositors—and thereby restrict the national banking system as a reliable instrument of national finance. In the *Sneeden* case the banking standards relied upon in

[1] Both these corporations are wholly owned by the United States.

the *Pottorff* case were applied likewise to deny to national banks power to pledge their assets as security for deposits by state and local governmental agencies except where permission is given by the Act of June 25, 1930, 46 Stat. 809, 12 U. S. C. § 90.[2]

But the function of national banks as depositaries of federal funds was not before the Court in the *Pottorff* and *Sneeden* cases, and the power of the banks in relation to such funds could not have been decided there. That power is the exact issue here. The solution of this problem, however, must be found by application of those standards for judgment which were decisive in the former cases. In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the national banks as fiscal agencies must give meaning to the silence of the Act.

Congress has necessarily been concerned from the beginning to provide appropriate safeguards for government funds. One of the motives in the establishment of the first Bank of the United States was its availability as a safe depositary for such funds. They were kept there until the expiration of that Bank's charter in 1811. Thereafter and until the second Bank of the United States was chartered, government monies were kept in state banks. These deposits were without security, and as a consequence severe losses followed the financial dislocation which came with the War of 1812. This experience led the Government to exact security, and losses became negligible. Phillips, Methods of Keeping the

[2] *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, involved merely the application of the *Sneeden* doctrine to the special circumstances presented by Georgia legislation in the case of national banks situated in that State. The *Lewis* case, like the *Pottorff* and *Sneeden* cases, did not bring into issue the power of national banks with reference to federal deposits. Of course, the *Lewis* case neither professed to enlarge, nor could it, the scope of the *Pottorff* and *Sneeden* decisions.

Public Monies of the United States, pp. 6–20; H. Rep. No. 358, 21 Cong., 1st Sess., Vol. 3, p. 12; IV McMaster, History of the People of the United States, p. 295 *et seq.*; III American State Papers, Finance, p. 11. The second Bank of the United States, established partly to serve as a Government depositary, kept most of the federal funds until their withdrawal in 1833 by Secretary Taney. But as a condition to their deposit in various state banks after 1833, Taney, acting upon the earlier experience of the Treasury under Secretaries Gallatin and Crawford, exacted appropriate security.[3] By the Act of June 23, 1836, 5 Stat. 52, Congress translated Treasury practice into legislative policy. It thereby became the Secretary's duty, whenever wisdom dictated, to require collateral for Government funds. As a result security was demanded of almost all the depositaries. Phillips, *op. cit.*, p. 63. The panic of 1837 brought another modification. Government monies were held by the local collectors and by the Treasury itself, and a little later deposited in the new Sub-Treasury. But in 1841 the old method of deposit in state banks was resumed under the practice which had been introduced in 1833. Exec. Doc. No. 123, 27th Cong., 2nd Sess., p. 2; Phillips, *op. cit.*, p. 113. This arrangement—that is, deposits secured by collateral—continued until the Sub-Treasury Act of 1846, 9 Stat. 59, led to the withdrawal of Government funds from private banks. The sub-treasury system persisted until the establishment of the modern national banking system.

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[3] These conditions, incorporated in contracts between the Treasury and the banks, required collateral to be pledged for all deposits in excess of one-half the bank's paid-in capital. In addition the Treasury reserved the right to demand additional security whenever it was thought prudent. Exec. Doc. No. 2, 23rd Cong., 1st Sess., Vol. 1, p. 36; Phillips, *op. cit.*, pp. 53–55; Girard, The Independent Treasury, p. 17.

The policy of securing Government deposits thus antedates the National Banking Act. It was the practical response to disastrous experience. It began without any statutory authorization, and was continued both with and without specific Congressional sanction. Long practice and Congressional approval lodged in the Secretary of the Treasury authority to take appropriate measures to safeguard the nation against loss of its funds. The integrity of Government monies was naturally considered an object of great national importance, the attainment of which properly belonged to those entrusted with their disposition.

It is against this background that the National Banking Act of 1864 must be projected, intended as it was to provide facilities for the deposit of Government funds. Congress was alive to the Treasury's experience with deposits, secured and unsecured, during the preceding decades, together with the policy which had evolved from that experience. Cong. Globe, 37th Cong., 3rd Sess., Pt. I, pp. 843–45. The banking system which Congress thus established embodied a blend of governmental and private purposes. See *Mercantile Bank* v. *New York,* 121 U. S. 138, 154; Davis, The Origin of the National Banking System, S. Doc. No. 582, 61st Cong., 2nd Sess.

By § 45 of the Act, Congress specifically commanded the Secretary of the Treasury to exact security for "public monies" deposited by him in national banks. R. S. § 5153 (12 U. S. C. § 90). We read this as an exaction of duty from the Secretary as to monies subject to his control, see *Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 449, and not as a limitation upon the power of the bank to give security when it may be required by other Government officers and agencies charged with the custody of federal funds. Placing § 45 in the setting of its history, we do not think it should be read in a nig-

gardly spirit, as though it expressed a gingerly departure from public policy. On the contrary, it is a manifestation of historic national practice, which is to be given scope consonant with the reason for its development. Compare *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381. By a series of specific statutory commands, Congress has recognized the power of national banks to give security for deposits of a governmental nature by laying upon various agencies, charged with the custody of such funds, a duty to exact collateral. See § 61 of the Bankruptcy Act, 30 Stat. 562; § 9 of the Postal Savings Act, 36 Stat. 816; and Acts relating to Insolvent Bank Funds, 39 Stat. 121; Porto Rican Funds, 39 Stat. 951; Government Obligations, 40 Stat. 291 and Indian Monies, 40 Stat. 591. With one exception all these special statutory requirements pertain to funds held by the Government for the benefit of others. It is difficult to suppose that what Congress has commanded with respect to funds held by its agencies in an immediate fiduciary capacity, it would deem a violation of law if done with respect to funds beneficially owned by the United States itself. What may be inimical to the private aspects of the national banking system, and therefore *ultra vires,* has no such relevance to the public aspect of national banks, and to the enforcement of the public interest by those charged with primary responsibility for its guardianship.

So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires.* Compare *Skinner & Eddy Corp.* v. *Mc-*

Carl, 275 U. S. 1, 8.[4] The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States,* 263 U. S. 341; *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. 415. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare *U. S. Grain Corp.* v. *Phillips,* 261 U. S. 106, 113. See Seventeenth Annual Report, U. S. Shipping Board, 1933, pp. 88–89, for summary of losses borne by Treasury on behalf of the Merchant Fleet Corporation, and compare Annual Report, Inland Waterways Corporation, 1936, pp. 16–22.

The policy underlying Congressional legislation and reflected in the history of governmental deposits is confirmed by the explicit recognition of that official in whom is centered oversight of the administration of the National Banking Act. S. Doc. 175, 73rd Cong., 2nd Sess. The Comptroller of the Currency, to be sure, must himself move within the orbit of the National Banking Act. Illegality cannot attain legitimacy through practice. But when legality itself is in dispute—when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress. More than half a dozen agencies have thought it their duty to safeguard deposits in nearly a hundred banks by transactions similar to those before us. This practice had the approval of the Comptroller because he believed it within the scope of the National

[4] See McDairmid, Government Corporations and Federal Funds, 31 Am. Pol. Science Rev. 1095; Federal Corporations and Corporate Agencies, 16 Harv. Bus. Rev. 436. The corporations, of course, perform "governmental" functions. *Graves* v. *O'Keefe,* 306 U. S. 466.

Banking Act. Even constitutional power, when the text is doubtful, may be established by usage. See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473. When dealing with such necessarily argumentative concepts as those of which the law of *ultra vires* is so largely composed, the responsible and pervasive practice of public officers bent on safeguarding the public interests ought to carry the day even were the issue more in doubt than we believe it to be.

Deeming the challenged pledges to have been validly made, we think petitioners were entitled to judgment. It is therefore unnecessary for us to consider the other arguments here urged in their behalf. The judgments below should be

Reversed.

MR. JUSTICE REED and MR. JUSTICE MURPHY took no part in the disposition of this case.

MR. JUSTICE ROBERTS, dissenting:

The court below followed and applied the decisions of this court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, *Marion* v. *Sneeden*, 291 U. S. 262, and *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559.

It is true that those cases presented the question whether national banks are authorized to give security for private deposits and those of state agencies. But the basis of each of the decisions was that national banks are without power to pledge assets as security for *any* deposits, in the absence of express legislative sanction. Paradoxically, the opinion of the court, while recognizing the authority, in the field of banking, of Mr. Justice Brandeis, who announced the opinions in all three cases for a unanimous court, rejects the fundamental principle of the opinions. Whereas in the *Lewis* case Mr. Justice Brandeis announced in plain terms that, in the absence of express authorization, a national bank has "no power

to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress," the opinion of the court spells out such power despite "the silence of the act."

In the *Texas & Pacific* and *Marion* cases the opinions point out that whenever Congress has intended that security should be taken for deposits of government funds specific authority has been granted.[1] That what was thus said by Mr. Justice Brandeis was deemed necessary to the decisions and was the deliberate conclusion of the court is evidenced by his statement in *Lewis* v. *Fidelity Co.*, at p. 564:

"In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, . . . we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

Now it is said that these cases incorrectly state the governing principle. That principle is now said to be that Congress cannot have intended to limit the authority of banks to give security in cases where administrative officers in charge of government funds have deemed it appropriate that security should be given. In other words, despite the withholding of any grant of power to institutions whose powers are only those granted,[2] a power is spelled out.

The attempt to buttress the implication of the power from the fact that federal agencies have heretofore exacted security, and that the Comptroller of the Currency has been of the view that such pledges were not

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[1] See *Texas & Pacific Ry. Co.* v. *Pottorff*, p. 257, Note 11; *Marion* v. *Sneeden*, p. 268.

[2] "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." *Texas & Pacific Ry. Co.* v. *Pottorff*, p. 253.

in violation of the Act, is answered by what was said in *Marion* v. *Sneeden* (p. 269):

"comptrollers of the currency knew that this was being done; and they assumed that the banks had power so to do. But the assumption was erroneous."

I think that as the Court of Appeals followed the principle rightly applied in the decisions of this court its judgment should be affirmed.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

WOODRING, SECRETARY OF WAR, ET AL. *v.* WARDELL, RECEIVER.

CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 5. Argued October 10, 11, 1939.—Decided March 25, 1940.

Decided upon the authority of the case last preceding.
69 App. D. C. 280; 100 F. 2d 690, reversed.

CERTIORARI, 306 U. S. 626, to review the affirmance of a judgment recovered by the receiver of a national bank against the petitioners.

Assistant Attorney General Shea, with whom *Solicitor General Jackson* and *Mr. Paul A. Sweeney* were on the brief, for petitioners.

Messrs. Brice Clagett and *George P. Barse,* with whom *Messrs. Charles E. Wainwright* and *George B. Springston* were on the brief, for respondent.

There is no congressional policy giving preference to Government deposits. Though Congress gave claims of the United States against insolvents priority over all others, the rule is inapplicable to claims against insolvent national banks.

The general power given to national banks to secure public deposits relates specifically to public money of the United States. Whenever Congress designed to authorize the securing of deposits of funds which, strictly speaking, might not be United States public money, it has done so by a specific Act.

It was recognized at the time these deposits were made, and since, that they did not constitute public money of the United States and did not fall under any statute authorizing the securing of deposits in national banks.

The pledges admittedly were not made under U. S. C., Title 12, § 90.

There is no specific Act of Congress, and no rule or regulation having the effect of such an Act, authorizing the pledge of securities by national banks to secure deposits of Canal Zone money order funds.

The lack of statutory authority can not be supplied either by custom or usage, or by the sanction and approval of the Comptroller of the Currency or other executive officers.

Being unauthorized, the pledge was void, and neither the pledgees, the Canal Zone, nor the United States acquired any right or interest in the illegally pledged bonds or the proceeds thereof, which remained the property of the bank. And the receiver is entitled to recover the property.

Since the possession of petitioners derives from a void act, their possession is personal, not official, and a suit against them is not a suit against the United States.

The doctrine of sovereign immunity does not apply, because the United States, having no interest in the fund sought to be recovered, is not an indispensable party to the suit.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a companion case to *Inland Waterways Corp.* v. *Young, ante,* p. 517. The District National Bank pledged some of its assets to secure deposits made by the Secretary of War on behalf of the Panama Canal Zone. The Bank became insolvent in 1933, and the pledged assets were sold. Respondent, the Bank's receiver, brought this action to recover that part of the proceeds which represented an amount in excess of dividends paid to the ordinary depositors. The District Court held that the pledges were *ultra vires* and gave judgment for the respondent. The Court of Appeals affirmed. 69 App. D. C. 280; 100 F. 2d 690.

For the reasons stated in *Inland Waterways Corp.* v. *Young, ante,* we are of opinion that the pledges given by the Bank were valid, and that the judgment below should be

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE ROBERTS, for the reasons set forth in their dissenting opinion in *Inland Waterways Corp.* v. *Young, ante,* p. 525, dissent here.

MR. JUSTICE REED and MR. JUSTICE MURPHY took no part in the disposition of this case.

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WHITNEY ET AL., EXECUTORS, ET AL. *v.* STATE TAX COMMISSION OF NEW YORK.

APPEAL FROM THE SURROGATE'S COURT OF NEW YORK.

No. 541. Argued February 28, 29, 1940.—Decided March 25, 1940.

A statute of New York, amending the 1930 estate tax law, operates to require inclusion in the gross estate of the decedent, for the purpose of computing the estate tax, of property in respect of which the decedent exercised after 1930 by will a non-general power of appointment created prior to that year. The statute reaches such transfers under powers of appointment as under the previous statute escaped taxation. *Held:*

1. The inclusion in the gross estate of a decedent of property never owned by her but appointed by her will under a limited power which could not be exercised in favor of the decedent, her creditors, or her estate, did not deny due process to those who inherited the decedent's property, even though, because the tax rate was progressive, the net amount they inherited from her was less than it would have been if the appointed property had not been included in the gross estate. P. 540.

2. Considering the history and purpose of the statute, the facts that it applies only to special powers of appointment created prior to 1930 and exercised thereafter, and that other special powers are taxed in the estate of the donor rather than that of the donee, does not render it violative of the equal protection clause of the Fourteenth Amendment. *Binney* v. *Long,* 299 U. S. 280, distinguished. P. 541.

281 N. Y. 297; 22 N. E. 2d 379, affirmed.

APPEAL from the affirmance of a judgment sustaining the constitutionality of a New York estate tax.

Mr. Arthur A. Ballantine, with whom *Messrs. Roy C. Gasser, Thomas B. Gilchrist, Horace R. Lamb,* and *Leo Gottlieb* were on the brief, for appellants.

An estate tax which requires inclusion in the decedent's taxable estate of property in respect of which she

exercised only a limited power of appointment, which she was precluded from exercising for the benefit of herself, her creditors or her estate, and which property never at any time belonged to her, constitutes an arbitrary and capricious allocation of the tax burden.

An estate tax may properly include in its measure property not technically owned by the decedent at death if the decedent stood in a relationship to the property which might fairly be regarded as the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625; *Leser* v. *Burnet,* 46 F. 2d 756. But the assumption of such a relationship in this case is erroneous and arbitrary.

The inclusion of property in respect of which the decedent exercised a general power of appointment is valid because a general power gives the grantee of the power the substantial equivalent of ownership, since he is free to exercise it in favor of his creditors and thus use the property for his own benefit. *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. 2d 600, 604; cert. den., 280 U. S. 602; *Morgan* v. *Commissioner,* 309 U. S. 78; *Chase National Bank* v. *United States,* 278 U. S. 327; *Helvering* v. *Parker,* 84 F. 2d 838; *Pennsylvania Co.* v. *Commissioner,* 79 F. 2d 295; cert. den., 296 U. S. 651; *Levy's Estate* v. *Commissioner,* 65 F. 2d 412; *McKelvy* v. *Commissioner,* 82 F. 2d 395; *Ballard* v. *Helburn,* 9 F. Supp. 812; aff'd 85 F. 2d 613; T. D. 4729, March 18, 1937; Reg. 80, Art. 25.

The necessity of preventing evasion or avoidance of the tax permits the inclusion of property once owned by the decedent in cases where the transaction as a whole may fairly be regarded as a substitute for a testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116–117; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Helvering* v. *City Bank Co.,* 296 U. S. 85; *Porter* v. *Commissioner,* 288 U. S. 436; *Tyler* v. *United States,* 281 U. S.

497; *United States* v. *Jacobs,* 306 U. S. 363; *Helvering* v. *Helmholz,* 296 U. S. 93; *Helvering* v. *Hallock,* 309 U. S. 106. Not so, however, where the property has never belonged to the decedent.

Where the decedent has never had any beneficial interest in the property in question, either at death or at any previous time, the inclusion of the property in his taxable estate denies due process. The tax in such a case can be based only upon an arbitrary assumption which is unfounded in fact. *Heiner* v. *Donnan,* 285 U. S. 312; *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Nichols* v. *Coolidge,* 274 U. S. 531; *Frew* v. *Bowers,* 12 F. 2d 625.

The fact that a legacy tax might have been imposed upon the receipt of this property by the appointees does not justfy the present tax. See *Nichols* v. *Coolidge,* 274 U. S. 531, 541; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270–1; *Coolidge* v. *Long,* 282 U. S. 582, 608, 609, 631–2; cf., *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77; *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Edwards* v. *Slocum,* 264 U. S. 61, 62–3.

In exercising the special power in trust granted to her in the will of her husband, the decedent was merely acting as her husband's fiduciary agent in connection with the disposition of his property. The circumstance that the decedent performed her fiduciary function with reference to her husband's property by means of the same instrument by which she disposed of her own property does not justify including her husband's property in the measure of a tax on the transmission of her estate.

The equal protection clause imposes a more exacting requirement of fairness than the due process clause. *Truax* v. *Corrigan,* 257 U. S. 312; *La Belle Iron Works* v. *United States,* 256 U. S. 377, 392.

The statute here discriminates between the estates of decedents who have exercised non-beneficial powers of appointment and those who have not.

An estate precisely like that of the decedent, so far as any property in which the decedent had ever had any beneficial interest is concerned, would pay only $360,000 in estate tax, whereas decedent's estate must pay $1,212,000.

Those who succeed to the decedent's own property must pay about $165,000 more than if the appointed property had not been included. Such is the effect of the application of the progressive rate scale.

There is no reasonable basis for the difference in treatment. *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71; *Smith* v. *Cahoon,* 283 U. S. 553; *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239.

The classification was not occasioned by local conditions known to the legislature; there is no room for the operation of any presumption based upon the legislature's greater knowledge of local conditions.

The Court will not indulge pure conjecture to justify the discrimination. *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150, 154; *Binney* v. *Long,* 299 U. S. 280, 294.

The only suggestion as to a possible reason of policy justifying the discrimination, is that the 1932 amendment was required to prevent the escape of the property here involved from all death taxation through the inadvertent repeal, by the estate tax law, of the old legacy tax which would have been payable upon the exercise, after the effective date of the estate tax law, of the powers theretofore created. This would have justified nothing more than the restoration of the tax which had been inadvertently repealed; it could not justify the imposition of a new and different tax based upon an erroneous and arbitrary factual assumption and producing the oppressive and discriminatory effect set forth.

It will not do to urge that it was easier to impose the new estate tax than to restore the old legacy tax. Even if there were any factual basis for such a claim, it is clear

that such an attempted justification would not meet with the approval of this Court. *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 559–60.

The applicability of the statute only to non-general powers of appointment created before September 1, 1930, constitutes an additional ground of invalidity under the equal protection clause. It is clear that the applicability of subdivision 7–a depends on whether the power of appointment involved was created before September 1, 1930, in which case subdivision 7–a may apply, or after September 1, 1930, in which case subdivision 7–a can never apply.

Such a difference in treatment, based solely on the date when the power was created, constitutes an arbitrary and capricious classification violative of the equal protection clause. *Binney* v. *Long,* 299 U. S. 290.

That the present case involves an estate tax rather than a legacy tax, merely serves to aggravate the discrimination. Under the Massachusetts statute, the aggregation of the appointive property with other property for the purpose of the graduated rate provisions was only an aggregation with other property going to the same beneficiary. In the present case, the effect of applying subdivision 7–a has been to aggregate the appointive property with all of the other property comprising the decedent's taxable estate, not only the property going to the same beneficiaries, but also all of the property going to entirely different beneficiaries.

Mr. Mortimer M. Kassell, with whom *Mr. Harry T. O'Brien, Jr.* was on the brief, for appellee.

Mr. Justice Frankfurter delivered the opinion of the Court.

Cornelius Vanderbilt died in 1899. By his will he established a trust to issue a designated annual income to his wife. Upon her death, Mrs. Vanderbilt was also

given the power to dispose of this fund among four of their children, in such proportions as she might choose. In default of her exercise of this discretionary power, the fund was to go to the children equally. Mrs. Vanderbilt died in 1934, and by her will availed herself of the power. The taxing authorities of New York included the value of this trust fund in her gross estate, and on this basis computed Mrs. Vanderbilt's estate tax. The Court of Appeals of New York, finding that the applicable New York legislation had been properly construed by the Tax Commission, sustained its validity. 281 N. Y. 297; 22 N. E. 2d 379. The result of this decision is to reduce the amount available for distribution among the beneficiaries of Mrs. Vanderbilt's independent property below what it would have been had the tax been assessed on the basis of that property without the inclusion of the trust fund which came from her husband. These beneficiaries, and the executors of the will, claim that the exaction thus sanctioned by New York violates the Fourteenth Amendment of the United States Constitution.

The contested statute, New York Laws of 1932, ch. 320, derives meaning as an incident in the history of New York's present system of death taxes. That system had its beginning in 1885. The original act taxed individual economic benefits derived upon death rather than the total amount of the estate. Laws of 1885, ch. 483. Under this legislation, the transmission of property subject to powers of appointment, either general or special, was attributed to the estate of the donor. *Matter of Stewart,* 131 N. Y. 274; 30 N. E. 184; and the subsequent exercise of the power was not taxed. *Matter of Harbeck,* 161 N. Y. 211; 55 N. E. 850. The administrative awkwardness incident to this treatment of appointive property led to an amendment whereby all property passing under powers of appointment was attributed to the do-

nee, not to the donor. Laws of 1897, ch. 284. This was the New York law when Cornelius Vanderbilt died. In 1930, experience with the legacy tax in New York and elsewhere led to a shift in the basis for imposing death duties. Acting upon the results of an inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs, New York in 1930 supplanted her system which taxed the individual legatee's privilege of succession by one which measured the levy by the size of the total estate. Laws of 1930, ch. 710. Under this legislation, property subject to a power of appointment—whether general or special—is included in the donor's gross estate. If the power is general, its later exercise sweeps the appointive property into the donee's gross estate also.

As is apt to happen in extensive legislative readjustments dealing with complex problems, the effect of the change in 1930 upon some of the more specialized situations coming within the general policy was overlooked. Powers created between 1885 and 1897 had been taxable at the donor's death. Special powers created after 1897 and exercised before 1930 had been taxed at the donee's death. Powers created and exercised after 1930 were included in the donor's estate. But powers created after 1897 and not exercised before 1930 were outside the legislative framework. Thus an unintended immunity from the incidence of taxation had been given to special powers of appointment created after 1897 but not exercised before the passage of the 1930 legislation. When experience disclosed this omission, the Legislature removed it in 1932. The amendment of that year, which is copied in the margin,* included in the donee's gross

*The amendment provided that there should be included in the decedent's gross estate interests of which the following was part of the enumeration of defined categories:

"7–a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed exe-

estate appointive property which was not taxable at the donor's death but would have been taxable under the superseded statutory provision of 1897. It is under this amendment that New York has imposed the tax here assailed. This brings us to a consideration of appellants' claims.

As against this attempt by the State to devise a harmonious taxing system, appellants urge that New York exacts an unjustifiably heavier estate tax from the beneficiaries of Mrs. Vanderbilt's unrestricted property because in the accounting of her estate property was included of which she was not the "beneficial owner." Attacking the 1932 Act from another point of view, they claim that New York had no authority to draw a taxing

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cuted in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . . provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The legislative history of this measure was thus summarized in the opinion of Surrogate Foley: "An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7–a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure: 'This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property.'" *Matter of Vanderbilt,* 163 Misc. (N. Y.) 667, 676; 297 N. Y. S. 554, 565.

line between special powers created prior to 1930 and those established thereafter.

Large concepts like "property" and "ownership" call for close analysis, especially when tax legislation is under scrutiny. Mrs. Vanderbilt, to be sure, had, in the conventional use of that term, no "beneficial interest" in the property which she transferred through the exercise of her power of appointment. She could not, that is to say, use the corpus of the trust herself or appoint it to her estate; nor could she have applied it to her creditors. These qualifications upon Mrs. Vanderbilt's power over the appointive property had a significance during her lifetime which death transmuted. For when the end comes, the power that property gives, no matter how absolutely it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the property—the "beneficial interest"—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death.

In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, "owned" by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in

what proportions among a restricted class the benefits shall fall.

The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of a decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* v. *United States,* 281 U. S. 497; likewise the full value of property in which the decedent was only a joint tenant may be taxed to his estate, *United States* v. *Jacobs,* 306 U. S. 363. In neither of these instances was there an exact equation between the "beneficial interest" owned by the decedent just before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change beneficiaries, excluding, however, himself and his estate from the range of choice. *Porter* v. *Commissioner,* 288 U. S. 436. The attempt to differentiate the tie that binds these cases by treating the *inter vivos* transfers in these decisions as mere substitutions for testamentary dispositions, disregards the emphasis in these cases on the practical effect of death in bringing about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax. This broader base is emphasized, for instance, by the fact that in the *Porter* case the decedent had divested himself of all "beneficial interest" in the trust property prior to the passage of the taxing act by which the trust was included in the value of his gross estate.

A person may by his death bring into being greater interests in property than he himself has ever enjoyed, and the state may turn advantages thus realized into a source of revenue, as illustrated by earlier cases dealing

with special powers of appointment that also came here from New York. *Orr* v. *Gilman,* 183 U. S. 278; *Chanler* v. *Kelsey,* 205 U. S. 466. In these cases, to be sure, a legacy tax was assailed—a tax, that is, measured by the specific interests which the beneficiaries of the power received. Here, the grievance is asserted more particularly by those succeeding to Mrs. Vanderbilt's free property. But if death may be made the occasion for taxing property in which the decedent had no "beneficial interest," then the measurement of that tax by the decedent's total wealth-disposing power is merely an exercise of legislative discretion in determining what the state shall take in return for allowing the transfer. The adoption of this measure may, of course, in the case of a graduated tax, burden individual beneficiaries beyond what they would bear if the same tax rate were applied to the value of the unrestricted property of the decedent and the property over which he had but a restricted control were excluded. There is nothing in the Fourteenth Amendment to prevent legislatures from devising death duties having this effect, nor to authorize courts to deny them the right to do so.

The circumstances of the present case illustrate the practical considerations which may induce a legislature to treat restricted and unrestricted property as a taxing unit. The potential interests of the beneficiaries of Mrs. Vanderbilt's free property are intertwined with their interests in the appointive property. The dispositions which she was free to make under her power of appointment served to enhance her freedom with respect to her own property. How Mrs. Vanderbilt would have distributed her individual property if she had possessed no control over that left by her husband is speculative. But it is certainly within the area of legislative judgment to assume that special powers of appointment are ordinarily designed for ends similar to those in the present case—

namely, to enlarge the donee's range of bounty, however narrowly restricted the enlargement may be, to a circle of beneficiaries closely related to, if not identical with, those whom the donee would be naturally disposed to favor. To the extent that this is true, there is compensation for those who may succeed to the donee's individual property, and who must pay a larger tax, because the appointive property is included in the gross estate. The legislature can hardly particularize the instances and draw up a tariff of compensations, and it is certainly not the province of courts to make the attempt. It suffices that the legislature has seen fit to frame a general enactment drawn on lines not offensive to experience and aimed at curing a revealed inequality in the state's taxing system.

Appellants vainly seek to draw strength from *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Hoeper* v. *Tax Commission,* 284 U. S. 206; and *Heiner* v. *Donnan,* 285 U. S. 312. The differences of opinion to which these cases gave rise are not here relevant.

But there remains the claim of appellants that in drawing the line between special powers created before 1930 and those having a later origin, New York ran afoul of the Equal Protection Clause. The brief summary we have given of the history of this legislation seems a sufficient answer to the charge of proscribed discrimination. To have continued the complete immunity from taxation which the 1930 legislation had unintentionally conferred upon special powers of appointment created before its passage was deemed by New York to have resulted in substantial inequality. The correction of such inequality is not a denial of the equality commanded by the Fourteenth Amendment. In the age-old but increasingly difficult task of tapping new sources of revenue, nothing may more legitimately attract the attention of financial statesmen than opportunities to reach property which has

enjoyed immunity from tax burdens borne by others similarly situated. *Watson* v. *State Comptroller,* 254 U. S. 122; *Welch* v. *Henry,* 305 U. S. 134.

Acceptance of *Binney* v. *Long,* 299 U. S. 280, would not constrain us to hold differently. In the circumstances confronting the New York Legislature, as the Court of Appeals pointed out, the discrimination affecting special powers was not based upon what was deemed in the *Binney* case to be a date "arbitrarily selected but is a logical solution by the Legislature of a problem which it was required to meet." 281 N. Y. at 317. All special powers, whether created before or after 1930, are taxed in New York. In one case, they are taxed to the donor's estate; in the other—since the same treatment would be manifestly impracticable—to the donee's. Differences in circumstances beget appropriate differences in law. The Equal Protection Clause was not designed to compel uniformity in the face of difference. *Madden* v. *Kentucky, ante,* p. 83.

The judgment below is

Affirmed.

Mr. Justice Roberts is of opinion that the instant case is indistinguishable in principle from *Binney* v. *Long,* 299 U. S. 280, and that, accordingly, the judgment should be reversed.

Mr. Justice McReynolds did not participate in the decision of this case.

Counsel for Parties.

PUERTO RICO *v.* RUBERT HERMANOS, INC.

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

No. 582. Argued March 7, 8, 1940.—Decided March 25, 1940.

1. The provision of § 39 of the Organic Act for Puerto Rico, 48 U. S. C. § 752, that "every corporation hereafter authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land" is enforcible by proceedings of *quo warranto* authorized by the local legislature under § 37 of the Organic Act, 48 U. S. C. § 821, which provides that "the legislative authority shall extend to all matters of a legislative character not locally inapplicable . . ." P. 548.
2. Section 39 of the Organic Act of Puerto Rico is not one of "the laws of the United States" within the meaning of the provision of Jud. Code § 256 which vests in "the courts of the United States . . . exclusive of the courts of the several States" jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States." P. 550.

106 F. 2d 754, reversed.

CERTIORARI, *post,* p. 642, to review the reversal of a judgment of the Supreme Court of Puerto Rico sustaining a proceeding in *quo warranto.*

Mr. William Cattron Rigby, with whom *Messrs. George A. Malcolm* and *Nathan R. Margold* were on the brief, for petitioner.

Messrs. Henri Brown and *George M. Wolfson* for respondent.

Mr. Melvin H. Siegel, with whom *Solicitor General Biddle* and *Assistant Attorney General Shea* were on the brief for the United States, as *amicus curiae,* by special leave of Court, urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question here in controversy is a matter of great importance to Puerto Rico and involves the power of its legislature to enforce Congressional policies affecting the Island. We therefore brought the case here on a writ of certiorari, to review a decision of the Circuit Court of Appeals for the First Circuit. 106 F. 2d 754. That court had reversed the judgment of the Supreme Court of Puerto Rico, 53 P. R. 779 (Spanish edition) sustaining a proceeding in *quo warranto* brought against respondent.

The proceeding was initiated in the Supreme Court of Puerto Rico under jurisdiction conferred upon it by the local legislature. The substance of two measures, enacted in 1935, and set out below, authorized the Government of Puerto Rico to bring a *quo warranto* proceeding in its Supreme Court against any corporation violating federal law.[1] Accordingly, the Attorney General of the Island

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[1] Act No. 33 of July 22, 1935, Laws of Puerto Rico, Special Session, 1935, p. 418, providing:

"Section 1.—There is hereby conferred upon the Supreme Court of Puerto Rico exclusive original jurisdiction to take cognizance of all *Quo Warranto* proceedings that the Government of Puerto Rico may hereafter institute for violations of the provisions of Section 752, Title 48, United States Code, and for that purpose it is provided that the violation of said provisions shall constitute sufficient cause to institute a proceeding of the nature of *Quo Warranto*.

"Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

"Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval."

Act No. 47 of August 7, 1935, Laws of Puerto Rico, Special Session, 1935, pp. 530–32, providing:

"Section 1.—Section 2 of An Act entitled 'An Act establishing Quo Warranto proceedings,' approved March 1, 1902, is hereby amended as follows:

" 'Section 2.—In case any person should usurp, or unlawfully hold or execute any public office or should unlawfully make use of any

brought the present suit against respondent, a corporation organized in 1927 under Puerto Rico's corporation law. The gravamen of the suit was alleged defiance by respondent of the Congressional restriction imposed upon "every corporation authorized to engage in agriculture . . . to the ownership and control of not to exceed five hundred acres of land." This restriction, according to the complaint, embodied "the public policy of the

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franchise, or likewise shall hold any office in any corporation created by and existing under the laws of Puerto Rico, or any public officer shall have done or suffered any act which, by the provisions of the law, involves a forfeiture of his office, or any association or number of persons shall act within Puerto Rico as a corporation, without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information accordingly. Where it appears to the court that the several rights of divers parties to the same office or franchise may properly be determined on the same proceeding, the court may give leave to join all such persons in the same petition, in order to try their respective rights to such office or franchise.'

"'When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, the People of Puerto Rico may, at its option, through the same proceedings, institue [*sic*] in its behalf the confiscation of such property, or the alienation thereof at public auction,

People of Puerto Rico" first declared by Congress in its Joint Resolution of May 1, 1900, 31 Stat. 715, supplementing the Foraker Act of April 12, 1900, 31 Stat. 77.[2] This limitation upon the corporate ownership of land was continued when Congress in 1917 revised the constitutional framework of Puerto Rico's government in what is the existing Organic Act, § 39 of the Act of March 2, 1917, 39 Stat. 951, 964 (48 U. S. C. § 752).

The present controversy derives from the fact that Congress affixed no direct consequences to disobedience of its land policy for Puerto Rico. The main issue presented here is whether Puerto Rico's Legislative Assembly has power to graft such consequences upon the Con-

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within a term of not more than six months counting from the date on which final sentence is rendered.

" 'In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain.' "

[2] § 3 of the Joint Resolution provides:

"No corporation shall be authorized to conduct the business of buying and selling real estate or be permitted to hold or own real estate except such as may be reasonably necessary to enable it to carry out the purposes for which it was created, and every corporation hereafter authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land; and this provision shall be held to prevent any member of a corporation engaged in agriculture from being in any wise interested in any other corporation engaged in agriculture. Corporations, however, may loan funds upon real estate security, and purchase real estate when necessary for the collection of loans, but they shall dispose of real estate so obtained within five years after receiving the title. Corporations not organized in Porto Rico, and doing business therein, shall be bound by the provisions of this section so far as they are applicable."

Whether the restriction operates directly as a limitation upon the powers of the corporation or merely as a limitation upon the Legislative Assembly's power to confer corporate privileges, its effect is to render corporate land ownership in excess of the prescribed acreage unlawful. See the opinion of Attorney General Wickersham, 28 Op. A. G. 258, 260–261.

gressional prohibition. This was the issue as the Supreme Court of Puerto Rico conceived it, and we are not disposed to deal with it differently. It was suggested by the dissenting judge in the Court of Appeals that the Supreme Court's judgment may be supported by construing the 1935 legislation as a means of enforcing the local land policy—identic, to be sure, with that declared by Congress—embodied in the 1911 corporation law of Puerto Rico. To do so, however, would take us into niceties of pleading and of local law which were not canvassed by the insular court. Such a course would be peculiarly gratuitous when the issue which the local court in fact decided is easily resolved.

In the setting of the traditional relation between the broad outlines designed by Congress for the government of territories and the powers of local legislatures to move freely within those outlines, the difficulties conjured up against the view taken by the Puerto Rican court rapidly evaporate. The objections urged against it illustrate vividly the power of subtle argument to give an appearance of difficulty to what is relatively simple. The breadth of local autonomy reposed by Congress in the Legislative Assembly was elucidated too recently and too thoroughly in *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, to call for repetition here. Suffice it to say that the opinion in that case underlined the fullness of scope which Congress gave to Puerto Rico when it provided by § 37 of the Organic Act of 1917 that "the legislative authority shall extend to all matters of a legislative character not locally inapplicable . . ." 39 Stat. 964, 48 U. S. C. § 821. Drawing on the practice of Congress in its treatment of territories throughout our history, and assimilating that practice into the Puerto Rican situation, the Court concluded that "The grant of legislative power in respect of local matters, contained in § 32 of the Foraker Act and continued in force by § 37 of the

Organic Act of 1917, is as broad and comprehensive as language could make it." 302 U. S. at 261.

Surely nothing more immediately touches the local concern of Puerto Rico than legislation giving effect to the Congressional restriction on corporate land holdings. This policy was born of the special needs of a congested population largely dependent upon the land for its livelihood.[3] It was enunciated as soon as Congress became responsible for the welfare of the Island's people, was retained against vigorous attempts to modify it,[4] and was reaffirmed when Congress enlarged Puerto Rico's powers of self-government. Surely Congress meant its action to have significance beyond mere empty words. To treat the absence of a specific remedy for violation of the restriction as an implied bar against local enforcement measures is to impute to Congress a dog-in-the-manger attitude bordering on disingenuousness. We refuse to believe that Congress was bent on the elaborate futility of a *brutum fulmen.* What was said in another context, *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 569, is apposite here: "The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." The suggestion that enforcement might come only through

[3] See Gayer, Homan and James, The Sugar Economy of Puerto Rico, pp. 97–132; Diffie, Porto Rico: A Broken Pledge, pp. 45–88; Fleagle, Social Problems in Porto Rico, pp. 19–27; Hanson, Planning Problems and Activities in Puerto Rico (Report to National Resources Committee, 1936). Compare Clark, etc., Porto Rico and Its Problems, pp. 495–500, 628 *et seq.*

[4] See H. R. 23,000, 61st Cong.; H. Rep. No. 750, 61st Cong., 2d Sess.; S. Rep. No. 920, 61st Cong., 3d Sess.; 45 Cong. Rec. 6861 *et seq.,* 7220 *et seq.,* 7584 *et seq.,* 7604 *et seq.,* 8177 *et seq.;* 46 Cong. Rec. 2644.

quo warranto proceedings by the Attorney General of the United States is equally reckless.

A much more rational explanation, consistent with the organic relation between Congress and the local government, is at hand. As the ultimate legislative guardian of the Island's welfare, Congress confined the legislature's discretion within the limits of the five hundred-acre restriction. How this policy was to be realized was for Puerto Rico to say. "Local authorities may ascertain facts and decide questions upon which depends appropriate exertion of the power much more conveniently than may the Congress." *Public Service Commission* v. *Havemeyer,* 296 U. S. 506, 515–16.

It is admitted, as indeed in view of the *Shell* case it could not be denied, that the remedy here pursued would have been available to the Legislative Assembly if that body had adopted the Congressional policy in a substantive statute of its own. But respondent contends that the same result cannot be achieved by investing the insular courts with jurisdiction directly to enforce the Congressional policy. Such useless indirection is compelled neither by the Organic Act nor by any general consideration underlying the distribution of power between Congress and the insular legislature. So long as the Legislative Assembly acts within the framework which Congress has set up it merely avails itself of the power conferred in § 37 of the Organic Act. It has done so here.

There remains for consideration an objection based on § 256 of the Judicial Code (28 U. S. C. § 371). That section vests in "the courts of the United States . . . exclusive of the courts of the several States" jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States." Whether a law passed by Congress is a "law of the United States" depends on the meaning given to that phrase by its context. A law

for the District of Columbia, though enacted by Congress, was held to be not a "law of the United States" within the meaning of § 250 of the Judicial Code. *American Security Co.* v. *District of Columbia,* 224 U. S. 491. Likewise, we hold that § 39 of the Organic Act is not one of "the laws of the United States" within the meaning of § 256. Section 39 is peculiarly concerned with local policy calling for local enforcement from which local courts should not be excluded by a statutory provision plainly designed for the protection of policies having general application throughout the United States.

Other objections urged at the bar and in respondent's brief do not call for particular mention. On the only questions now before us, we think the Supreme Court of Puerto Rico acted within the scope of power validly conferred upon it by the Legislative Assembly.[5] The judgment of the Circuit Court of Appeals must therefore be

Reversed.

MR. JUSTICE MCREYNOLDS did not participate in the decision of this case.

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[5] The imposition of a fine by the Supreme Court of Puerto Rico, as a part of the power to grant relief ancillary to the main proceeding for forfeiture of the corporate privileges, was within the scope of authority validly conferred upon it by the 1935 legislation. Compare *Illinois* v. *Illinois Central R. Co.,* 33 F. 721. See High, Extraordinary Legal Remedies, §§ 745–762.

MINNESOTA *v.* NATIONAL TEA CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 500. Argued March 7, 1940.—Decided March 25, 1940.

The grounds of a state court decision, holding a graduated tax on gross income from chain stores unconstitutional, being obscure and the jurisdiction of this Court to review being therefore in doubt, the judgment is vacated and the cause remanded for further proceedings so that the state and federal questions may be clearly separated. P. 555.

205 Minn. 443; 286 N. W. 360, vacated.

CERTIORARI, 308 U. S. 547, to review the affirmance of judgments granting refunds of taxes.

Messrs. Matthias N. Orfield and *George W. Markam,* with whom *Mr. J. A. A. Burnquist,* Attorney General of Minnesota, was on the brief, for petitioner.

Mr. Michael J. Doherty, with whom *Messrs. Wilfrid E. Rumble* and *William Mitchell* were on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1933 Minnesota enacted a chain store tax (L. 1933, c. 213) one item of which was a tax on gross sales. § 2 (b). The gross sales tax was graduated: one-twentieth of one per cent was applied on that portion of gross sales not in excess of $100,000; and larger percentages were applied as the volume of gross sales increased, until one per cent was exacted on that portion of gross sales in excess of $1,000,000. Respondents (chain stores conducting retail businesses in Minnesota) paid under protest the gross sales tax demanded by the Minnesota Tax Commission for the years 1933 and 1934 and thereafter

sued in the state court for refunds.[1] Judgments granting refunds were affirmed by the Supreme Court of Minnesota, 205 Minn. 443; 286 N. W. 360. We granted certiorari because of the importance of the constitutional issues involved in *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550 and *Valentine* v. *Great Atlantic & Pacific Tea Co.,* 299 U. S. 32, which cases, it was asserted, controlled the decision below.

At the threshold of an inquiry into the applicability of the *Stewart* and *Valentine* cases to these facts, we are met with a question which is decisive of the present petition. That is the question of jurisdiction.

The Supreme Court of Minnesota discussed not only the equal protection clause of the Fourteenth Amendment of the federal constitution but also Art. 9, § 1 of the Minnesota constitution which provides: "Taxes shall be uniform upon the same class of subjects . . ." It said that "these provisions of the Federal and State Constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation." [2] It stated that the "question is . . . whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating the constitutional requirement of uniformity." It quoted the conclusion of the lower Minnesota court that the statute violated both the federal and the state constitution. It then adverted briefly to three of its former decisions which had

[1] Extra Sess. L. 1933–1934, c. 16, § 1. Respondents also paid under protest that portion of the chain store tax which was based upon the number of stores within the state. L. 1933, c. 213, § 2 (a). That item of the composite tax was upheld by the lower court in Minnesota from which no appeal was taken.

The gross sales feature of the 1933 chain store tax was eliminated in 1937. Extra Sess. L. 1937, c. 93.

[2] 205 Minn., p. 447. The court here cited *Reed* v. *Bjornson,* 191 Minn. 254; 253 N. W. 102.

interpreted Art. 9, § 1 of the Minnesota constitution and quoted from one of them.[3] It merely added: "So much for our own cases"; and proceeded at once to a discussion of cases based solely on the Fourteenth Amendment of the federal constitution. While its discussion of Art. 9, § 1 of the Minnesota constitution was in general terms, its analysis of the Fourteenth Amendment was specifically related to chain store taxation. It distinguished decisions of this Court which held that the number of stores in a given chain affords an appropriate basis for classification for imposition of progressively higher taxes.[4] It then stated that the "precise question here presented" had been directly passed upon adversely to the state's contention in five cases: *Stewart Dry Goods Co.* v. *Lewis, supra; Valentine* v. *Great Atlantic & Pacific Tea Co., supra; Ed. Schuster & Co.* v. *Henry,* 218 Wis. 506; 261 N. W. 20; *Lane Drug Stores, Inc.* v. *Lee,* 11 F. Supp. 672; *Great Atlantic & Pacific Tea Co.* v. *Harvey,* 107 Vt. 215; 177 A. 423. It added that the tax here involved was on

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[3] This reference to Minnesota constitutional law was limited to the following:

"Our cases hold (and that is the general rule) that the legislature 'has a wide discretion in classifying property for the purposes of taxation, but the classification must be based on differences which furnish a reasonable ground for making a distinction between the several classes. The differences must not be so wanting in substance that the classification results in permitting one to escape a burden imposed on another under substantially similar circumstances and conditions. The rule of uniformity, established by the Constitution, requires that all similarly situated shall be treated alike.' State *v.* Minnesota Farmers Mut. Ins. Co., 145 Minn. 231, 234, 176 N. W. 756, 757; State *ex rel.* Mudeking *v.* Parr, 109 Minn. 147, 152, 123 N. W. 408, 134 A. S. R. 759; In re Improvement of Third Street, 185 Minn. 170, 240 N. W. 355."

[4] *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Louis K. Liggett Co.* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co.,* 294 U. S. 87; *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412.

all fours with that struck down by this Court in *Stewart Dry Goods Co.* v. *Lewis, supra.* It quoted with approval from the opinion in *Ed. Schuster & Co.* v. *Henry, supra.* And it concluded with the following statement:

"We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which our attention has been called *directly deciding the question presented* we are of opinion that we should follow them and *that it is our duty so to do."* [5] [Italics added.]

Respondents contend that the court held the statute invalid for violation not only of the federal constitution but also of the state constitution. Hence they seek to invoke the familiar rule that where a judgment of a state court rests on two grounds, one involving a federal question and the other not, this Court will not take jurisdiction. *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52; *New York City* v. *Central Savings Bank,* 306 U. S. 661. In support of this position they point to the court's discussion of the Minnesota constitution and to the fact that the syllabus states that such a tax is violative of both the federal and state constitutions.[6] But as to the latter we are not referred to any Minnesota authority which, as in some states,[7] makes the syllabi the law of the case. And as to the former the opinion is quite inconclusive. For the opinion as a whole leaves the impression that the court probably

[5] 205 Minn., p. 451.

[6] By statute the court is required to prepare the syllabus. Mason's Minn. Stats. 1927, § 134.

[7] See *State* v. *Hauser,* 101 Ohio St. 404, 407; 131 N. E. 66; *Hart* v. *Andrews,* 103 Ohio St. 218, 221; 132 N. E. 846; *Thackery* v. *Helfrich,* 123 Ohio St. 334, 336; 175 N. E. 449.

felt constrained to rule as it did because of the five decisions which it cited and which held such gross sales taxes unconstitutional by reason of the Fourteenth Amendment. That is at least the meaning, if the words used are taken literally. For if, as stated by the court, the "precise question here presented" was ruled by those five cases, that question was a federal one. And in that connection it is perhaps significant that the court stated not only that it "should follow" those decisions but that "it is our duty so to do."

Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, *Honeyman* v. *Hanan,* 300 U. S. 14, consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

But that does not mean that we should dismiss the petition. This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. *State Tax Commission* v. *Van Cott,* 306 U. S. 511; *Patterson* v. *Alabama,* 294 U. S. 600. That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment, where the record failed adequately to state the facts underlying a decision of the federal question, and where the grounds of the state decision were obscure. *Honeyman* v. *Hanan, supra,* and cases there cited. That principle was also applied in *State Tax Commission* v. *Van Cott, supra,* where it was said p. 514:

". . . if the state court did in fact intend alternatively to base its decision upon the state statute and upon an

immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law."

The procedure in those cases was to vacate the judgment and to remand the cause for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated.

In this type of case we deem it essential that this procedure be followed. It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review. *State Tax Commission* v. *Van Cott, supra.* On the other hand we cannot be content with a dismissal of the petition where there is strong indication, as here, that the federal constitution as judicially construed controlled the decision below.

If a state court merely said that the Fourteenth Amendment, as construed by this Court, is the "supreme law of the land" to which obedience must be given, our jurisdiction would seem to be inescapable. And that would follow though the state court might have given, if it had chosen, a different construction to an identical provision in the state constitution. But the Minnesota Supreme Court did not take such an unequivocal position. On the other hand, it did not declare its independence of the decisions of this Court, when the state constitutional provision avowedly had identity of scope with the relevant clause of the Fourteenth Amendment. In the latter respect this case differs from *New York City* v. *Central Savings Bank, supra.* The cases in which the New York Court of Appeals professes to go on both the state and federal due process clauses clearly rest upon an adequate nonfederal ground. For that court has

ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court. See *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, 317; 94 N. E. 431. The instant case therefore presents an intermediate situation to which an application of the procedure followed in *State Tax Commission* v. *Van Cott, supra,* is peculiarly appropriate.

It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

Judgment vacated.

[Over.]

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

MR. CHIEF JUSTICE HUGHES, dissenting:

I think that sound principle governing the exercise of our jurisdiction requires the dismissal of the writ. I see no reason to doubt that the Supreme Court of Minnesota held that the tax in question was laid in violation of the uniformity clause of the State Constitution. Not only is that shown, as it seems to me, from the court's discussion of that question, but it conclusively appears from the syllabus which definitely states that the tax is "violative of art. 9, § 1, of our state constitution." 205 Minn. 443; 286 N. W. 360. Minnesota requires that in all cases decided by the Supreme Court it shall give its decision in writing, "together with headnotes, briefly stating the points decided." Mason's Minn. Stat., § 134. In obedience to the statute, the court has thus given explicitly in its syllabus its own deliberate construction of what it has decided.

The decision thus rested upon an adequate non-federal ground and in accordance with long-established doctrine we are without jurisdiction. *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210.

This is not a case where the record leaves us in uncertainty as to what has actually been determined by the state court. *Honeyman* v. *Hanan,* 300 U. S. 14, 23, 26; *State Tax Commission* v. *Van Cott,* 306 U. S. 511. Nor have there been supervening changes since the entry of the judgment. *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U. S. 503, 507; *Patterson* v. *Alabama,* 294 U. S. 600, 607. I find no warrant for vacating the judgment on either of these grounds.

The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which ade-

quately rests upon its application of the provision of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the federal constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand. It cannot be supposed that the Supreme Court of Minnesota is not fully conscious of its independent authority to construe the constitution of the State, whatever reasons it may adduce in so doing. As the Minnesota court said in *Reed* v. *Bjornson,* 191 Minn. 254, 257; 253 N. W. 102, 104, after referring to the question presented under the federal constitution, "Our interpretation of our own constitution is of course final."

The disposition of this case is directly within our recent and unanimous ruling in *New York City* v. *Central Savings Bank,* 306 U. S. 661. In that case, the Court of Appeals of New York had decided that a state statute was repugnant to the due process clause of the state constitution, that clause being the same as the due process clause of the Fourteenth Amendment which the court held had also been violated. 280 N. Y. 9, 10; 19 N. E. 2d 659. We declined jurisdiction upon the ground that the judgment of the state court in applying the state constitution rested upon an adequate non-federal ground, despite the reliance upon our decisions.

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

TRADESMENS NATIONAL BANK OF OKLAHOMA CITY *v.* OKLAHOMA TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 596. Submitted March 6, 1940.—Decided March 25, 1940.

1. Congress constitutionally may authorize state taxation of the franchises of national banking associations. P. 564.
2. R. S. § 5219, as amended March 25, 1926, authorizes state taxation of national banking associations—in addition to other methods theretofore authorized—"according to or measured by their net income," including "the entire net income received from all sources," subject only to certain restrictions as to the rate. As amended in 1935, an Oklahoma statute imposing on such associations a tax measured by net income, contained a provision expressly including in gross income (from which the net income was computed) interest from tax-exempt federal securities, which theretofore had been expressly excluded. *Held,* a tax under the Oklahoma statute, the measure of which included dividends on federal reserve bank stock and interest on tax-exempt federal securities, was authorized by R. S. § 5219, and valid. P. 565.
3. That the Oklahoma statute, in provisions for computing taxes on net income of corporations other than national banking associations, expressly excludes interest from tax-exempt federal securities, does not render it violative of the restriction in R. S. § 5219 that "the rate shall not be higher than . . . the highest of the rates . . . assessed upon mercantile, manufacturing, and business corporations doing business" within the State, where, considering the State's tax structure as a whole, no discrimination against national banking associations results. P. 567.

   That a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations, is not proof of discrimination.
4. The restrictions placed by R. S. § 5219 on the permitted methods of taxation are directed at systems of state taxation which in practical operation discriminate against national banking associations or their shareholders as a class. P. 567.

185 Okla. 656; 95 P. 2d 121, affirmed.

APPEAL from the affirmance of a judgment denying recovery of taxes alleged to have been illegally exacted.

Mr. E. A. Walker submitted for appellant.

Mr. F. M. Dudley submitted for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Oklahoma, denying recovery of taxes alleged to have been exacted from appellant, a national banking corporation, in violation of the provisions of R. S. 5219 and the Constitution of the United States.

Section 16 of the Oklahoma Income Tax Law of 1935, S. L. 1935, c. 66, art. 6,[1] lays a tax upon every national banking association located or doing business within the state "according to, or measured by, its net income" at the

[1] The text of § 16 reads as follows:

"(a) In lieu of the tax imposed by Section 6, every national banking association located or doing business within the limits of the State of Oklahoma, shall annually, pay to this State, a tax according to, or measured by, its net income, to be computed in the manner hereinafter provided, at the following rates upon the basis of its entire net income for the next preceding fiscal or calendar year:

"Six (6%) per centum of the amount of the net income as herein provided.

"(b) The State of Oklahoma is hereby adopting method numbered (4), authorized by Section 5219, U. S. Revised Statutes, as amended. The tax imposed by this Section shall be exclusive and in lieu of all taxes imposed by the State of Oklahoma, or any subdivision thereof, on the property of any association liable to tax hereunder; provided, that nothing in this Section shall be construed to exempt the real property of national banking associations from taxation to the same extent, according to its value, as other real property is taxed."

. . . . . .

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rate of six per centum. Section 17 provides for a similar tax upon state banks and Morris Plan Companies.

The net income used as the measure of the tax under §§ 16 and 17 is determined by subtracting from gross income, as defined in § 18, certain deductions allowed by § 9. Section 18 defines gross income for the purposes of "National banking associations, state banks, trust companies and other financial corporations," § 8 (c). It specifically includes in gross income "interest upon the obligations of the United States, or its possessions, or upon securities issued under the authority of an Act of Congress, the income from which is tax free."

All other types of corporations are taxed at the flat rate of six per centum upon the net income allocable to business transacted within the state, § 6. Net income for this purpose is determined by making certain specified deductions from gross income, §§ 7, 9, which is defined expressly so as to exclude interest on tax-immune federal securities, § 8 (b) (4).

The appellee Oklahoma Tax Commission, in assessing appellant's tax for the year 1936 under § 16, included in gross income the dividends received by appellant on stock owned by it in a federal reserve bank and the interest received on bonds and notes issued pursuant to acts of Congress declaring the income from such securities tax exempt.[2] The present suit was brought by appellant to recover that portion of the tax, paid under protest, which resulted from including such dividends and interest in the computation.

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[2] The stipulation of facts shows that the interest used in the computation of the tax was derived from the following types of securities: U. S. Treasury Notes; U. S. Treasury Bonds; Bonds of the Federal Farm Loan Act; Joint Stock Land Bank Bonds; Home Owners' Loan Corporation Bonds; and Federal Land Bank Bonds.

R. S. 5219, 12 U. S. C. § 548, copied in the margin,[3] authorizes four alternative methods whereby a state may impose a tax on national banking associations located within its limits. Method numbered (4) provides for a tax on such associations "according to, or measured by" "the entire net income received from all sources" subject only to certain restrictions as to the rate. This method was added to the three previously authorized under R. S. 5219 by an amendment of March 25, 1926, c. 88, 44 Stat. 223. The plain meaning of the amendment is confirmed by its legislative history showing beyond doubt that Congress intended to authorize a franchise

[3] "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

. . . . . .

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits:

. . . . . .

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

tax measured by net income including interest on tax-immune federal securities.[4]

Oklahoma in the 1935 act expressly followed and adopted the method thus authorized in the amendment. See *First National Bank* v. *Oklahoma Tax Commission,* 185 Okla. 98; 90 P. 2d 438. Subsection (b) of § 16 expressly declares that the state thereby adopts method numbered (4) authorized by R. S. 5219, 12 U. S. C. § 548.

The power of Congress to authorize a state to impose a tax on the franchise of a national banking association can not now be doubted. *Van Allen* v. *Assessors,* 3 Wall. 573. Compare *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 389; *Helvering* v. *Gerhardt,* 304 U. S. 405, 411–412n; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 234–235. Any immunity attaching to the franchise by virtue of R. S. 5219 as it read prior to the 1926 amendment, compare *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, could be withdrawn by Congress and the franchise subjected to state taxing power, just as national bank shares were so subjected by the Act of June 3, 1864. *Van Allen* v. *Assessors,* 3 Wall. 573. See *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103; *Peoples National Bank* v. *Board of Equalization,* 260 U. S. 702.

The power of a state to levy a tax on a legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities or their income is likewise well settled. *Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Home Insurance Co.* v. *New York,* 134 U. S. 594; *Educational Films Corp.* v. *Ward,* 282 U. S. 379. Thus state laws taxing the shareholders of national banks in accordance with R. S. 5219 on the full net value of their shares, although the banks owned tax-

[4] 67 Cong. Rec. 5760–5762, 5822–5823, 6082–6089.

exempt federal securities, have been consistently upheld. *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103; *Peoples National Bank* v. *Board of Equalization,* 260 U. S. 702; *Van Allen* v. *Assessors,* 3 Wall. 573. The rule that a tax upon a legitimate subject, measured by net income, including that from tax-immune federal instrumentalities, is not an infringement of the immunity, was affirmed in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 147, 165, and followed in *Educational Films Corp.* v. *Ward,* 282 U. S. 379. Compare *Pacific Co.* v. *Johnson,* 285 U. S. 480, 490. The tax-immunity conferred on the securities owned by appellant has not been shown to be any greater in extent than that conferred on the federal securities included in the measure of the taxes sustained in the cited cases.

Sections 16 and 17 of the 1933 act were for present purposes identical with the corresponding sections of the 1935 act, but § 18 of the prior act contained a provision expressly excluding from gross income the interest on tax-immune federal securities.

Appellant contends that the act of 1935, by expressly including in the measure of the tax the interest on federal securities which before had been expressly excluded from the measure, must be regarded not as a valid franchise tax but as an unconstitutional levy on the tax-immune income itself. In support of its position, its main reliance is placed upon our decision in *Macallen* v. *Massachusetts,* 279 U. S. 620.

A similar contention was urged against the California franchise tax measured by net income, including tax-exempt income on state bonds, which was upheld in *Pacific Co.* v. *Johnson,* 285 U. S. 480. In rejecting the claim, the holding in the *Macallen* case was referred to as follows (285 U. S. at 494): "There the Commonwealth, which had long imposed a tax on corporate franchises measured by taxable income of the corporation, amended

its statutes so as to add the income from tax-exempt bonds of the federal government to the measure of the tax. It was held that this change of taxation policy, embodied in the statute and 'adopted as though it had been so declared in precise words for the very purpose of subjecting these securities *pro tanto* to the burden of the tax,' was invalid. Thus the legislative abandonment of a policy which had previously discriminated in favor of tax-exempt securities was treated as a discrimination against them, and the tax, although in fact non-discriminatory, was condemned as analogous to the discriminatory tax held invalid in the *Miller* case [*Miller* v. *Milwaukee,* 272 U. S. 713]." See also *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 392–393.

It cannot be said that the Oklahoma tax in question here was aimed at tax-exempt federal securities in the manner thus disclosed and condemned in the *Macallen* case. The history of the Oklahoma legislation on this subject discloses only that it sought to change its policy pursuant to the express authorization conferred by R. S. 5219. It has effected its purpose by including within the measure of its franchise tax on national banks the entire net income without respect to source and without discrimination against tax-exempt federal securities. See *First National Bank* v. *Oklahoma Tax Commission,* 185 Okla. 98; 90 P. 2d 438.

We do not now decide just what circumstances, if any, would bring a situation within the precise scope of the *Macallen* case, assuming that case still has vitality. It is sufficient to hold, as we do, that the statute in the instant case meets the test stated in *Pacific Co.* v. *Johnson,* viz: "Since the mere intent of the legislature to do that which the Constitution permits cannot deprive legislation of its constitutional validity, . . . the present act must be judged by its operation rather than by the motives which inspired it. As it operates to measure the tax on the cor-

porate franchise by the entire net income of the corporation, without any discrimination between income which is exempt and that which is not, there is no infringement of any constitutional immunity."

Appellant finally contends that the tax here in question violates the restriction in R. S. 5219 that "the rate shall not be higher than . . . the highest of the rates . . . assessed upon mercantile, manufacturing, and business corporations doing business" within the state.[5]

A consideration of the course of judicial decision on R. S. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class. Compare *First National Bank* v. *Hartford,* 273 U. S. 548; *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373; *Covington* v. *First National Bank,* 198 U. S. 100; *Lionberger* v. *Rouse,* 9 Wall. 468. Thus it is not a valid objection to a tax on national bank shares that other moneyed capital in the state or shares of state banks are taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks. *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373; *Covington* v. *First National Bank,* 198 U. S. 100.[6] We think the same purpose to prevent actual discrimination but to allow the states considerable freedom in working out an equitable tax system

[5] No claim is made that state financial institutions receive more favorable treatment than national banking associations. Sections 17, 18 and 8 (c) show that the tax imposed on such state institutions is the equivalent of the tax levied by § 16 on national banks.

[6] See also *Davenport Bank* v. *Davenport Board of Equalization,* 123 U. S. 83; *Mercantile Bank* v. *New York,* 121 U. S. 138; *Des Moines* v. *Fairweather,* 263 U. S. 103.

is discernable in the particular restriction upon which appellant relies.

The resolution of the issue raised by appellant thus turns upon an examination of the whole tax structure of the state. Counsel have stipulated that six thousand business and mercantile corporations, in addition to paying the income tax imposed by § 6 on six per centum of their net income, filed a corporation license tax return for the year 1936 and paid a tax based on one dollar per one thousand dollars of the value of the capital stock employed within the state, and that the Government bonds held by each were included as capital in the measure of the franchise tax. They further stipulated that only thirty-seven of these six thousand corporations owned Government bonds and that, in the case of all but three, the franchise taxes paid exceeded the additional amounts which would have been due under the income tax imposed by § 6 had their gross income, contrary to the fact, included the interest derived from the bonds. In addition to the foregoing taxes, so it is stipulated, each of these corporations paid an ad valorem tax on its moneyed capital.

This brief survey suffices to show that, considering all the taxes imposed upon business and mercantile corporations doing business in the state, the scheme of taxation adopted by Oklahoma does not discriminate against national banking associations. Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations. Compare *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373, at 393; *Lionberger* v. *Rouse,* 9 Wall. 468. Judged in the light of the established policy of Congress with respect to this subject, the 1935 Oklahoma taxing statute cannot be held to violate the provisions of R. S. 5219.

The other contentions advanced by appellant have been considered and found to be without substance.

Affirmed.

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

WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO.

MICHIGAN *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO ET AL.

NEW YORK *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO ET AL.

Nos. 2, 3 and 4, Original. Argued March 25, 26, 1940.—Decided April 3, 1940.

Special Master appointed to make summary inquiry and speedy report as to condition of the Illinois Waterway due to the introduction of untreated sewage, the effect upon the health of inhabitants of communities bordering the Waterway, and the remedial or ameliorating measures available to the State of Illinois without an increase in diversion of water from Lake Michigan. P. 571.

Upon petition of the State of Illinois for a temporary modification of the decree restricting diversion of water of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal, and the return of the plaintiff States in response to a rule to show cause. See also, order on p. 636, *post*.

Messrs. John E. Cassidy, Attorney General of Illinois, and *Montgomery S. Winning,* for the State of Illinois, defendant.

Mr. Herbert H. Naujoks for the State of Wisconsin et al.; *Mr. Timothy F. Cohan,* Assistant Attorney Gen-

eral of New York, for the State of New York; and *Mr. Thomas J. Herbert,* Attorney General of Ohio, for the State of Ohio. With them on the brief for complainants were *Messrs. John E. Martin,* Attorney General of Wisconsin, *J. A. A. Burnquist,* Attorney General of Minnesota, *Claude T. Reno,* Attorney General of Pennsylvania, *William S. Rial,* Deputy Attorney General of Pennsylvania, *Thomas Read,* Attorney General of Michigan, *James W. Williams,* Assistant Attorney General of Michigan, and *John J. Bennett, Jr.,* Attorney General of New York.

PER CURIAM.

By the decree of April 21, 1930 (281 U. S. 179, 696), the State of Illinois and the Sanitary District of Chicago were enjoined from diverting on and after December 31, 1938, any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal or otherwise in excess of the annual average of 1500 cubic feet per second in addition to domestic pumpage. That date was fixed as affording adequate time, upon a liberal estimate, for the completion of the entire system designed for sewage treatment, together with controlling works to prevent reversals of the Chicago River in times of storm.

The State of Illinois now seeks a temporary modification of the decree so as to permit an increase of the diversion to not more than 5000 cubic feet per second, in addition to domestic pumpage, until December 31, 1942. The State submits its petition, not on behalf of the City of Chicago or the Sanitary District, but at the instance of certain communities bordering on the Illinois Waterway, including Lockport and Joliet. The grounds for the application are that the system for sewage treatment has not yet been completed and will not be completed until the end of the year 1942, and that, in consequence,

through the introduction of untreated sewage into the stream, an "obnoxious, noisome, filthy, unsanitary and dangerous condition to public health" exists along the Sanitary District Canal and the Illinois Waterway.

The State of Illinois has failed to show that it has provided all possible means at its command for the completion of the sewage treatment system as required by the decree as specifically enlarged in 1933 (289 U. S. 395, 710). No adequate excuse has been presented for the delay. Nor has the State submitted appropriate proof that the conditions complained of constitute a menace to the health of the inhabitants of the complaining communities or that the State is not able to provide suitable measures to remedy or ameliorate the alleged conditions without an increase in the diversion of water from Lake Michigan in violation of the rights of the complainant States as adjudged by this Court.

In order, however, that the Court may be satisfied as to the actual condition of the Illinois Waterway by reason of the introduction of untreated sewage, and as to the actual effect, if any, of that condition upon the health of the inhabitants of the complaining communities, and also with respect to the feasibility of remedial or ameliorating measures available to the State of Illinois without an increase in the diversion of water from Lake Michigan, the Court appoints a Special Master to make a summary inquiry as to such condition, effect and measures, and to report to this Court with all convenient speed.

WYOMING *v.* COLORADO.

No. 10, original, October Term, 1935. Argued February 26, 27, 1940.—Decided April 22, 1940.

1. The decree of this Court in the litigation between Wyoming and Colorado over the Laramie River limits the quantity of water which Colorado may divert from the stream to a maximum of 39,750 acre feet per annum. P. 576.
2. So long as this maximum is not exceeded, Colorado remains free to determine, by her laws and adjudications, how the water diverted shall be distributed and used by and among her water-users. Pp. 579 *et seq.*
3. That portion of the water allocated to Colorado which was allowed on the basis of the "Meadow Land Appropriations" was limited by the decree of this Court to 4,250 acre feet measured at the point of diversion from the stream, this quantity being deemed sufficient when the water is rightly and not wastefully applied. P. 578.

   Colorado's claim of a right to continue applying much larger quantities to the meadowland irrigation upon the ground that the greater part of the water so applied returns to the stream through surface drainage and percolation, so that the part actually consumed does not exceed 4,250 acre feet, was considered and rejected in fixing that limit to the Meadow Land Appropriations.
4. Upon an application to have Colorado adjudged in contempt for having withdrawn more water from the Laramie River than the 39,750 acre feet limited by this Court's decree, a defense upon the ground that Wyoming was not injured is inadmissible. P. 581.
5. Colorado, being charged with having made excessive withdrawals of water from the Laramie River, in contempt of this Court's decree, adduced proof by affidavits, that the withdrawals, made through the meadowland ditches, were acquiesced in by Wyoming officials, for the reason that a great portion of the water so diverted returned to the river to be used downstream by Wyoming appropriators. Wyoming presented affidavits to the contrary. *Held:* That, in the light of all the circumstances, it sufficiently appears that there was uncertainty and room for misunderstanding which may be considered in extenuation; but in the future there will be no ground for any possible misapprehension based upon views of the effect of the meadowland diversions or otherwise with

respect to the duty of Colorado to keep her total diversions from the Laramie River and its tributaries within the limit fixed by the decree. P. 581.

Upon a petition of the State of Wyoming praying that the State of Colorado be adjudged in contempt for having diverted water from the Laramie River in excess of the quantity allowed by the decree of this Court; and upon returns of the State of Colorado submitted in response to an order to show cause. See *post*, p. 627.

Mr. Ewing T. Kerr, Attorney General of Wyoming, with whom *Messrs. Harold I. Bacheller,* Deputy Attorney General, *Arthur Kline,* Assistant Attorney General, *James A. Greenwood,* and *W. J. Wehrli* were on the brief, for complainant.

Mr. Byron G. Rogers, Attorney General of Colorado, with whom *Messrs. Ralph L. Carr,* Governor, *Henry E. Lutz,* Deputy Attorney General, *Schrader P. Howell,* Assistant Attorney General, *Clifford H. Stone, Jean S. Breitenstein, Albert P. Fischer, Robert G. Smith,* and *Lawrence R. Temple* were on the briefs, for defendant.

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

The State of Wyoming sought leave to file its petition for a rule requiring the State of Colorado to show cause why it should not be adjudged in contempt for violation of the decree in this suit, restraining diversions of water from the Laramie river. 259 U. S. 419, 496; 260 U. S. 1; 286 U. S. 494; 298 U. S. 573.

In response, Colorado asked that evidence be taken to determine the amount of return flow to the Laramie river from the diversions at the headgates of meadowland ditches and that Colorado have credit therefor. This matter had been considered by the Court in framing its

decree (298 U. S. pp. 581, 582) and the motion was denied. Leave was granted to Wyoming to file its petition and Colorado was directed to show cause accordingly.

Two returns have been filed on behalf of Colorado, one by the Governor of the State setting forth his executive order directing the withdrawal of the appearance of the Attorney General and appointing special counsel to represent the State, and another return by the Attorney General who challenges the authority of the Governor to supersede him. In the view we take of the material matters presented, we find no such differences between the two returns as to require us to determine the question of authority.

Wyoming charges that from May 1, 1939, to June 18, 1939, Colorado diverted from the Laramie river 39,865.43 acre feet, that is, somewhat in excess of the total of 39,750 acre feet allocated to Colorado by our decree; that thereupon, and on June 19, 1939, Colorado closed the headgates of the various ditches involved; that on June 22, 1939, in violation of the decree, Colorado opened the headgates and permitted the diversion between June 22, 1939, and July 11, 1939, of 12,673 acre feet in excess of the 39,750 acre feet allowed; and that in particular, with respect to meadowland ditches, Colorado permitted the diversion between May 1, 1939, and July 11, 1939, of 24,775 acre feet above the 4250 acre feet (measured at the headgates) specifically allowed for the meadowland appropriations. 298 U. S. p. 586.

In defense, Colorado contends that the meadowland diversions in excess of 4250 acre feet were in accordance with Colorado law and were not inconsistent with the decree of this Court until a diversion by Colorado from the Laramie river for all purposes reached the allocated total of 39,750; that the diversion of an amount greater than that total during the period above specified was with

the acquiescence of Wyoming; and that Wyoming has not been injured.

Colorado pledges that hereafter its officials will administer the flow of the Laramie river in that State in accordance with Colorado laws and adjudication decrees until a total amount of 39,750 acre feet, measured at the headgates, has been diverted, and, when that total has been reached in any year, Colorado can and will close the headgates and keep them closed during the remainder of the irrigation season.

In support of the contention that the diversion of more than 4250 acre feet for the meadowland appropriations should not be regarded as a violation of our decree, if the aggregate diversions in Colorado do not exceed the total allowed, Colorado presents a declaratory judgment of the District Court of that State for the County of Laramie, entered February 2, 1939, in the suit of *Adelrick Benziger* v. *The Water Supply & Storage Company, et al.* That suit was brought on behalf of the meadowland appropriators in Colorado, and the defendants were the other appropriators in that State whose respective appropriations had been the subject of consideration in the suit in this Court. Our rulings were examined by the state court which concluded that they were intended to, and did, determine only the relative rights of the two States to divert the waters of the Laramie river and its tributaries and that it was not our purpose to withdraw the appropriations and water claims in Colorado from the operation of its local laws or to restrict the utilization of the waters in any way "not affecting the rights of the State of Wyoming and her water claimants." Accordingly the state court held that the fixing in our decree of the meadowland appropriations was intended only to bear upon the relative rights of the States and was not intended to be an adjudication of the relative rights of the decreed appropriations in Colorado; hence, that so

long as the aggregate of the water diverted in Colorado does not exceed the total of 39,750 acre feet accredited to the Colorado appropriations, as stated, they are subject to the laws of Colorado. In that view the Court adjudged that the meadowland appropriators and the defendant appropriators were entitled to divert according to their respective priorities until they reached the amount of 39,750 acre feet, and that when that amount had been diverted "all headgates are to be closed for the balance of the season."

A review of our decisions confirms the construction thus placed upon them. Suit was brought in 1911 to prevent a proposed diversion in Colorado of the waters of the Laramie river, an interstate stream. Voluminous evidence was taken, the case was thrice argued, and a final decision was rendered in 1922. 259 U. S. 419. After an elaborate consideration of the physical features of the region and the principles applicable to a determination of the rights of the respective States, the Court concluded that as both States had adopted the doctrine of appropriation, it was equitable to apply that doctrine and to determine their respective rights according to the rule of priority. The Court examined the evidence with respect to the flow of the stream, its variations, and other relevant matters, and found that the available supply—288,000 acre feet—was not sufficient to satisfy the Wyoming appropriations and also the proposed Colorado appropriation. The Court found that there were some existing Colorado appropriations entitled to precedence over many of those in Wyoming. These included 18,000 acre feet for what was known as the Skyline Ditch and 4250 acre feet for meadowland appropriators. These were not to be deducted, as the 288,000 acre feet was the available supply after they were satisfied. The proposed Colorado appropriation which was in controversy in the suit was that known as the Laramie-Poudre Tunnel di-

version, a part of an irrigation project known as the Laramie-Poudre project. The evidence showed that the Wyoming appropriations having priorities senior to the one in Colorado, and which were dependent on the available supply above specified, required 272,500 acre feet. Deducting that from the available 288,000 acre feet there remained 15,500 acre feet which were subject to the proposed appropriation in Colorado. Accordingly a decree was entered enjoining the defendants from diverting more than 15,500 acre feet annually from the Laramie river through the Laramie-Poudre project. The decree provided that it should not prejudice the right of Colorado, or of anyone recognized by her as entitled thereto, to continue to divert 18,000 acre feet through the Skyline Ditch and 4250 acre feet through the meadowland appropriations. 259 U. S. pp. 496, 497. Soon after, this decree was modified so as not to prejudice a diversion by Colorado for the Wilson Supply Ditch (260 U. S. 1), a diversion which amounted to 2000 acre feet. 298 U. S. p. 580. In this way the total allowed to Colorado amounted to 39,750 acre feet.

In 1931, Wyoming brought another suit in this Court, alleging that Colorado was permitting excessive diversions and seeking the protection and quieting of Wyoming's rights under the former decree. Wyoming asked provision for accurately measuring and recording the quantities of water diverted and also an injunction restraining excessive diversions, if it were held that the former decree related only to the diversion by the Laramie-Poudre Tunnel appropriation. Motion to dismiss the bill was denied. We held that the former decree should be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries; that the limited injunction did not warrant an inference that it marked "the limits of what was intended to be decided," but that the

decree did define the quantity of water which Colorado and her appropriators might divert "from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators." 286 U. S. 494, 506–508.

Final hearing was had and the case was decided in 1936. 298 U. S. 573. Wyoming contended that while the decree fixed the amount of the diversions under the meadowland appropriations in Colorado at 4250 acre feet, the actual diversions had ranged from 36,000 to 62,000 acre feet. Colorado answered that the greater part of this water was returned to the stream through surface drainage and percolation and that the part actually consumed did not exceed the amount which the decree allowed. The Court said that the amount of 4250 acre feet had been fixed as the measure of the meadowland appropriations because it was deemed sufficient for that purpose "when the water is rightly and not wastefully applied." The Court referred to the wasteful process that had been used. It was said that when water is so applied a considerable portion ultimately finds its way back into the stream, but that it was also true "that a material percentage of the water is lost by evaporation and other natural processes and there is no way of determining with even approximate certainty how much of the water returns to the stream." The Court then held that the decree referred to the water taken from the stream "at the point of diversion, and not to the variable and uncertain part of it that is consumptively used." As it was plainly shown that diversions were being made under the meadowland appropriations in quantities largely in excess of the amount fixed in the decree, an injunction issued forbidding further departures from the decree in that regard. *Id.*, pp. 581, 582.

With respect to the request for an order permitting Wyoming to install measuring devices for the purpose of

determining the amount of water diverted in Colorado, the Court recognized that the problem of measuring and recording the diversions was a difficult one and the hope was expressed that the two States by coöperative efforts would find a satisfactory solution. Leave was granted to Wyoming to make a later application if the States were unable to agree. *Id.*, pp. 585, 586. It seems that measuring devices have been installed.

While an injunction was thus granted with respect to diversions for the meadowland appropriations in excess of 4250 acre feet, this was manifestly upon the assumption that Colorado was otherwise using the total amount of water allocated to that State. That it was not intended to restrict Colorado in determining the use of the water of the river, according to Colorado laws and adjudications, provided the diversions did not exceed the aggregate amount of 39,750 acre feet to which Colorado was entitled, is clear from the ruling upon another branch of the case. It appeared that the diversion for the Skyline Ditch had been above the amount allowed therefor, but that other diversions were less, so that, eliminating the excessive meadowland diversions, the aggregate allowance to the State would not be exceeded. Hence the Court found that it must consider Colorado's contention "that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally." *Id.*, p. 583.

The Court noted that in both Colorado and Wyoming water rights were transferable and that the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators; that these rules were but incidental to the doctrine of appropriation, prevailing in both

States, upon which the decree had been based. The Court observed that it was not its purpose "to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants." It was found that the diversions through the transmountain ditches had been made with the consent of the owners of the water rights and with the full sanction of Colorado, and hence the situation was not different from what it would have been if the owners of other claims had formally transferred parts of their water rights to the Skyline owners. The Court said: "But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is 'the right of the State of Colorado, *or of anyone recognized by her as duly entitled thereto,* . . . to divert and take' the water included in the designated appropriations." The Court concluded that in the circumstances shown the Skyline Ditch diversions did not constitute an infraction of the decree. *Id.*, pp. 584, 585.

It is plain that the principle of this ruling, as applied to the transmountain appropriations which diverted the water of the Laramie river to another watershed, would certainly also apply to the meadowland appropriations within the same watershed, where part of the water diverted may find its way back to the stream. The limitation of the meadowland appropriations to 4250 acre feet was to keep the diversions in Colorado within the amount allowed to that State, not to prevent the distribution of the water thus allowed, according to Colorado

laws, where there was no infraction of the rights of Wyoming and her water claimants.

We conclude that the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie river and its tributaries more than 39,750 acre feet per annum.

In 1939, however, Colorado diverted more than that total amount. Apparently no question had been raised by Wyoming as to the diversions in 1937 and 1938. It is undisputed that when the diversions in 1939 reached 39,865.43 acre feet on June 19th, Colorado closed the headgates of the various appropriations within that State. But Wyoming alleges that Colorado wrongfully permitted the headgates to be reopened on June 22d and to remain open until July 11th, thus permitting the diversion of 12,673 acre feet in excess of the aggregate amount allowed to Colorado, despite Wyoming's protest. That there was this excessive diversion is not controverted.

Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie river and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree.

But Colorado insists that the diversion of more than the allocated total during the season of 1939 was with Wyoming's acquiescence. That is the sole available defense. To support it, Colorado has presented affidavits showing communications between an association of

meadowland appropriators and the special hydrographer of Wyoming and also stating that at a conference in the office of the Governor of Colorado on July 1, 1939, the officers of Wyoming said that they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of the water so diverted returned to the Laramie river to be used downstream by Wyoming appropriators. Wyoming presents affidavits to the contrary, setting forth her demands. It is unnecessary to review in detail the points in controversy. In the light of all the circumstances, we think it sufficiently appears that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation. In the future there will be no ground for any possible misapprehension based upon views of the effect of the meadowland diversions or otherwise with respect to the duty of Colorado to keep her total diversions from the Laramie river and its tributaries within the limit fixed by the decree.

For the reasons stated, the petition of Wyoming is denied, the costs to be equally divided.

Petition denied.

WESTERN UNION TELEGRAPH COMPANY *v.* NESTER ET AL.

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

No. 597. Argued March 8, 1940.—Decided April 22, 1940.

A telegraph company undertook to transmit a money order, the contract providing that it should not be liable for damages for delay or non-payment, though due to negligence, "beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued." *Held,* that the sum specified was not intended to prescribe a definite liability (liquidated dam-

ages), but is a limitation upon the maximum permissible recovery for actual loss or damage properly alleged and shown by evidence. P. 587.

106 F. 2d 587, reversed.

CERTIORARI, *post,* p. 643, to review the affirmance of a judgment against a telegraph company in an action for breach of a money order contract. 25 F. Supp. 478.

Mr. Francis R. Stark, with whom *Messrs. Alfred Sutro, Oscar Lawler,* and *Francis R. Kirkham* were on the brief, for petitioner.

Mr. Earl C. Demoss, with whom *Mr. George J. Hider* was on the brief, submitted for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondents, Nester and Charles, are partners in mining operations near Aramecina, Republic of Honduras. September 1, 1937, at Los Angeles, California, petitioner, the Telegraph Company, in the ordinary course of business, received from Nester one hundred and fifty dollars for transmission by unrepeated message and delivery to Charles at Aramecina. It failed so to do.

In a "Complaint for damages for breach of duty" filed against petitioner in the District Court, Southern District, California, respondents claimed the failure to deliver resulted from gross negligence and that as a direct consequence they suffered specified losses amounting to $7,600. For that sum they asked judgment.

Petitioner denied liability and as an affirmative defense alleged—

"The money order referred to in the plaintiff's complaint was delivered to and accepted by the defendants subject to the terms of the standard money order contract of The Western Union Telegraph Company, a copy of which is hereto annexed."

It is not now denied that this standard form had been duly filed with the Federal Communications Commission and was treated by the parties as a statement of the contract between them. Certain of the conditions contained therein are printed below.[1]

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[1] "Money Orders Are Subject to the Following Conditions:

"Domestic orders will be canceled and refund made to the sender if payment cannot be effected within 72 hours after receipt at paying office (Ellis Island, N. Y., excepted). Orders payable at Ellis Island will be canceled after the expiration of five days.

"In the case of a Foreign Order the Foreign equivalent of the sum named in the order will be paid at the rate of exchange established by the Company or its agents on the date of the transfer.

"In the case of a Foreign Order the equivalent, in the currency of the country of payment, of the sum named will be purchased promptly; and if for any reason payment cannot be effected, refund will be made by the Company and will be accepted by the depositor on the basis of the market value of such foreign currency in American funds, at New York, on the date when notice of cancelation is received there by the Company from abroad.

"When the Company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sender, without liability, and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium, for the further transmission and final payment of this order.

"In any event, the company shall not be liable for damages for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

"In the event that the company accepts a check, draft or other negotiable instrument tendered in payment of a money order, its obligation to effect payment of the money order, shall be conditional and shall cease and determine in case such check, draft or other negotiable instrument shall for any reason become uncollectible, and in any event the sender of this money order hereby agrees to hold

The point for determination here arises out of the following condition—

"In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The cause was tried by the court without a jury upon the pleadings and evidence. It found as matter of fact

"That it is not true that by reason of the failure of the defendant, Western Union Telegraph Company, to transmit and to deliver and to pay promptly said money order as aforesaid, the plaintiffs have suffered damages in the sum of Seventy-six hundred ($7,600.00) Dollars; the court finds, however, that by reason of such failure, the plaintiffs have suffered and sustained damages, loss and injury in the sum of Five Hundred ($500.00) Dollars."

Evidently it was not intended by this finding to declare actual damages had been shown, as respondents'

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the telegraph company harmless from any loss or damage incurred by reason or on account of its having so accepted any check, draft or negotiable instrument tendered in payment of this order.

"All messages included in money orders are subject to the following terms: . . .

"The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the unrepeated-message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeated-message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages."

counsel suggest. After pointing out the lack of any evidence of actual loss resulting from the alleged negligence, the court's opinion asserts—"So that, assuming that the action is in tort, there is no substantial proof of any of the special damages claimed. However, the plaintiffs are not without redress."

The court found as matter of law "That the condition on the application for the transmission of the money order filed by The Western Union Telegraph Company with the Federal Communications Commission limiting its liabilities to five hundred ($500) dollars is a valid undertaking. That Paul Nester and Juan Charles, co-partners plaintiff are entitled to recover the amount of five hundred dollars ($500.00) against the Western Union Telegraph Company . . . without prejudice to their right to sue for and recover the one hundred and fifty ($150) dollars" accepted for transmission.

The condition relative to liability for $500.00, quoted above, was construed by the trial court as "a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof or without any offer of proof." And it said, "Hence although we are unable to award to the plaintiffs the special damages they ask, they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract. . . . Here the plaintiffs, under the facts alleged in the complaint and proved at the trial, have shown themselves entitled to recovery, even though they were unable to prove the damages they sought." 25 F. Supp. 478.

The judgment against petitioner was affirmed by the Circuit Court of Appeals. 106 F. 2d 587. The opinion there declares—

"Appellant contends that the provision in the money order blank was a part of the tariff filed with the Interstate Commerce Commission, and as such limited the

damages recoverable to the actual damage, not exceeding $500, and that without actual damage there could be no recovery. The question presented is one of interpretation of the provision, not of validity thereof."

Also—"Here, the provision in question has a limitation of liability clause—'the company shall not be liable for damages . . . beyond the sum of five hundred dollars.' The provision also contained a clause by which it was agreed that 'the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued' at $500. Although appellant contends that the clause means that such right is valued at not 'beyond the sum of' $500, the clause does not so state. It states that such right is valued at $500."

"When Nester delivered the $150 to appellant, he had the right to have the money transmitted without unreasonable delay (Western U. Teleg. Co. *v.* Crovo, 220 U. S. 354) and delivered to Charles. Moore *v.* New York Cotton Exchange, 270 U. S. 593. Because of appellant's acts, that right was destroyed, and Nester is entitled to recover its value, which the parties agreed was $500."

By its petition for certiorari the Telegraph Company presents a single question—"Does the limitation of liability provision in petitioner's money order tariff—which is substantially the same as that in its telegraph tariff—constitute a liquidated damage provision which would automatically make petitioner liable for damages in the fixed sum of $500, in case of default in service, regardless of whether or not the sender had sustained any actual damage, or is the provision rather one which fixes a maximum limit within which damages may be proved?"

We think the provision in question was not intended to prescribe a definite liability (liquidated damages), but is a limitation upon the maximum permissible recovery for

actual loss or damage properly alleged and shown by evidence. The courts below erred in ruling otherwise.

Considering what has been ruled in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252, the validity of the condition before us is not open to serious doubt; and viewed in the light of its history and evident purpose it must be interpreted as imposing a limitation upon the amount which may be recovered. See, Unrepeated Message Case, 44 I. C. C. 670, 675, and Limitations of Liability in Transmitting Telegrams, 61 I. C. C. 541, 550.

The interpretation of the condition approved below would permit a recovery of five hundred dollars irrespective of the sum deposited for transmission and without requiring the sender to show any loss whatsoever. A mere failure to transmit a small sum deposited with the company might impose a heavy and utterly unreasonable burden upon the common carrier although the patron had suffered no loss. This does not harmonize with the declared purpose of the statute to impose just and reasonable rates.

The precise question here involved has been ruled upon by two intermediate courts. *Miazza* v. *Western Union Telegraph Co.* (1935), 50 Ga. App. 521; 178 S. E. 764; and *Wernick* v. *Western Union Telegraph Co.* (1937), 290 Ill. App. 569, 573–574; 9 N. E. 2d 72, 74. In the first the Court of Appeals of Georgia sustained a demurrer to a complaint which definitely sought to recover five hundred dollars as liquidated damages for failure properly to transmit a message. The opinion in the second cause well said—

"Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the tele-

graph company since 1921, it has never been interpreted as a liquidated damage provision, and no cases are cited which would justify such an interpretation. Reading the agreement as a whole, as it must be read under the fundamental rules of construction, and taking into consideration the historical reasons for changing the legal relationship between telegraph companies and their patrons through federal legislation, and the effect thereof as stated by the court in *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* and the *Priester* case, *supra,* we think the court was unwarranted in interpreting the language employed as a liquidated damage clause. In so doing, it evidently failed to consider the intent, purpose and meaning of the entire clause, and considered only the words 'at which amount the right . . . is hereby valued.' The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that *'in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of $500* . . . , unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected."

The challenged judgment must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion.

Reversed.

YONKERS *v.* DOWNEY, RECEIVER.*

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

No. 542. Argued February 29, 1940.—Decided April 22, 1940

1. Concurrent findings of two lower courts accepted here, to the effect that withdrawals of deposits from a national bank were made when there was reason to believe that the bank would be unable to repay its depositors in due course, and with intent to prefer. P. 595.
2. National banks have no implied power to pledge assets as security for deposits. P. 595.
3. Rescission by a national bank of an unauthorized pledge securing deposits is not conditioned upon return of the amounts deposited. P. 595.
4. The Act of June 25, 1930, permits national banking associations to give security for deposits of public money of a State or any political subdivision thereof "of the same kind as is *authorized* by law of the State in which such an association is located in the case of other banking institutions in the State." *Held,* that such pledges are not "authorized" by the law of a State (New York) which forbids them as *ultra vires,* though it conditions rescission upon repayment of deposits made in reliance upon them. P. 597.

106 F. 2d 69, affirmed.

CERTIORARI, 308 U. S. 547, to review the affirmance of recoveries by a receiver of a national bank of deposits withdrawn from it while insolvent. The case was tried to the court without a jury. 23 F. Supp. 1018.

Messrs. Leonard G. McAneny and *E. J. Dimock,* with whom *Mr. J. Donald Rawlings* was on the brief, for petitioners.

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* Together with No. 543, *Condon, Mayor, et al.* v. *Downey, Receiver;* No. 544, *Condon, Mayor, et al.* v. *Downey, Receiver;* and No. 545, *Yonkers, Trustee,* v. *Downey, Receiver,* also on writs of certiorari, 308 U. S. 547, to the Circuit Court of Appeals for the Second Circuit.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits can not be recovered from it.

In the absence of a federal statute on the effect of an *ultra vires* pledge by a national bank, that effect would be ascertained by applying the rule that questions of *ultra vires* are governed by the law of incorporation and questions of the effect of the *ultra vires* acts, by the law of the State where the acts are done. Restatement of the Law of Conflict of Laws, § 166, subdivision c. of the comment.

The effect of the silence of the National Bank Act on the subject would be, therefore, that national banks and state banks would compete on an equal footing in so far as the effect of *ultra vires* acts was concerned. The prescribing of a special statutory rule for the national banks would be a departure from the traditional congressional policy toward placing the national banks on equality with the state banks. *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564.

The state law always governs the transactions of national banks except where in conflict with some paramount federal law. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564. Thus, if the National Bank Act is to override the law of New York as to the consequences of an *ultra vires* pledge, it must not only indicate a general policy of Congress that an *ultra vires* act of a national bank shall be without force or effect but also indicate that Congress has actually supplanted the state law on the subject. Nothing in the National Bank Act indicates either of those things. Therefore, the consequences of an *ultra vires* act of a national bank are determined by the law of the State where it occurs. *Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211.

The lien on the security arose when the security was taken, long before insolvency, and such a lien, although created by state law, is effective as applied to national banks. *Scott* v. *Armstrong,* 146 U. S. 499, 510.

The New York law as to the consequences of the pledge was incorporated in the National Bank Act by reference in the Act of June 25, 1930.

Corporations have power to perform certain acts which are outside of their powers. *First National Bank* v. *Mott Iron Works,* 258 U. S. 240; *Pullman's Palace-Car Co.* v. *Central Transportation Co.,* 171 U. S. 138; *State Bank of Commerce* v. *Stone,* 261 N. Y. 175. In other words, a corporation has *de facto* powers to accept the liabilities and rights thrust upon it by the local law as consequences of the attempted exercise of disapproved powers. Every time a court of the State of incorporation holds a corporation for the consequences of an *ultra vires* act, it holds that the corporation is "authorized" to accept them. The court below was wrong in limiting the expression "authorized security" to security authorized *de jure.*

Any hesitation that one may have about applying the word "authorized" to *de facto* powers of a corporation arises from our habitual association of authorization with the legislature. Since these powers to accept the consequences of *ultra vires* acts are usually given by judicial decision, they do not generally fit into the class of powers authorized by the legislature. Here, however, by hypothesis, Congress has treated these powers to accept the consequences of *ultra vires* acts as the subject of legislative action so that the word "authorized" is a natural one for Congress to apply to them.

The deposits paid out upon checks of the City before the Comptroller took over the Bank can not be recovered by the receiver even if the security is unenforceable.

Mr. George P. Barse, with whom *Messrs. Benjamin W. Moore, Milton L. Romm, John F. Anderson,* and *Lee Roy Stover* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By these companion suits, begun during 1936, the Receiver of The First National Bank and Trust Company of Yonkers ("The Bank"), seeks to recover fifty per centum of deposits withdrawn by petitioners from the association while insolvent. Thus, it is said, they obtained unlawful preferences within the meaning of the National Banking Act.[1] From corporate assets, general creditors have been paid dividends amounting to fifty per centum of their claims—forty, December, 1933; ten, November, 1937.

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[1] Title 12 U. S. C.—

Sec. 91. "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." (R. S. § 5242.)

Sec. 194. "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." (R. S. § 5236.)

The Bank was located in New York. In each cause the points of law and fact are substantially alike. It will suffice to consider them as presented by the Record in No. 542.

Petitioner's deposits with The Bank, March 4, 1933, amounted to $277,000. To secure this and other smaller public ones, bonds of the association totalling $535,000 were in pledge.

The Governor of New York proclaimed Saturday, March 4th and Monday, March 6th, 1933, bank holidays. Later the President and the Governor extended such holidays through March 9th. The Bank was not opened for unrestricted business after March 3rd. A Conservator, appointed March 20th, remained in control until January 23, 1934, when a Receiver took charge.

Between March 9th and 20th, 1933, petitioner withdrew deposits amounting to $89,000; between March 20th and 28th, $67,000. On the latter day, under direction of the Conservator, petitioner's remaining deposits were paid and The Bank retook the pledged bonds.

A jury having been waived the cause was tried to the court upon pleadings and evidence. Among other things it found—

> The pledge of assets by The Bank to secure the deposits was *ultra vires* and unlawful.
>
> The Bank was insolvent March 6th, 1933, and as of that day the rights of creditors became fixed.
>
> The payments of deposits to petitioner were not allowed by any Presidential Proclamation or Executive Order. They were made voluntarily under mistake of law by an officer of the United States and are recoverable. Also they were made with intent to give petitioner preference over other creditors.
>
> No statute of New York confers upon state banks general power to pledge assets to secure deposits. They have no such power under the common law of New York.

Judgment went for the Receiver for fifty per centum of the amounts withdrawn by the petitioner after March 9, 1933, with interest, etc.

The Circuit Court of Appeals affirmed this action. 106 F. 2d 69. It held all withdrawals after March 9th occurred when the facts indicated The Bank would be unable to pay depositors in due course and that adequate evidence supported the trial court's findings of an intent to prefer. We find no reason to disregard these findings by two courts and accept them as correct.

The Circuit Court of Appeals further held national banks have no implied power to pledge assets to secure deposits; that here The Bank was not empowered so to do by the Act June 25, 1930 [2]; that the pledge might

[2] Act June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C., § 90—

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the

be rescinded without return by the Receiver of the sums withdrawn. With these conclusions we agree.

Unless empowered by the Act June 25, 1930 or concerning federal funds (not here claimed) as in *Inland Waterways Corp.* v. *Young, ante,* p. 517, national banks may not secure deposits by pledge of assets.

Texas & Pacific Ry. Co. v. *Pottorff,* 291 U. S. 245, 253–255, and *Marion* v. *Sneeden,* 291 U. S. 262, authoritatively interpreted the National Banking Act and approved the view that under this, a national bank possesses no inherent power to secure deposits, public or private, by pledging assets, and that such a pledge is both *ultra vires* and contrary to public policy. "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied." Also, that in case of insolvency, assets so pledged, may be reclaimed without payment of the deposits. "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets." The result in these causes was not influenced by consideration of local law.

We cannot accept the suggestion of counsel for petitioner that the cited opinions merely declare a pledge of assets *ultra vires* and leave the consequences to be determined by the law of the state where it occurs. This view is not in harmony with the language of the opinions nor with the general purposes of the National Banking Act there pointed out.

Under the common law as interpreted in New York, pledge of securities by a state bank to secure deposits is "contrary to law and beyond the power and authority

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safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

vested in the officers." Although forbidden, such a pledge will not be set aside unless deposits made in reliance upon it are first repaid. *State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 187–188; 184 N. E. 750; *City of Mount Vernon* v. *Mount Vernon Trust Co.,* 270 N. Y. 400, 406; 1 N. E. 2d 825.

The Act of June 25, 1930 permits national banks to give security for public deposits "of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." Counsel maintain that within the fair intendment of this, state banks in New York are "authorized" to pledge bonds to secure public deposits. They rely upon the rulings of the local courts, in the causes last cited, concerning conditions which must be met before an *ultra vires* act will be set aside.

They submit that corporations have capacity to accept the result of their actions. "That the capacity to accept the consequences of an *ultra vires* act is itself a power." Further, that " 'giving' a power is but another word for 'authorizing' its exercise." Hence, the argument seems to run, as a state bank may hold the fruit of a pledge until return of the thing pledged, therefore, it is "authorized by law" to make a pledge thus conditioned.

In this procession, obviously, different meanings are attributed to the word "power" and it is confused with "capacity" and "authority." In one sense, every corporation has "power" to do wrong, also "capacity" to suffer the consequences of wrong-doing. But no corporation has authority to violate an inhibition or go beyond the limits of its charter. Authorization to do a forbidden thing cannot be inferred from capacity to accept the prescribed consequences. The law forbade local institutions to make pledges such as the one here in question.

The challenged judgments must be

Affirmed.

MAURER ET AL., TRADING AS MAURER & MYERS AUTO CONVOY, *v.* HAMILTON, SECRETARY OF REVENUE OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 380. Argued February 2, 1940. Reargued March 27, 28, 1940.—Decided April 22, 1940.

1. A Pennsylvania statute prohibiting the operation on the highways of the State of any vehicle carrying any other vehicle "above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle," and applied to interstate carriers, *held* consistent with due process of law, and consistent with the commerce clause in the absence of Congressional action. P. 603.
2. The Federal Motor Carrier Act of 1935 did not undertake to deprive the State of power to impose this regulation upon vehicles moving in interstate commerce. P. 604, *et seq.*
3. Section 204 of the Federal Motor Carrier Act empowers the Interstate Commerce Commission to establish reasonable requirements with respect to "safety of operation and equipment" of motor vehicles of common and contract carriers in interstate commerce, but its authority with respect to sizes and weights of vehicles is expressly limited in § 225 to investigation and report on the need of regulation. P. 607.
4. "Sizes and weight" in the meaning of § 225 includes the size and weight of the motor vehicle and its load. P. 610.
5. The authority to regulate the "sizes and weight" of motor vehicles, left with the States by § 225 of the Federal Motor Carrier Act, is not restricted to over-all measurements and gross weight, but includes particular dimensions of motor vehicles and their loads and the weight distribution of load, which affect safety as well as the wear and tear of the highways. P. 610.
6. The Pennsylvania regulation is an exercise of the state's power to protect the safe and convenient use of its highways, which it was the purpose of § 225 to reserve to the State from the grant of regulatory power to the Commission. P. 611.
7. In ordinary speech the load of a vehicle is not spoken of as a part of its equipment. P. 612.
8. Even if the phrase "operation and equipment" in § 204 could be taken, when standing alone, as including the weight and size of

loads, it can not be so taken when read in conjunction with the reservation of § 225 of "sizes and weight" from the regulatory power of the Commission. P. 612.

9. Congressional intention to displace local laws in the exercise of the commerce power is not to be inferred unless clearly indicated. P. 614.

336 Pa. 17; 7 A. 2d 466, affirmed.

APPEAL from a judgment affirming the dismissal of a complaint in an action to enjoin the enforcement of a state regulation of motor vehicles.

Messrs. Sterling G. McNees and *Edmund M. Brady,* with whom *Mr. Gilbert Nurick* was on the brief, on the reargument and on the original argument, for appellants.

Mr. George W. Keitel, Assistant Deputy Attorney General of Pennsylvania, with whom *Mr. Claude T. Reno,* Attorney General, was on the brief, on the reargument and on the original argument, for appellees.

By leave of Court, *Solicitor General Biddle* and *Messrs. E. M. Reidy, Edwin E. Huddleson, Jr.,* and *Daniel W. Knowlton* filed a brief on behalf of the United States et al., as *amici curiae,* urging reversal.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether a statute of Pennsylvania prohibiting the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator of such carrier vehicle, is superseded by the rules and regulations promulgated by the Interstate Commerce Commission under the Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301–327, applicable to common and contract carriers in interstate commerce.

Appellants, co-partners engaged as common carriers in the business of transporting in interstate commerce new

automobiles upon motor trucks specially constructed for that purpose, brought this suit in the Pennsylvania state courts to enjoin appellees, state officers, from enforcing against appellants § 1033(c) of the Pennsylvania Vehicle Code, effective June 29, 1937, 75 P. S. 642, which prohibits the operation on the highways of the state of any vehicle carrying any other vehicle "above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle." [1] Two other like suits brought by motor carriers engaged in like transportation interstate were consolidated with the present suit.

After a hearing in which there was extensive evidence tending to show that the transportation by appellants over the state highways of cars placed above the cab of the transporting vehicle is unsafe to the driver and to the public, the trial court found that the location of motor vehicles over the cab of the carrier rendered its operation dangerous on the curves and grades of the Pennsylvania

[1] "(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle."

After the argument of the appeal in this case, but before the decree in the State Supreme Court, this section was amended to read:

"(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, the weight of which is directly above the cab of the carrier vehicle or directly over the head of the operator of such carrier vehicle." Act No. 400 of June 27, 1939.

The Supreme Court of Pennsylvania, in its opinion, considered this amendment and concluded that the statute both before and after the amendment applied to the vehicles used by appellants and was directed at the same evils, and that no essential change was made by the amendment, a construction which we adopt. The Supreme Court also concluded that as the amendment named no date when it was to take effect it would become effective some two months later, on September 1, 1939, as provided by § 4 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 1020.

highways. It found that such location of the carried car above the driver raises the center of gravity of the loaded car above that which is normal in trucking operations, places excessive weight on the front axles and tires, obscures the vision of the driver of the carrier car, with the results that it increases the difficulty of steering the loaded car, adversely affects braking, particularly on curves, and affects the balance of the loaded car so as to make its use on the highways dangerous.

It also found that in case of collision or loss of control the overhead car has a tendency to fly off the cab, in consequence of which, in numerous cases, serious injury had resulted to the operator of the truck or to the colliding car and its occupants, or both, and that the height of the overhead car and its interference with the driver's vision causes him to drive on the wrong side of the road in order to avoid overhead obstructions. The court concluded that the state statute was a safety regulation of motor-cars using the highways of the state and that, as applied to appellants, it infringed neither the commerce clause of the Federal Constitution nor the due process clause of the Fourteenth Amendment, and gave judgment dismissing the complaint. On appeal the Supreme Court of Pennsylvania confirmed the findings of the trial court and affirmed the decree. 336 Pa. 17; 7 A. 2d 466. The case comes here on appeal under § 237 of the Judicial Code, as amended, 28 U. S. C. § 344.

Before the present suit was brought, the Interstate Commerce Commission, purporting to act under the Motor Carrier Act, had promulgated regulations effective July 1, 1936, with respect to "safety of operation and equipment" of common and contract motor carriers in interstate commerce, subject to the Act. These regulations contained no provisions specifically applicable to cars carried over the cab of the carrier vehicle. On March 11, 1939, while the present cause was pending be-

fore the Supreme Court of Pennsylvania, the Interstate Commerce Commission, in "Car Over Cab Operations," 12 M. C. C. 127, issued its report of an investigation of the practice of the car over cab method of transportation of motor vehicles, in which it announced its conclusion that

"The record discloses no testimony whatsoever to show that the operation of motor vehicles, used in transporting new automobiles, and which are so constructed that one of the automobiles being transported extends in whole or in part over the cab, is unsafe. On the contrary, the evidence is clear that the average number of accidents in which vehicles of this type are involved is less than the country's average for all trucks. We find no reasons of record why the operations of such vehicles should be forbidden. The safety regulations heretofore prescribed by us, of course, apply to these as well as other vehicles operated by common and contract carriers in interstate or foreign commerce. The operations of vehicles so equipped are therefore permitted by the existing regulations, and there is no need for change." (p. 132.)[2]

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[2] The report of the Interstate Commerce Commission states, page 133, that in this proceeding "the only evidence was introduced by or on behalf of carriers engaged in the type of operation under investigation," that the State of Pennsylvania declined to participate in the proceeding and that a representative of the state invited the attention of the Commission to the evidence which had been taken in the present suit, but that such evidence was not made a part of the record in the proceeding before the Commission and was not considered by it. The Commission, so far as the report discloses, gave no consideration to the consequences of placing the carried car above the cab of the motor carrier when accidents do in fact occur, to the effect of the weight distribution of the combination when used on highways of grades and curves over which petitioners operate in Pennsylvania, and its tendency to cause the driver of the combination to hold to the middle of the road to avoid injury to the carried car on the tree-lined highways of the state, all of which were deemed by the state courts in the present case to have an important bearing on safety.

The Supreme Court of Pennsylvania took judicial notice of this action of the Commission, but concluded that the authority of the state to enact § 1033 (c) of the Vehicle Code was unimpaired by federal action under the commere clause for the reason that the applicable provisions of the Motor Carrier Act, enacted by Congress, did not purport to withdraw from the state its constitutional power to make the regulation embodied in that section, and for a second reason, which we find it unnecessary to consider, that in any case the action of the Commission in declining to adopt any rule or regulation with respect to the car over cab practice of interstate common and contract motor carriers could not be taken as a mandate to such carriers to continue the practice despite state regulation prohibiting it.

Appellants assail the state statute on the grounds that even though it is unaffected by the provisions of the Motor Carrier Act it nevertheless infringes the commerce clause and the due process clause of the Fourteenth Amendment and that in any case the statute is superseded by the action taken by the Commission in conformity to the Motor Carrier Act.

Only a word need be said of the constitutional objections. The present record lays a firm foundation for the exercise of state regulatory power, unless the state has been deprived of that power by Congressional action authorizing the Commission to substitute its judgment for that of the state legislature as to the need and propriety of the state regulation. The nature and extent of the state power, in the absence of Congressional action, to regulate the use of its highways by vehicles engaged in interstate commerce has so recently been considered by this Court that it is unnecessary to review the authorities now, or to restate the standards which define the state power to prescribe regulations adapted to promote safety upon its highways and to insure their conservation

and convenient use by the public. See *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. Judged by these standards we can find no basis for saying that the Pennsylvania statute is not such a regulation or that it is a denial of due process or that it infringes the commerce clause if Congress has not authorized the Interstate Commerce Commission to promulgate a conflicting rule.

This brings us to the more serious question whether Congress, by the enactment of the Motor Carrier Act of 1935, as a regulation of interstate commerce, has undertaken to deprive the state of the power to impose the present regulation upon vehicles moving in interstate commerce. With the adoption of the Motor Carrier Act, the national government embarked on the regulation of a type of interstate traffic many of whose regulatory problems bear little resemblance to those of other systems of transportation which had previously been subjected to Congressional control. They presented difficulties and complexities differing from and far exceeding those of any earlier regulations of interstate commerce. Our most extensive experience had been in the national regulation of rail carriers, operating over roads and with rolling stock privately owned and controlled, with standards of roadbed, operation and equipment, substantially uniform throughout the country, and with the movement of traffic on each road subject to a single unified control.

Regulation of vehicular traffic over the highways of the United States involves a far more varied and complex undertaking. The highways of the country have been built by the states with substantial financial aid from the federal government in the construction of some of them.[3] They are state owned, and, in general, are open

[3] For the significance of federal aid, see hearings before Senate Committee on Interstate Commerce on S. 2793, 72d Cong., 1st Sess. (1932), p. 217. See also *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 417.

in each state to use by privately owned and controlled motor vehicles of widely different character as respects weight, size, and equipment.[4] The width, grades, curves, weight-bearing capacity, surfacing and overhead obstructions of the highways differ widely in the forty-eight different states and in different sections of each state. There are like variations with respect to congestion of traffic. State regulation, developed over a period of years, has been directed to the safe and convenient use of the highways and their conservation with reference to varying local needs and conditions.

Assumption of national control involved problems of peculiar difficulty and delicacy. Apart from regulations of interstate motor traffic having commercial aims and involving routes, schedules, rates and the like, any regulation on a national scale, whatever its extent, has an intimate and vital relation to the conservation of highways which belong to the states, and to their safe and convenient use by the general public in both interstate and intrastate traffic. Our entire experience with the growth of automobile traffic and its regulation by the states teaches that in any form of non-commercial regulation, safety is a dominant consideration. Motor vehicles are dangerous machines whose operation is attended by serious hazard to persons and property. *Hess* v. *Pawloski,* 274 U. S. 352, 356. In 1934, the year before the enactment of the Motor Carrier Act, there were 36,000 reported deaths from motorcar accidents in the United States.[5] Excessive speed, defective appliances,

[4] It is estimated that 85 per cent of all trucks are privately owned and operated, and that over 200,000 separate trucks would be subject to the federal regulation. See Hearings before Senate Committee on Interstate Commerce on S. 2793, 72d Cong., 1st Sess., p. 223; S. Doc. 152, 73d Cong., 2d Sess., p. 28 (1934); Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5262, 74th Cong., 1st Sess. (1935), p. 156, *et seq.*

[5] Accident Facts (1936) published by National Safety Counsel, Inc.

negligent driving, size, weight and loading of cars in conjunction with local conditions of traffic and of the highways, contributed in varying degrees to this record of disaster.

It is in the light of this history and background that we must appraise and apply the provisions of the Motor Carrier Act of 1935. The declared policy of the Act, § 202 (a), is to preserve and foster the economic and commercial advantages of an efficient transportation system. The power to regulate, which it confers on the Interstate Commerce Commission, extends in some measure to safety regulations. Section 204 (a) provides:

"It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Subdivision (2) imposes a like duty upon the Commission to regulate "contract carriers." Subdivision (3) imposes the duty

"To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

Section 225 provides:

"The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of

service of employees of all motor carriers and private carriers of property by motor vehicle; . . ."

The words of this section indicate, as its history demonstrates, that it was intended to reserve from the regulatory power of the Commission the regulation of "sizes and weight of motor vehicles." Unlike § 204 (a) (3), which makes it the duty of the Commission "if need therefor is found" to establish reasonable requirements to promote safety of operation and to prescribe standards of equipment for "private carriers of property," § 225 imposes no duty and confers no authority on the Commission to regulate the sizes and weights of motor vehicles.[6] Its authority is limited to investigation and report of the need of such regulation.[7]

The bill containing the provisions of §§ 204 and 225 which we have quoted, was prepared by the Federal Coordinator of Transportation and its adoption was recommended in his 1934 report to the Interstate Com-

[6] Cf. Coordination of Motor Transportation, 182 I. C. C. 263, 387, Recommendation 11.

[7] On November 8, 1937, the Commission ordered an Investigation

"In the Matter of Regulations Governing the Sizes and Weight of Motor Vehicles and Combination of Motor Vehicles used by Common and Contract Carriers . . . and Private Carriers. . . .

"1. To enable the Commission to make a report under the provisions of section 225 on the need for Federal regulation of the sizes and weight of motor vehicles and combinations thereof.

"2. To enable the Commission to prescribe reasonable requirements under the provisions of section 204 of the act as to the sizes and weight of motor vehicles and combinations therefor insofar as they affect the safety of operation."

The Commission is now engaged in making its investigation and has made no report of its findings or conclusions. Report No. 1, a preliminary study as yet unpublished (April, 1940), made by the Bureau of Motor Carriers, Interstate Commerce Commission, is devoted to an analysis of state limitations of sizes and weights of motor vehicles.

merce Commission, which transmitted the report and proposed bill to the Senate with its favorable recommendation. Sen. Doc. No. 152, 73rd Cong., 2d Sess. The report made no mention of the scope, purpose or meaning of § 225, other than the statement, p. 49, that it provides for "investigation and report to Congress of the need, if any, for federal regulation of the sizes and weights of motor vehicles." The report referred, p. 32, to the facts that the states regulate extensively the length, width, height and speed of motor vehicles, and their maximum gross weights and require that they "be equipped with a variety of safety appliances"; that these regulations "are designed in part to protect the safety and convenience of the public in its use of the highways and in part to protect the highways from excessive wear and tear," and that the "requirements as to gross weights, lengths, and widths of vehicles are often grounded in State policies with respect to the design of highways," with respect to their weight sustaining capacity and their curves. In testifying at the hearings upon the bill before the Senate Committee on Interstate Commerce, the Coordinator explained the provisions of § 225 by stating:

"with respect to size and weight of vehicles . . . we do not undertake in this bill to cover that situation except to provide for a thorough investigation of it by the Commission with recommendations to Congress because there is involved not only a question of fact as to what the regulation should be, but also as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways. They have the right to protect their highways against unsafe or unreasonable use, but whether or not the federal government can come in and interfere with it I cannot say at this time." Hearings before

Senate Committee on Interstate Commerce on S. 1629, 74th Cong., 1st Sess., (1935) p. 92.[8]

Again, page 61, he referred to "sizes and weights" as "an extremely important matter from the standpoint of public safety and convenience." This Court has also had occasion to point out that the sizes and weights of automobiles have an important relation to the safe and convenient use of the highways, which are matters of state control. *Sproles* v. *Binford,* 286 U. S. 374; *South Carolina Highway Dept.* v. *Barnwell Bros., supra.* It is evident that the purport of § 225 is to reserve "sizes and weight" from the regulatory powers of the Commission, quite as much when related to safety as when related to highway construction, pending investigation and report by the Commission of the need for such regulation, and further consideration of the matter by Congress. Such has been the uniform construction of § 225 by courts having occasion to consider the subject.[9]

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[8] On page 61 of the Report the Coordinator stated: "But on this question of sizes and weight of motor vehicles, which is an extremely important matter from the standpoint of public safety and convenience, there is not only the question here as to what those sizes and weights ought to be from the standpoint of road construction and road use, but there is also the legal question as to whether the federal government can exercise power over the matter, or whether it is a matter exclusively within the jurisdiction of the states. It was because of doubts not only as to the facts with reference to that matter, but also to the law that provisions were made for this investigation."

The Committee Reports make no comment on § 225. See S. Rept. No. 482, 74th Cong., 1st Sess.; H. Rept. No. 1645, 74th Cong., 1st Sess.

[9] *L. & L. Freight Lines* v. *Railroad Commission,* 17 F. Supp. 13 (1936); *Barnwell Bros.* v. *South Carolina State Highway Dept.,* 17 F. Supp. 803 (1937); *Werner Transportation Co.* v. *Hughes,* 19 F. Supp. 425 (1937); *Houston & North Texas Freight Lines* v. *Phares,* 19 F. Supp. 420 (1937); *Morrison* v. *State,* 133 Tex. Cr. App. 141; 109 S. W. 2d 205 (1937); *Yellow Cab Transit Co.* v. *Tuck,* 115 S. W.

On the argument before us it was conceded that the "size and weight of motor vehicles," of which § 225 speaks, must be taken to include the sizes and weights of motor vehicles and their loads. This is evident both because an investigation of sizes and weights of motor vehicles, apart from their load, would be useless so far as the major problems of safety and use of the highways are concerned and because, as presently will appear, the state regulation of sizes and weights to be investigated has from the beginning included sizes and weights of the loaded vehicle. The power of the states to regulate the sizes and weights of loaded motor vehicles was thus left undisturbed. Such other courts as have had occasion to consider the matter in the cases already noted have arrived at the same conclusion.[10]

But the question remains whether the Pennsylvania statute is a regulation of "size and weight" within the meaning of § 225, or whether it is a regulation of "safety of operation and equipment," which the Commission was authorized to make by § 204 (1) (2). Perusal of the present record can leave no doubt that in both a technical and a practical sense § 1033 (c) is a regulation of weight and size of the loaded motor vehicle, and that the Pennsylvania Legislature intended it to be such.[11] By provid-

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2d 455 (Tex. Civ. App. 1938); see *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79 (1939).

Upon the appeal in *South Carolina Highway Dept.* v. *Barnwell Bros., supra*, to the Supreme Court, respondents abandoned their contention in the trial court that power to regulate the loaded weight and size of motor vehicles had not been withheld from the Commission by § 225. 303 U. S. 177.

[10] See note 9, *supra*.

[11] In addition to subsection (c) of § 1033, which in its amended form is specifically directed to the location of the "weight" of the carried car, the section contains three other subdivisions which affect size and weight distribution of the loaded vehicle. Subsection (a) prohibits the operation of vehicles "having two levels for the carriage

ing that the carried car shall not be loaded above the cab, the statute sets practical limits to the height of the loaded car and precludes its projection beyond the cab of the carrier car and into the line of vision of its driver. It is also a restriction on weight distribution of the loaded car and in its amended form specifically prohibits placing the "weight" of the carried car above the driver.[12] The highest court of the state has declared that such are the purposes of subsection (c), in order to avoid the safety hazards resulting from improper weight distribution and the height of the carried car at a point where it cannot be observed by the driver. As interpreted and applied by the state court, we can not regard the regulation as other than an exercise of the state's power to protect the safe and convenient use of its highways through the control of size and weight of motor vehicles passing over them, which it was the purpose of § 225 to reserve to the state from the grant of regulatory power to the Commission. Being thus reserved we think it is unaffected by the authority conferred on the Commission by § 204 to regulate "safety of operation and equipment."

The Commission in its report in "Car Over Cab Operations," *supra,* gave no consideration to the extent of its authority under § 204, to make safety regulations affecting the car over cab practice or to the question whether the Pennsylvania restriction is in fact and in practical operation a weight and size regulation, or whether the

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of other vehicles." Subdivision (b) prohibits operation of vehicles carrying other vehicles any part of which is more than 115 inches from the ground; and subdivision (d) prohibits the operation of vehicles carrying any other vehicle "any axle of which is more than 3 feet higher than any other axle on such carrying vehicle." Subsections (a), (b) and (d) do not become effective until January 1, 1942. West Virginia has a statute containing similar provisions. Ch. 88, Acts of W. Va., 1939.

[12] See note 1, *supra.*

authority to make such regulations is reserved to the states by § 225. The power of the Commission to regulate with respect to safety in the case of common and contract carriers is defined by § 204(a)(1) and (2), which makes it the duty of the Commission to regulate "safety of operation and equipment." In the exercise of this authority the Commission has made no regulation concerning sizes and weight of motor vehicles or their loads. But in a brief filed in this cause it contends that the Pennsylvania statute is an infringement of the Commission's authority to regulate safety of equipment. In ordinary speech the load of a vehicle is not spoken of as a part of its equipment. In the Motor Carrier Safety Regulations, promulgated by the Commission, safety of equipment is treated as synonymous with or the equivalent of parts and accessories of motor cars affecting safety. The Uniform Act regulating motor car traffic on highways, which was recommended by the National Conference of State and Highway Safety in 1930 and 1934, which was referred to in the report of the Coordinator, placed all size and weight regulations in a single "Article XVI, Size, Weight and Load," separate from the articles containing provisions relating to the speed, driving and movement of motor cars and from "Article XV, Equipment," which was confined to automobile parts and accessories and their inspection.[13]

But even though the phrase "operation and equipment" of motor cars could be taken, when standing alone, as including the weight and size of their loads, we think it plain that it cannot be so taken when read in conjunction with the reservation in § 225 of "sizes and weights" from the regulatory power of the Commission. As the report

[13] See Uniform Act Regulating Traffic on Highways, IV, National Conference on Street and Highway Safety (1930), 38, 49; Uniform Act Regulating Traffic on Highways, V, Bureau of Public Roads, United States Department of Agriculture (1934), 23, 35.

of the Coordinator and the legislation in the several states shows, and as this Court has recognized, see *Sproles* v. *Binford, supra; South Carolina Highway Dept.* v. *Barnwell Bros., supra,* the sizes and weights of motor vehicles and their loads present safety problems which are special and distinct from those involved in the driving and movement of cars ordinarily known as their operation, and from their parts and accessories ordinarily referred to as motor car equipment. As we have seen, one of the purposes of the reservation made in § 225 was to give opportunity for further study and consideration by the Commission of the relation of sizes and weights of motor cars to the public safety and convenience, as well as to road construction and use so that the Commission and Congress might be advised what the regulation of these safety factors should be and how far Congress should interfere with their regulation by the states.

The Couzens bill, S. 2793, § 2 (a) (1) (2), 72d Cong., 1st Sess., discussed in the 1934 report of the Coordinator, authorized the Commission to prescribe reasonable requirements with respect to "safety of operation and equipment (including the weight, length, width and height of motor vehicles used by such carriers)." This proposal was not adopted and in the bill recommended by the Coordinator and the Commission in 1934 and enacted as the Motor Carrier Act of 1935, the parenthetical clause in the provision authorizing regulation of safety of operation and equipment as it appeared in the Couzens bill, was transferred to § 225, where it appeared as "sizes and weight of motor vehicles," federal regulation of which was reserved to await the future action of Congress. The clause which was thus resorted to in the earlier bill to include regulations of sizes and weight in the authority to regulate "safety of operation and equipment" was by its transfer to § 225 of the Act of 1935 similarly made the means of withholding from the regulatory power of the Commission regulations of sizes and weight affecting safety.

As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned. *Kelly* v. *Washington,* 302 U. S. 1, 10–14; *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79, 85 and cases cited. There are other cogent reasons why the reservation made by § 225 cannot be given a narrow construction. The hesitancy manifested by Congress, until the adoption of the 1935 Act, to interfere with the state highway regulations and its failure then to follow earlier and more far-reaching proposals are persuasive against such a construction.[14] A thorough investigation by the Commission which the statute authorized was necessary not only to determine the importance of sizes and weight "from the standpoint of public safety and convenience," but also to resolve the uncertainty of the draftsmen of the bill and presumably of Congress "as to the facts with reference to the matter" and "as to what the regulation should be." S. Doc. No. 152, 73rd Cong., 2d Sess., p. 61. The extent to which Congress should, if at

[14] Prior to the 70th Congress, the bills for federal regulation contained no provisions of any kind relating to size and weight. Beginning with the 70th Congress the bills almost uniformly provided that interstate carriers should remain subject to state regulations relating "to the maintenance, protection, safety, or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce." The Rayburn bill which the Interstate Commerce Commission approved, contained such a clause (S. Doc. 152, 73d Cong., 2nd Sess., 25). Only the Couzens bill (S. 2793, 72d Cong., 1st Sess.) affirmatively prescribed federal regulation. The Dill bill (S. 3171, 73d Cong., 2d Sess.) and S. 1629, 74th Cong., 1st Sess., which was finally enacted as the Motor Carrier Act, envisaged the possibility of such regulation of size and weights but only after a report to Congress. For a discussion of these bills see Kauper, Federal Regulation of Motor Carriers, 33 Mich. L. Rev. 239, 240–243, notes 128, 129, 132.

all, curtail state regulation, could be determined only when those doubts were resolved.

A considerable period of time was required for preparation for the investigation and for bringing it to a conclusion. The investigation which was authorized in November 1937, Ex parte No. M. C. 15, has not yet proceeded beyond the preliminary stage of gathering information. It could not be assumed that in the meantime a rapidly changing industry would not produce new types of vehicles involving new problems of the relation of sizes and weight to safety such as are involved in the present case. A construction of the reservation made in § 225 is not to be favored which would deprive the states of authority to make safety regulations of sizes and weight before Congress was informed by a full investigation and report of the Commission of the nature of the regulations, both those in force and those which are needed, and whether in the light of the competing demands for national uniformity and for accommodation to local conditions, regulation of sizes and weight can be best prescribed by the Commission, by the state legislatures, or by a divided authority. For these reasons we think that the reservation of state power by § 225 is not restricted to the particular problems of weight and size which the traffic had developed at the moment when the act was passed, or which were then known to the Commission, in advance of the investigation which was to ascertain the facts, what the regulation should be and how far regulations of sizes and weights should be withdrawn from the states.

Sizes and weights which affect safety, not excluding consideration of local conditions, as well as those which affect wear and tear of the highways were to be the subject of investigation, and it is the subject of investigation which defines the reservation from the Commission's authority to regulate. Hence the phrase "sizes and weight" in § 225, when safety is concerned, is not to be

narrowly limited to the overall length, width and height of the loaded cars and to their gross weight. For as we have seen, distribution of weight and dimensions of load or particular parts of it in connection with local conditions of curves, grades and overhead obstruction of the highways, have an important relation to safety. In the light of the investigation Congress might conclude that the regulation of gross weights and dimensions, concededly left to the states, could not be conveniently or wisely separated from regulation of weight distribution and particular dimensions.

It is true that the report of the Coordinator presenting the bill for Congressional action particularized gross weight and overall dimensions as a common subject of regulation by the states and as a reason for making the investigation. But we find nothing in the report, or in his testimony before the Senate Committee, or elsewhere in the legislative history, to show that it was intended by § 225 to confine state power to regulation of sizes and weights of automobiles and their loads to gross weights and overall dimensions. The bill as proposed and as enacted did not specify any such limitation of "sizes and weight," and it was well known that state size and weight regulations then in force or proposed were not so restricted.

Schedule B of the 1934 report of the Coordinator disclosed, page 213, that state regulation was then concerned with distribution of load weight by axle and wheel weight requirements. The weight provisions of the Uniform Act proposed by the National Conference on State and Highway Safety in 1930 and 1934, contained gross weight limitations and axle weight limitations which involved distribution of weight of the loaded car. The preliminary report (No. 1) of the Interstate Commerce Commission, Bureau of Motor Carriers of April, 1940, p. 71, notes various state regulations fixing axle weight or wheel weight limitations, sometimes with and sometimes with-

out a gross weight limitation, and states that the combination of these factors "is basically intended to control not only total gross weight of the vehicle and its load but also distribution of the load on the vehicle."

The proposed Uniform Act also contained provisions, in "Article XVI, Size, Weight and Load" (§ 78 (e) of the 1930 Draft; § 142 (d) of the 1934 Draft), for the distribution or location of load and its particular dimensions, independently of gross weight and overall measurements. They directed that "the load upon any vehicle . . . shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle if it is equipped with such a bumper." Report No. 1 of the Commission indicates that this provision has been adopted in twenty-three states and that three states prohibit any such projection of load. As already noted, the present Pennsylvania statute regulating car over cab operation has been enacted in substance in West Virginia.[15]

Reading the words of § 225 in the light of its legislative history, and mindful of the peculiar conditions of the traffic and the problems of state regulation to which the section must be applied, and of its obvious purpose to postpone until the report of the Commission determination of the extent to which Congress should withdraw from the states their power to regulate sizes and weight of motor vehicles, we cannot say that the phrase as used in the statute is restricted to overall measurements or gross weight, or that it does not include particular dimensions of motor vehicles and their loads and the distribution of load, which affect safety as well as the wear and tear of the highways. We conclude that the Pennsylvania statute now before us is a weight and size regulation within the meaning of § 225, and is within the regulatory authority of the state reserved by that section from the authority granted to the Commission by § 204.

Affirmed.

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[15] See note 11, *supra*.

DECISIONS PER CURIAM, ETC., FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.*

No. 204. KOBILKIN *v.* PILLSBURY, DEPUTY COMMISSIONER OF U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL. Certiorari, 308 U. S. 530, to the Circuit Court of Appeals for the Ninth Circuit. Argued January 8, 9, 1940. Decided January 29, 1940. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Mr. George G. Olshausen* submitted for petitioner. *Mr. Telford Taylor,* with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Aaron B. Holman* and *Richard H. Demuth* were on the brief, for Pillsbury, Deputy Commissioner (the brief being also on behalf of the Compensation Commission, as *amicus curiae*); and *Mr. M. B. Plant,* with whom *Messrs. Herman Phleger, Maurice E. Harrison,* and *Gregory A. Harrison* were on the brief, for Matson Navigation Co.,—respondents. Reported below: 103 F. 2d 667.

No. 603. JAGELS, "A FUEL CORPORATION," *v.* TAYLOR, COMPTROLLER OF THE CITY OF NEW YORK. Appeal from the Supreme Court of New York. January 29, 1940. *Per Curiam:* The motion to substitute Joseph D. McGoldrick, present Comptroller of the City of New York, as appellee in place of Frank J. Taylor is granted. The judgment is affirmed. *McGoldrick* v. *Berwind-White Coal Mining Co., ante,* p. 33; *McGoldrick* v. *Du Grenier, ante,* p. 70; *McGoldrick* v. *Felt & Tarrant Co., ante,* p. 70. *Mr. Marion B. Pierce* for appellant. *Mr. William C. Chanler* for appellee. Reported below: 255 App. Div.

*For decisions on applications for certiorari, see *post,* pp. 642, 653; for rehearing, *post,* p. 692. For cases disposed of without consideration by the Court, *post,* p. 691.

965; 280 N. Y. 766; 281 N. Y. 664, 677; 8 N. Y. S. 2d 456; 21 N. E. 2d 526; 22 N. E. 2d 487, 872.

No. 629. COLUMBIA TERMINALS CO. *v.* LAMBERT ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. January 29, 1940. *Per Curiam:* The decree is vacated and the cause is remanded to the District Court with directions to dismiss the complaint on the merits. *Eichholz* v. *Public Service Commission,* 306 U. S. 268; *Welch Co.* v. *New Hampshire,* 306 U. S. 79. *Messrs. Guy A. Thompson* and *Charles M. Spence* for appellant. *Messrs. James H. Linton, Daniel C. Rogers,* and *Edgar H. Wayman* for appellees. Reported below: 30 F. Supp. 28.

No. 630. PUBLIC SERVICE COMMISSION OF MISSOURI *v.* COLUMBIA TERMINALS CO. Appeal from the District Court of the United States for the Eastern District of Missouri. January 29, 1940. *Per Curiam:* The appeal is dismissed for want of jurisdiction. *Public Service Commission* v. *Brashear Lines,* 306 U. S. 204. *Messrs. James H. Linton* and *Daniel C. Rogers* for appellant. *Messrs. Guy A. Thompson* and *Charles M. Spence* for appellee. Reported below: 30 F. Supp. 28.

No. 622. CADY ET AL., DOING BUSINESS AS C. M. CADY & SONS *v.* DETROIT ET AL. Appeal from the Supreme Court of Michigan. January 29, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. (1) *Euclid* v. *Ambler,* 272 U. S. 365; *Cusack Co.* v. *Chicago,* 242 U. S. 526; (2) *Hatch* v. *Reardon,* 204 U. S. 152, 160–161; *Standard Food Co.* v. *Wright,* 225 U. S. 540, 550; *Warehouse Co.* v. *Tobacco Growers,* 276

U. S. 71, 88; (3) *Caperton* v. *Boywer,* 14 Wall. 216, 236–237; *Herndon* v. *Georgia,* 295 U. S. 441, 442–443. *Mr. Edward N. Barnard* for appellants. Reported below: 289 Mich. 499; 286 N. W. 805.

No. —, original. Ex parte J. L. Stewart; and

No. —, original. Ex parte L. Carrizal. January 29, 1940. Motions for leave to file petitions for writs of habeas corpus denied.

No. 2, original. Wisconsin et al. *v.* Illinois et al.;

No. 3, original. Michigan et al. *v.* Illinois et al.; and

No. 4, original. New York et al. *v.* Illinois et al. January 29, 1940. A rule is ordered to issue returnable February 26 next requiring the complainants to show cause why the petition for temporary modification of the decree should not be granted.

No. 10, original, October Term, 1935. Wyoming *v.* Colorado. January 29, 1940. The return 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 petition for rule to show cause and return to the rule to show cause.

Nos. 543 and 544. Loehr, Mayor, et al. *v.* Downey, Receiver. February 1, 1940. John J. Condon, Mayor, Gustav W. Klein, Jr., First Deputy and Acting Comptroller, and Raymond J. Whitney, City Manager, etc., successors to Joseph F. Loehr, Mayor, James J. Hushion, Comptroller, and Dennis M. Morrissey, Commissioner of Public Safety, respectively, substituted as the parties pe-

titioners herein on motion of *Mr. George P. Barse* on behalf of counsel for the petitioners.

No. 281. WADLEY ET AL. *v.* LOUISIANA EX REL. MUNN. Appeal from the Supreme Court of Louisiana. Argued January 30, 31, 1940. Decided February 5, 1940. *Per Curiam:* The appeal is dismissed for want of a properly presented federal question. *Godchaux* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443. *Messrs. John B. Files* and *Joseph H. Jackson* for appellants. *Messrs. R. D. Watkins, A. L. Burford,* and *T. W. Holloman* were on a brief for appellee. Reported below: 192 La. 874; 189 So. 561.

No. 370. MONTROSE CEMETERY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 308 U. S. 542, to the Circuit Court of Appeals for the Seventh Circuit. Argued February 2, 1940. Decided February 5, 1940. *Per Curiam:* As it appears that the Board of Tax Appeals received and considered the evidence pertinent to the question of the valuation of the cemetery lots on March 1, 1913, we find no ground for disturbing its ruling. The judgment of the Circuit Court of Appeals is affirmed. *Mr. Elden McFarland,* with whom *Mr. E. J. Quinn* was on the brief, for petitioner. *Mr. Richard H. Demuth,* with whom *Solicitor General Jackson, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for respondent. Reported below: 105 F. 2d 238.

No. 614. PUBLIC SERVICE COMMISSION *v.* WISCONSIN TELEPHONE CO. See *post,* p. 657.

No. —, original. Ex parte Warren Elwood; and No. —, original. Ex parte Kenneth Gerard. February 5, 1940. Motions for leave to file petitions for writs of habeas corpus denied.

No. —, original. Ex parte Samuel White. February 5, 1940. Motion for leave to file petition for writ of prohibition denied.

No. 648. Winkelman *v.* Allman. February 5, 1940. Motion of respondent to require petitioner to post a cost bond denied without prejudice to an application to the Circuit Court of Appeals for the Ninth Circuit. *Mr. Walter C. Fox, Jr.* for petitioner. *Mr. Roy G. Allman* for respondent. Reported below: 106 F. 2d 663.

No. 473. McGoldrick, Comptroller of the City of New York, *v.* Gulf Oil Corp. See *post*, p. 692.

No. —, original. Oklahoma ex rel. Williamson, Attorney General, *v.* Woodring, Secretary of War. Argued January 29, 30, 1940. Decided February 12, 1940. *Per Curiam:* The motion for leave to file a bill of complaint is denied by an equally divided Court. Mr. Justice Murphy took no part in the consideration or decision of this motion. *Messrs. Claude C. Hatchett* and *Mac Q. Williamson*, Attorney General of Oklahoma, with whom *Messrs. Randell S. Cobb*, First Assistant Attorney General, and *William O. Coe* were on the brief, for the motion. *Attorney General Jackson*, with whom *Assistant Attorney General Littell* and *Messrs. Warner*

W. Gardner, Oscar A. Provost, Richard H. Demuth, and *Joseph W. Kimbel* were on the brief, in opposition.

No. 355. UNITED STATES *v.* MOSCOW FIRE INSURANCE CO. ET AL. Certiorari, 308 U. S. 542, to the Supreme Court of New York. Argued February 1, 2, 1940. Decided February 12, 1940. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE STONE, MR. JUSTICE REED, and MR. JUSTICE MURPHY took no part in the consideration or decision of this cause. *Mr. Edward J. Ennis,* with whom *Solicitor General Jackson, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney, Frederick Bernays Wiener,* and *Aaron B. Holman* were on the brief, for the United States. *Mr. Paul C. Whipp,* with whom *Mr. Lounsbury D. Bates* was on the brief, for Lucke, Surviving Director of Moscow Fire Ins. Co.; *Mr. Borris M. Komar* for Morro et al.; *Mr. Osmond K. Fraenkel* for Kentman et al.; *Mr. Hartwell Cabell* for Heckscher et al.; *Mr. Walter H. Pollak* for Zahle et al.; *Mr. Samson Selig* submitted for Sawyer et al.; and *Mr. Thomas Kiernan* submitted for Hoppe, Executor;—respondents. By leave of Court *Mr. Frederick H. Wood* filed a brief on behalf of Steingut et al., Receivers, as *amici curiae,* urging affirmance. Reported below: 161 Misc. 903; 253 App. Div. 644; 280 N. Y. 286; 294 N. Y. S. 648; 3 N. Y. S. 2d 653; 20 N. E. 2d 758; 21 N. E. 2d 890.

No. 437. MCCABE *v.* BOSTON TERMINAL CO. Certiorari, 308 U. S. 543, to the Superior Court in and for the County of Suffolk, Massachusetts. Argued February 8, 1940. Decided February 12, 1940. *Per Curiam:* The Supreme Judicial Court, holding that the plaintiff's cause of action arose under the Federal Employers' Liability Act, directed judgment for the defendant upon the ground

that the time had passed within which an action could be brought or an amendment allowed setting up such a cause of action. We are of the opinion that this was error and that an opportunity for such an amendment should have been afforded. *New York Central & Hudson River R. Co.* v. *Kinney,* 260 U. S. 340. The judgment is vacated and the cause is remanded for further proceedings not inconsistent with this opinion. *Mr. Laurence D. Yont,* with whom *Messrs. Alonzo E. Yont* and *Henry Lawlor* were on the brief, for petitioner. *Messrs. Joseph Wentworth* and *John M. Hall,* with whom *Mr. John L. Hall* was on the brief, for respondent. Reported below: 22 N. E. 2d 33.

No. —, original. Ex parte John Brown. February 12, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Charles E. Phillips; and No. —, original. Ex parte Clarence M. Brummett. February 26, 1940. Motions for leave to file petitions for writs of habeas corpus denied.

No. —, original. Ex parte Wallace S. Bransford. February 26, 1940. A rule is ordered to issue, returnable Monday, March 18, next, requiring the respondent to show cause why leave to file the petition for writ of mandamus should not be granted.

No. —, original. Ex parte Ira J. McCullough et al. February 26, 1940. A rule is ordered to issue, returnable Monday, March 18, next, requiring the respondent to show cause why leave to file the petition for writ of mandamus should not be granted.

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No. —, original. Ex parte Edmond C. Fletcher. February 26, 1940. Motion for leave to file petition for writ of mandamus denied.

Nos. —, —, original. Ex parte R. L. Scott. February 26, 1940. Motions for leave to file petitions for writs of mandamus denied.

No. 476. United States *v.* Northern Pacific Railway Co. et al.; and

No. 477. Northern Pacific Railway Co. et al. *v.* United States. February 26, 1940. Motion of the Minority Stockholders of the Northern Pacific Railroad Company for leave to appear and present oral argument in these cases denied.

No. 210. Morgan, Executor, *v.* Commissioner of Internal Revenue. February 26, 1940. The opinion is amended by striking from the first line of the second full paragraph on page 2 the words "it is conceded that", and by striking from the first line of the fourth full paragraph on page 3 the words "it is conceded that". The petition for rehearing is denied.

Opinion reported as amended, *ante,* p. 78.

No. 632. Cantwell et al. *v.* Connecticut. Appeal from the Supreme Court of Errors of Connecticut. February 26, 1940. With respect to the appeal of all appellants from the judgment of the Supreme Court affirming the judgment of conviction on the third count of the information, probable jurisdiction is noted. The appeal of Jesse Cantwell from the judgment of the Supreme

Court affirming the judgment of conviction on the fifth count is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon that appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code (43 Stat. 936, 938), certiorari is granted. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for appellants. *Messrs. William L. Hadden, Edwin S. Pickett, Francis A. Pallotti,* Attorney General of Connecticut, *Richard F. Corkey,* Assistant Attorney General, and *Luke H. Stapleton* for appellee. Reported below: 126 Conn. 1; 8 A. 2d 533.

No. 730. FRIEDMAN *v.* MARKENDORF, CHAIRMAN, ET AL. Appeal from the Court of Appeals of Kentucky. March 4, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Gardner* v. *Massachusetts,* 305 U. S. 559; *Gray* v. *Connecticut,* 159 U. S. 77; *Roschen* v. *Ward,* 279 U. S. 337; *Semler* v. *Dental Examiners,* 294 U. S. 608, 611. *Mr. John H. Chandler* for appellant. Reported below: 280 Ky. 484; 133 S. W. 2d 516.

No. 10, original, October Term, 1935. WYOMING *v.* COLORADO. Argued February 26, 27, 1940. Order entered March 4, 1940. The motion of the State of Wyoming for leave to file a petition for a rule directing the State of Colorado to appear and show cause why it should not be adjudged in contempt for the violation of a decree of this Court is granted. The petition presented is ordered filed, and the State of Colorado is directed to show cause, as aforesaid, on or before March 25, 1940. The motion of the State of Colorado that evidence be taken to determine the amount of return flow to the Laramie

River from the diversions at the headgates of the meadowland ditches is denied. *Mr. Ewing T. Kerr,* Attorney General of Wyoming, with whom *Messrs. Harold I. Bacheller,* Deputy Attorney General, *Arthur Kline,* Assistant Attorney General, *James A. Greenwood,* and *W. J. Wehrli* were on the brief, for the complainant. *Mr. Byron G. Rogers,* Attorney General of Colorado, with whom *Messrs. Ralph L. Carr,* Governor, *Henry E. Lutz,* Deputy Attorney General, *Shrader P. Howell,* Assistant Attorney General, *Albert P. Fischer, Robert G. Smith, Lawrence R. Temple, Clifford H. Stone,* and *Jean S. Breitenstein* were on the brief, for the defendant.

No. —, original. Ex parte James A. Lovvorn. March 4, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Pennsylvania *v.* New Jersey et al. Argued February 26, 1940. Order entered March 4, 1940. Motion for leave to file a bill of complaint granted and process ordered to issue returnable March 25 next. *Mr. Wm. A. Schnader,* with whom *Mr. Claude T. Reno,* Attorney General of Pennsylvania, was on the brief, for the complainant. *Mr. John W. Ockford,* Assistant Attorney General of New Jersey, for the State of New Jersey; and *Mr. Egbert Rosecrans,* with whom *Mr. Robert B. Meyner* was on the brief, for Bessie Colburn et al., defendants.

No. 2, original. Wisconsin et al. *v.* Illinois et al.;
No. 3, original. Michigan et al. *v.* Illinois et al.; and
No. 4, original. New York et al. *v.* Illinois et al. March 4, 1940. The return to the rule to show cause is

received and ordered filed and the cause is assigned for argument on Monday, March 25 next, on the petition for temporary modification of the decree and the return to the rule to show cause.

No. 634. CANTY *v.* ALABAMA. On petition for writ of certiorari to the Supreme Court of Alabama. March 11, 1940. *Per Curiam:* Motion for leave to proceed *in forma pauperis,* and petition for writ of certiorari, granted. The judgment is reversed. *Chambers* v. *Florida, ante,* p. 227. *Mr. Leon A. Ransom* for petitioner. *Messrs. Thomas S. Lawson,* Attorney General of Alabama, and *William H. Loeb,* Assistant Attorney General, for respondent. Reported below: 238 Ala. 384; 191 So. 260.

No. 664. AMERICAN MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. March 11, 1940. *Per Curiam:* The petition for writ of certiorari is granted. Section 2 (g) (3) of the order of the Circuit Court of Appeals is modified so as to read as follows:

"(3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts."

As so modified the order is affirmed. *National Licorice Co.* v. *Naticnal Labor Relations Board, ante,* p. 350. MR.

JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the order should be affirmed without modification. *Mr. Thomas F. Magner* for petitioner. *Solicitor General Biddle* and *Mr. Charles Fahy* for respondent. Reported below: 106 F. 2d 61.

No. 735. GORDON ET AL. *v.* WIRTZ ET AL. Appeal from the Supreme Court of Mississippi. March 11, 1940. *Per Curiam:* The motion to dismiss is granted and 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) of the Judicial Code (43 Stat. 936, 938), certiorari is denied. *Messrs. Marcellus Green, Garner W. Green,* and *C. C. Moody* for appellants. *Messrs. William Webb Venable* and *Charles H. Watson* for appellees. Reported below: 192 So. 29.

No. 742. ARTHUR *v.* INDIANA. Appeal from the Supreme Court of Indiana. March 11, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Hendrick* v. *Maryland,* 235 U. S. 610; *Hicklin* v. *Coney,* 290 U. S. 169, 173; *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72–73. *Messrs. Sherman Minton* and *William C. Erbecker* for appellant. *Messrs. Omer Stokes Jackson,* Attorney General of Indiana, *Joseph W. Hutchinson,* and *Rexell A. Boyd,* Deputy Attorneys General, for appellee. Reported below: 216 Ind.—; 23 N. E. 2d 674.

No. 750. EDGAR BROTHERS CO. *v.* HEAD, STATE REVENUE COMMISSIONER. Appeal from the Court of Appeals of Georgia. March 11, 1940. *Per Curiam:* The motion

to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Bass, Ratcliff & Gretton, Ltd.,* v. *State Tax Commission,* 266 U. S. 271; *Matson Navigation Co.* v. *State Board,* 297 U. S. 441; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331. *Mr. Orville A. Park* for appellant. *Messrs. B. B. Zellars* and *Marshall L. Allison* for appellee. Reported below: 60 Ga. App. 482; 4 S. E. 2d 71.

No. 562. CONNOR *v.* CALIFORNIA ET AL. Certiorari, 308 U. S. 547, to the Supreme Court of California. March 25, 1940. *Per Curiam:* The motion for a writ of certiorari to correct a diminution of the record is denied. The motion to remand is granted, the judgment is vacated and the cause is remanded to the Supreme Court of California for further consideration of the application for habeas corpus. *Frank S. Connor, pro se* and *Mr. H. Thomas Austern* for petitioner. *Messrs. Earl Warren,* Attorney General of California, and *Everett W. Mattoon,* Assistant Attorney General, for respondents. Reported below: 15 Cal. 2d 161.

No. 87. WHITE *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. March 25, 1940. *Per Curiam:* The motion for leave to file a petition for rehearing is granted, and the petition for rehearing is also granted. The order entered November 13, 1939, 308 U. S. 608, is vacated. The motion for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted and the judgment is reversed. *Chambers* v. *Florida, ante,* p. 227; *Canty* v. *Alabama, ante,* p. 629. The mandate is ordered to issue forthwith. *Mr. Carter Wesley* for petitioner. Reported below: 139 Texas Crim. Rep. —; 128 S. W. 2d 51.

No. 698. FRAME *v.* HUDSPETH, WARDEN. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. March 25, 1940. *Per Curiam:* The motion for leave to proceed *in forma pauperis* is granted. The petition for certiorari is also granted, and, upon consent of the Solicitor General, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for the purpose of making a full inquiry into the mental status of the petitioner at the time he entered the pleas of guilty. *Perry Frame, pro se.* Reported below: 109 F. 2d 356.

No. 463. BERGER, RECEIVER, *v.* CHASE NATIONAL BANK;

No. 464. SCHRAM, RECEIVER, *v.* SAME;

No. 465. WARDELL, RECEIVER, *v.* SAME;

No. 466. YOUNG, SUCCESSOR TO HARDEE, RECEIVER, *v.* SAME; and

No. 467. FEUCHT ET AL., LIQUIDATING TRUSTEES, *v.* SAME. On petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. March 25, 1940. The petition for writs of certiorari is granted, and the judgments of the Circuit Court of Appeals are affirmed. *Woodring* v. *Wardell, ante,* p. 527; *Inland Waterways Corp.* v. *Young, ante,* p. 517. The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE ROBERTS dissent. MR. JUSTICE MURPHY took no part in the consideration or decision of this cause. *Messrs. John Vance Hewitt, Swagar Sherley, Charles F. Wilson, Brice Clagett, George B. Springston, Martin Conboy,* and *George P. Barse* for petitioners. *Mr. Henry Root Stern* for respondent. Reported below: 105 F. 2d 1001.

No. 781. RAYBURN ET AL. *v.* RICHARDSON ET AL. Appeal from the Court of Civil Appeals, 5th Supreme Judi-

cial District, of Texas. March 25, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Hendrick* v. *Maryland,* 235 U. S. 610; *Sproles* v. *Binford,* 286 U. S. 374, 388–389; *Hicklin* v. *Coney,* 290 U. S. 169, 173. *Mr. William H. Snyder* for appellants. *Messrs. Gerald C. Mann* and *Glenn R. Lewis* for appellees. Reported below: 131 S. W. 2d 1000.

No. 788. GREEN POINT SAVINGS BANK *v.* BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD ET AL. Appeal from the Supreme Court of New York. March 25, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Cleveland & Pittsburgh R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 344; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700; (2) *Euclid* v. *Ambler,* 272 U. S. 365; *Zahn* v. *Board of Public Works,* 274 U. S. 325; *Lewis* v. *Mayor,* 290 U. S. 585. *Mr. Irving Mariash* for appellant. *Mr. Franklin T. Voelker* for appellees. Reported below: 257 App. Div. 843; 281 N. Y. 534; 12 N. Y. S. 2d 79; 24 N. E. 2d 319.

No. —, original. EX PARTE LOUIS E. SIMMONDS; and
No. —, original. EX PARTE HENRY LONG. March 25, 1940. Motions for leave to file petitions for writs of habeas corpus denied.

No. 621. VILES *v.* PRUDENTIAL INSURANCE CO. March 25, 1940. Petition for leave to file an amended complaint denied. *Edmond L. Viles, pro se.* Reported below: 107 F. 2d 696.

No. 355. UNITED STATES *v.* MOSCOW FIRE INSURANCE CO. ET AL. See *post,* p. 697.

No. 152. CHANNAN SINGH *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. Certiorari, 308 U. S. 533, to the Circuit Court of Appeals for the Ninth Circuit. Argued March 26, 1940. Decided April 1, 1940. *Per Curiam:* The judgment is affirmed. *Low Wah Suey* v. *Backus,* 225 U. S. 460, 468; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Bilokumsky* v. *Tod,* 263 U. S. 149, 157. *Mr. Marshall B. Woodworth* submitted for petitioner. *Mr. Gerard D. Reilly,* with whom *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip, W. Marvin Smith,* and *Albert E. Reitzel* were on the brief, for respondent. Reported below: 103 F. 2d 303.

No. 809. PEOPLES GAS LIGHT & COKE CO. *v.* HART ET AL. Appeal from the Supreme Court of Illinois. April 1, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 304–305; *Lindheimer* v. *Illinois Tel. Co.,* 292 U. S. 151, 164; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290, 298; *Townsend* v. *Yeomans,* 301 U. S. 441, 450–451. *Messrs. Francis L. Daily, Clay Judson, William P. Sidley,* and *James F. Oates, Jr.* for appellant. *Messrs. John E. Cassidy, Montgomery S. Winning, Harry R. Booth,* and *Barnet Hodes* for appellees. Reported below: 367 Ill. 435; 373 *id.* 31; 287 Ill. App. 379; 5 N. E. 2d 285; 11 N. E. 2d 929; 25 N. E. 2d 482.

No. 14, original. MCCULLOUGH ET AL., DOING BUSINESS AS MCCULLOUGH TOOL CO., *v.* COSGRAVE, JUDGE, FOR THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA. April 1, 1940. *Per Curiam:* The motion for leave to file petition for mandamus is granted, and the

return to the order to show cause is treated as an answer to the petition. The District Judge is directed to vacate the order dated January 15, 1940, in the cases of Kammerer Corporation and Baash-Ross Tool Company *v.* Ira J. McCullough et al., and Ira J. McCullough *v.* Baash-Ross Tool Company and Kammerer Corporation, referring these cases to a Master for trial. It is further ordered that the trial of these cases be had by the District Court in due course without postponement of the trial to that of other cases not entitled to a preference, but with such arrangement as to the particular Judge who shall conduct the trial as may be consistent with the court's convenience. Rules of Civil Procedure, Rule 53 (b); *Los Angeles Brush Manufacturing Co.* v. *James,* 272 U. S. 701. *Mr. Ford W. Harris* for petitioners. *Messrs. Frederick S. Lyon, Leonard S. Lyon,* and *Henry S. Richmond* for respondent.

No. —, original. Ex parte Glen W. Shafer; and No. —, original. Ex parte Arthur E. Hansen. April 1, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte J. C. Moore. April 1, 1940. Motion for leave to file petition for writ of mandamus denied.

No. 10, original. Texas *v.* New Mexico et al. April 1, 1940. The motion of the complainant to apply funds in the registry of the Court to reimburse El Paso County Water Improvement District No. 1 for costs advanced by said District is denied, and the amount remaining in the registry of the Court is directed to be paid to the Attorney General of the State for such disposition as the State may require.

No. 13, original. PENNSYLVANIA *v.* NEW JERSEY ET AL. April 1, 1940. The answers are received and ordered filed. The cause is set for hearing on the Bill of Complaint and Answers and assigned for argument on Monday, April 22, next.

No. 674. UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO. April 1, 1940. Motion of the Commonwealth of Virginia for leave to intervene denied, with permission to file a brief and participate in oral argument as *amicus curiae*. MR. CHIEF JUSTICE HUGHES took no part in the consideration or decision of this application. Reported below: 23 F. Supp. 83.

No. 2, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, original. NEW YORK *v.* ILLINOIS ET AL. April 3, 1940.

ORDER.

Upon consideration of the return of the States who are complainants in the above entitled causes to the rule issued January 29, 1940, requiring them to show cause why the petition of the State of Illinois for temporary modification of the decree of this Court entered April 21, 1930, and enlarged May 22, 1933, should not be granted, and of the argument had thereon,

IT IS ORDERED that the petition of the State of Illinois and the return of the complainant States to the order to show cause be referred to Monte M. Lemann, Esquire, as a Special Master, with directions and authority to make summary inquiry and to report to this Court with all convenient speed with respect to the actual condition of the Illinois Waterway by reason of the introduction of untreated sewage, and whether, and to what extent, if

any, that condition constitutes an actual menace to the health of the inhabitants of the complaining communities, and also with respect to the feasibility of remedial or ameliorating measures available to the State of Illinois without an increase in the diversion of water from Lake Michigan.

The Special Master is authorized to employ stenographic and clerical help, to fix times and places for taking evidence, to issue subpoenas to witnesses, including those of his own selection, and to administer oaths. When the report of the Special Master is filed the clerk of the Court shall cause the same to be printed. The Special Master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants and the cost of printing his report shall be charged against and be borne by the parties in such proportions as the Court hereafter may direct.

If the appointment herein made of a Special Master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

[See *ante*, p. 569.]

No. 767. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WOOD ET AL., TRUSTEES. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. April 8, 1940. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings. *Helvering* v. *Bruun*, *ante*, p. 461. *Solicitor General Biddle* for petitioner. Reported below: 107 F. 2d 869.

No. 823. A. M. KLEMM & SON *v.* WINTER HAVEN ET AL. Appeal from the Supreme Court of Florida. April 8, 1940. *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, 460–461; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450. *Mr. Harvey C. Crittenden* for appellant. *Mr. Henry M. Sinclair* for appellees. Reported below: 140 Fla. 60; 192 So. 652.

No. 840. ACME FAST FREIGHT, INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. April 8, 1940. *Per Curiam:* The decree is affirmed. *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U. S. 235; *Northern Ry. Co.* v. *O'Connor,* 232 U. S. 508. *Mr. J. R. Turney* for appellants. *Mr. J. Stanley Payne* for appellees. Reported below: 30 F. Supp. 968.

No. —, original. EX PARTE ROBERT CONSIDINE. April 8, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. 674. UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO. April 8, 1940. The motion of the States of Virginia and West Virginia for a continuance is granted and the case is assigned for argument on Monday, October 14, next. The CHIEF JUSTICE took no part in the consideration and decision of this application.

No. 822. WASHINGTON EX REL. COLUMBIA BROADCASTING CO. *v.* SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY ET AL. Appeal from the Supreme

Court of Washington. April 8, 1940. The appeal is dismissed for want of jurisdiction. § 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) of the Judicial Code (43 Stat. 936, 938), certiorari is granted. *Messrs. Cassius E. Gates* and *Godfrey Goldmark* for appellant. Reported below: 1 Wash. 2d 379; 96 P. 2d 248.

No. 768. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CENTER INVESTMENT CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. April 22, 1940. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed and the cause is remanded to the Circuit Court of Appeals with directions to remand to the Board of Tax Appeals for findings in the light of the principles established in *Helvering* v. *Bruun, ante,* p. 461, and for findings and decision on the other questions left undetermined by the Board. *Solicitor General Biddle* for petitioner. *Mr. D. G. Eggerman* for respondent. Reported below: 108 F. 2d 190.

No. 844. FLORIDA EX REL. GARLAND *v.* CITY OF WEST PALM BEACH. Appeal from the Supreme Court of Florida. April 22, 1940. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the state court is based upon a non-federal ground adequate to support it. *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271; *Doyle* v. *Atwell,* 261 U. S. 590; *McCoy* v. *Shaw,* 277 U. S. 302. *Messrs. Stuart B. Warren, George W. Wylie,* and *J. Velma Keen* for appellant. Reported below: 141 Fla. 244; 193 So. 297.

No. 845. FLORIDA EX REL. YOEMAN *v.* CITY OF SARASOTA; and

No. 846. FLORIDA EX REL. GARLAND *v.* SAME. Appeals from the Supreme Court of Florida. April 22, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the reason that the judgments of the state court are based upon a non-federal ground adequate to support them. *Farson, Son & Co.* v. *Bird,* 248 U. S. 268, 271; *Doyle* v. *Atwell,* 261 U. S. 590; *McCoy* v. *Shaw,* 277 U. S. 302. *Messrs. Stuart B. Warren, George W. Wylie,* and *J. Velma Keen* for appellants. *Messrs. J. J. Williams, Jr.* and *Francis C. Dart* for appellee. Reported below: 141 Fla. 256; 142 *id.* 371; 194 So. 875; 193 *id.* 299.

No. 836. SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, ET AL. *v.* EVANS, BUILDING AND LOAN COMMISSIONER. Appeal from the Supreme Court of California. April 22, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443. *Messrs. Wm. M. Cannon* and *W. H. Orrick* for appellants. *Messrs. O. K. Cushing, Charles S. Cushing, Everett S. Layman,* and *Bartley C. Crum* for appellee. Reported below: 14 Cal. 2d 563; 96 P. 2d 107.

No. 838. MOON *v.* JONES, COUNTY CLERK; and

No. 862. FRANKLIN SOCIETY FOR HOME BUILDING & SAVINGS *v.* BENNETT, ATTORNEY GENERAL, ET AL. Appeals from the Supreme Court of New York. April 22, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Bell's Gap R. Co.* v. *Pennsylvania,* 134

U. S. 232, 237; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 138–139; *Alward* v. *Johnson,* 282 U. S. 509, 513–514. *Messrs. Seth T. Cole, Martin Saxe, Edward F. Colladay,* and *S. F. Colladay* for appellant in No. 838. *Messrs. James A. Davis* and *Leon Quat* for appellant in No. 862. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, *Henry Epstein,* Solicitor General, and *Jack Goodman,* Assistant Attorney General, for appellees. Reported below: No. 838, 282 N. Y. 553; 24 N. E. 2d 981; 25 N. E. 2d 396. No. 862, 257 App. Div. 486; 282 N. Y. 79; 14 N. Y. S. 2d 49; 24 N. E. 2d 854.

No. 87. WHITE *v.* TEXAS. Certiorari, *ante,* p. 631, to the Court of Criminal Appeals of Texas. April 22, 1940. This cause is set for May 20, 1940, in order to afford to the State of Texas the opportunity to present its contentions upon the questions set forth in subdivisions (e), (f), (g), (h), and (j) of paragraph 4 of its petition for rehearing. The case will be heard on briefs and oral argument, or on briefs alone if that is desired, briefs to be filed and served on or before the date above mentioned. *Mr. Carter Wesley* for petitioner. *Messrs. Gerald C. Mann,* Attorney General of Texas, *George W. Barcus,* Assistant Attorney General, and *Lloyd W. Davidson* for respondent. Reported below: 139 Texas Crim. —; 128 S. W. 2d 51.

No. —, original. EX PARTE ALBERT LEIGHTON. April 22, 1940. Motion for leave to file petition for writ of mandamus denied.

No. —, original. EX PARTE SAMUEL WHITE; and

No. —, original. EX PARTE JAMES J. WALSH. April 22, 1940. Motions for leave to file petitions for writs of habeas corpus denied.

No. —. Ex parte E. R. Lindsey. April 22, 1940. Application denied.

No. 499. Federal Communications Commission *v.* Sanders Brothers Radio Station. April 22, 1940. The opinion in this case is amended by inserting the word "financially" between the words "be" and "injured," in the last line on page 5, and by striking from the opinion the first full sentence, beginning "In" and ending "remedy," on page 6. The petition for rehearing is denied.

Opinion reported as amended, *ante,* p. 470.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.

No. 582. Puerto Rico *v.* Rubert Hermanos, Inc. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby, Nathan R. Margold,* and *George A. Malcolm* for petitioner. *Mr. Henri Brown* for respondent. By leave of Court, *Solicitor General Jackson* filed a brief on behalf of the United States, as *amicus curiae,* in support of the petition. Reported below: 106 F. 2d 754.

No. 587. United States *v.* City and County of San Francisco. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Jackson* for the United States. *Messrs. John J. O'Toole, Dion R. Holm, Robert M. Searls,* and *Garret W. McEnerney* for respondent. Reported below: 106 F. 2d 569.

No. 595. Kersh Lake Drainage District et al. *v.* Johnson. January 29, 1940. Petition for writ of

certiorari to the Supreme Court of Arkansas granted. *Mr. George B. Rose* for petitioners. *Messrs. Charles T. Coleman* and *Walter G. Riddick* for respondent. Reported below: 198 Ark. 743; 131 S. W. 2d 620; 132 S. W. 2d 658.

No. 579. UNION JOINT STOCK LAND BANK OF DETROIT *v.* BYERLY. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs A. G. Masters* and *Ralph G. Martin* for petitioner. *Messrs. Elmer McClain* and *William Lemke* for respondent. Reported below: 106 F. 2d 576.

No. 597. WESTERN UNION TELEGRAPH CO. *v.* NESTER ET AL., COPARTNERS. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Francis R. Stark, Alfred Sutro, Oscar Lawler,* and *Francis R. Kirkham* for petitioner. *Mr. Earl C. Demoss* for respondents. Reported below: 106 F. 2d 587.

No. 593. PERKINS, SECRETARY, ET AL. *v.* LUKENS STEEL CO. ET AL. February 5, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Jackson* for petitioners. *Messrs. William Clarke Mason, O. Max Gardner, Frederick H. Knight, Harold F. McGuire,* and *Roberts B. Thomas* for respondents. Reported below: 70 App. D. C. 354; 107 F. 2d 627.

No. 613. UNITED STATES *v.* GEORGE S. BUSH & CO. February 5, 1940. Petition for writ of certiorari to the Court of Customs and Patent Appeals granted. *Solicitor*

General Jackson for the United States. *Mr. George R. Tuttle* for respondent. Reported below: 27 C. C. P. A. (Customs) —; 104 F. 2d 368.

No. 426. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LEONARD. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Messrs. J. Donald Duncan* and *James B. Alley* for respondent. Reported below: 105 F. 2d 900.

No. 427. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FULLER. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Jackson* for petitioner. *Mr. Lucius F. Robinson* for respondent. Reported below: 105 F. 2d 903.

No. 632. CANTWELL ET AL. *v.* CONNECTICUT. See *ante*, p. 626.

No. 638. APEX HOSIERY CO. *v.* LEADER ET AL. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Sylvan H. Hirsch, Allen J. Levin, Arno P. Mowitz,* and *Stanley Folz* for petitioner. *Messrs. Isadore Katz* and *A. J. Nydick* for respondents. Reported below: 108 F. 2d 71.

No. 662. DAMPSKIBSSELSKABET DANNEBROG ET AL. *v.* SIGNAL OIL & GAS CO. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Lane Summers, W. H.*

Hayden, and *F. T. Merritt* for petitioners. *Mr. Glenn J. Fairbrook* for respondent. Reported below: 106 F. 2d 896.

No. 671. SONTAG CHAIN STORES CO. *v.* NATIONAL NUT CO. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Wm. Nevarre Cromwell, Frank H. Towner,* and *Guy A. Gladson* for petitioner. *Messrs. Hugh N. Orr* and *Charles S. Evans* for respondent. Reported below: 107 F. 2d 318.

No. 682. ANDERSON *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 683. PRICHARD *v.* SAME. March 4, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Chas. H. Garnett* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for respondent. Reported below: 107 F. 2d 459.

No. 690. MINERSVILLE SCHOOL DISTRICT ET AL. *v.* GOBITIS. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Joseph W. Henderson, Thomas F. Mount,* and *George M. Brodhead, Jr.* for petitioners. *Messrs. Hayden C. Covington* and *Joseph F. Rutherford* for respondent. Reported below: 108 F. 2d 683.

No. 643. WARREN ET AL. *v.* PALMER ET AL. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Erwin N. Griswold, John Noble, Jr.,* and *Paul E. Troy* for

petitioners. *Mr. Hermon J. Wells* for respondents. Reported below: 108 F. 2d 164.

No. 674. UNITED STATES *v.* APPALACHIAN ELECTRIC POWER CO. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. The CHIEF JUSTICE took no part in the consideration and decision of this application. *Solicitor General Biddle* and *Mr. David W. Robinson, Jr.* for the United States. *Messrs. Raymond T. Jackson, A. Henry Mosle, Hugo Kohlmann,* and *John L. Abbot* for respondent. Reported below: 107 F. 2d 769.

No. 634. CANTY *v.* ALABAMA. See *ante,* p. 629.

No. 664. AMERICAN MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. *See ante,* p. 629.

No. 681. RAILROAD COMMISSION OF TEXAS ET AL. *v.* ROWAN & NICHOLS OIL CO. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Gerald C. Mann,* Attorney General of Texas, and *W. F. Moore,* First Assistant Attorney General, for petitioners. *Messrs. Dan Moody* and *Rice M. Tilley* for respondent. Reported below: 107 F. 2d 70.

No. 87. WHITE *v.* TEXAS. See *ante,* p. 631.

No. 698. FRAME *v.* HUDSPETH, WARDEN. See *ante,* p. 632.

No. 463. BERGER, RECEIVER, *v.* CHASE NATIONAL BANK;

No. 464. SCHRAM, RECEIVER, *v.* SAME;

No. 465. WARDELL, RECEIVER, *v.* SAME;

No. 466. YOUNG, SUCCESSOR TO HARDEE, RECEIVER, *v.* SAME; and

No. 467. FEUCHT ET AL., LIQUIDATING TRUSTEES, *v.* SAME. See *ante*, p. 632.

No. 584. CRANE-JOHNSON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. See *post*, p. 692.

No. 675. UNITED STATES *v.* STEWART. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Biddle* for the United States. *Messrs. W. Glenn Harmon, Ernest L. Wilkinson,* and *John W. Cragun* for respondent. Reported below: 106 F. 2d 405.

No. 705. UNITED STATES *v.* DICKERSON. March 25, 1940. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biddle* for the United States. *Messrs. Herman J. Galloway, George R. Shields, John W. Gaskins,* and *Fred W. Shields* for respondent. Reported below: 89 Ct. Cls. 520.

No. 715. UNITED STATES *v.* SUMMERLIN, ANCILLARY ADMINISTRATRIX. March 25, 1940. Petition for writ of certiorari to the Supreme Court of Florida granted. *Solicitor General Biddle* for the United States. *Mr. Asbury Summerlin* for respondent. Reported below: 140 Fla. 475; 191 So. 842.

No. 650. SCHRIBER-SCHROTH CO. *v.* CLEVELAND TRUST CO. ET AL.;

No. 651. ABERDEEN MOTOR SUPPLY CO. *v.* SAME; and

No. 652. F. E. ROWE SALES CO. *v.* SAME. March 25, 1940. Motion to consider the petition for writs of certiorari on a reduced number of copies of the record, and petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit, granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. John H. Bruninga* and *John H. Sutherland* for petitioners. *Messrs. Arthur C. Denison, F. O. Richey, Wm. C. McCoy,* and *Milton Tibbetts* for respondents. Reported below: 108 F. 2d 109.

No. 733. DECKERT ET AL. *v.* INDEPENDENCE SHARES CORP. ET AL.; and

No. 734. SAME *v.* PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES. March 25, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Harry Shapiro* for petitioners. *Messrs. Frank Rogers Donahue, George M. Kevlin,* and *Robert F. Irwin, Jr.* for Independence Shares Corp. et al.; and *Mr. Walter Biddle Saul* for the Pennsylvania Co.,—respondents. Reported below: 108 F. 2d 51.

No. 752. BORCHARD ET AL. *v.* CALIFORNIA BANK ET AL. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. William Lemke* and *Lloyd S. Nix* for petitioners. *Messrs. Thomas W. Henderson, Jr.* and *Chas. E. Donnelly* for respondents. Reported below: 107 F. 2d 96.

No. 770. MILK WAGON DRIVERS UNION LOCAL 753 ET AL. *v.* LAKE VALLEY FARM PRODUCTS, INC., ET AL. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Abraham W. Brussell* and *David A. Riskind* for petitioners. *Mr. Arthur R. Seelig* for respondents. Reported below: 108 F. 2d 436.

No. 796. SECURITIES & EXCHANGE COMMISSION *v.* UNITED STATES REALTY & IMPROVEMENT CO. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* and *Mr. Chester T. Lane* for petitioner. *Messrs. Joseph M. Hartfield* and *Charles W. Dibbell* for respondent. Reported below: 108 F. 2d 794.

No. 732. INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL AND DIE MAKERS LODGE NO. 35 *v.* NATIONAL LABOR RELATIONS BOARD. April 1, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Mr. Joseph A. Padway* for petitioners. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 110 F. 2d 29.

No. 767. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WOOD ET AL., TRUSTEES. See *ante,* p. 637.

No. 759. BRIDGES *v.* CALIFORNIA. April 8, 1940. Petition for writ of certiorari to the Supreme Court of California granted. *Mr. A. L. Wirin* for petitioner. *Messrs. Wm. B. McKesson, Allen W. Ashburn,* and *Michael G. Luddy* for respondent. By leave of Court, briefs of *amici*

curiae were filed by *Mr. Osmond K. Fraenkel,* on behalf of the American Civil Liberties Union; and by *Messrs. Harry Graham Balter, Carey McWilliams, Ellis E. Patterson,* and *George Bodle,* on behalf of the National Lawyers Guild, Los Angeles Chapter,—in support of the petition. Reported below: 14 Cal. 2d 464; 94 P. 2d 983.

No. 783. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HORST. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. Harry H. Wiggins* for respondent. Reported below: 107 F. 2d 906.

No. 799. SIBBACH *v.* WILSON & Co. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Lambert Kaspers* and *Royal W. Irwin* for petitioner. *Mr. J. F. Dammann* for respondent. Reported below: 108 F. 2d 415.

No. 813. MONTGOMERY WARD & Co. *v.* DUNCAN. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. J. Merrick Moore* for petitioner. *Messrs. Edward H. Coulter* and *Kenneth W. Coulter* for respondent. Reported below: 108 F. 2d 848.

No. 822. WASHINGTON EX REL. COLUMBIA BROADCASTING Co. *v.* SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY ET AL. See *ante,* p. 638.

No. 768. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CENTER INVESTMENT Co. See *ante,* p. 639.

No. 818. SMITH *v.* TEXAS. April 22, 1940. Motion for leave to proceed further *in forma pauperis,* and petition for writ of certiorari to the Court of Criminal Appeals of Texas, granted. *Mr. William A. Vinson* for petitioner. Reported below: 139 Tex. Crim. —; 136 S. W. 2d 842.

No. 726. FLEISHER ENGINEERING & CONSTRUCTION CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF HALLENBECK. See *post,* p. 693.

No. 778. WILSON & CO., INC. *v.* UNITED STATES;

No. 779. WILSON & CO., INC., OF KANSAS *v.* SAME; and

No. 780. T. M. SINCLAIR & CO. *v.* SAME. April 22, 1940. Petition for writs of certiorari to the Court of Claims granted. *Messrs. J. Harry Covington, Dean G. Acheson,* and *Paul E. Shorb* for petitioners. *Solicitor General Biddle, Assistant Attorney Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 90 Ct. Cls. 131; 30 F. Supp. 672.

No. 789. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* BROWNING ET AL., CONSTITUTING THE STATE BOARD OF EQUALIZATION. April 22, 1940. Petition for writ of certiorari to the Supreme Court of Tennessee granted. *Messrs. Wm. H. Swiggart* and *Edwin F. Hunt* for petitioner. *Mr. W. F. Barry* for respondents. Reported below: 176 Tenn.—; 140 S. W. 2d 781.

No. 814. AMERICAN UNITED MUTUAL LIFE INSURANCE CO. *v.* CITY OF AVON PARK, FLORIDA. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Giles J.*

Patterson for petitioner. *Mr. Robert J. Pleus* for respondent. Reported below: 108 F. 2d 1010.

No. 815. FIDELITY UNION TRUST CO. ET AL., EXECUTORS, ET AL. *v.* FIELD. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Francis F. Welsh* for petitioners. *Mr. Russell C. MacFall* for respondent. Reported below: 108 F. 2d 521.

No. 774. BACARDI CORPORATION *v.* BONET, TREASURER, ET AL. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Edward S. Rogers, Thomas Hunt, Jerome L. Isaacs, Karl D. Loos,* and *Preston B. Kavanagh* for petitioner. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* for Bonet, Treasurer; and *Mr. David A. Buckley, Jr.* for Destileria Serralles, Inc.,—respondents. Reported below: 109 F. 2d 57.

No. 782. WEST INDIA OIL CO. (Puerto Rico) *v.* BONET, TREASURER OF PUERTO RICO. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. James R. Beverley* for petitioner. *Messrs. William Cattron Rigby, George A. Malcolm,* Attorney General of Puerto Rico, and *Nathan R. Margold* for respondent. Reported below: 108 F. 2d 144.

No. 803. HANSBERRY ET AL. *v.* LEE ET AL. April 22, 1940. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Mr. Earl B. Dickerson* for

petitioners. *Messrs. Angus Roy Shannon* and *William C. Graves* for respondents. Reported below: 372 Ill. 369; 24 N. E. 2d 37.

No. 825. L. SINGER & SONS ET AL. *v.* UNION PACIFIC RAILROAD CO.; and

No. 826. KANSAS CITY, MISSOURI, *v.* L. SINGER & SONS ET AL. April 22, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. John M. Cleary* for petitioners. *Mr. Henry N. Ess* for Union Pacific Railroad Co., respondent. Reported below: 109 F. 2d 493.

No. 581. PALMER ET AL., TRUSTEES, *v.* CONNECTICUT RAILWAY & LIGHTING CO. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. James Garfield* and *Hermon J. Wells* for petitioners. *Mr. George W. Martin* for respondent. Reported below: 109 F. 2d 568.

DECISIONS DENYING CERTIORARI, FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.

No. 605. MILAR *v.* BURLEIGH, EXECUTRIX, ET AL. January 29, 1940. Petition for writ of certiorari to the Supreme Court of Ohio, and motion for leave to proceed further *in forma pauperis,* denied. *Anna May Milar, pro se.* Reported below: 135 Ohio St. 587; 21 N. E. 2d 677.

No. 617. STEWART *v.* ST. SURE, U. S. DISTRICT JUDGE. January 29, 1940. 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,* de-

nied. *J. L. Stewart, pro se.* Reported below: 109 F. 2d 162.

No. 649. Cox *v.* WILSON, WARDEN, ET AL. January 29, 1940. Petition for writ of certiorari to the Washington County Court, of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Thomas R. Cox, pro se.*

No. 625. GETZ ET AL. *v.* BALTIMORE & OHIO R. CO. ET AL. January 29, 1940. The motion to dispense with the printing of the record is granted. The petition for writ of certiorari to the District Court of the United States for the District of Maryland is denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. Meyer Abrams* and *Gersh I. Moss* for petitioners. *Messrs. Henry W. Anderson* and *Leonard D. Adkins* for respondents. Reported below: 29 F. Supp. 608.

No. 604. STANDARD OIL COMPANY OF CALIFORNIA ET AL. *v.* UNITED STATES. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE STONE took no part in the consideration and decision of this application. *Messrs. Oscar Lawler, Donald R. Richberg, Eugene M. Prince,* and *William H. Burges* for petitioners. *Solicitor General Jackson, Mr. John W. Preston* and *Annette Abbott Adams* for the United States. By leave of Court, briefs of *amici curiae* were filed by *Messrs. Edward D. Landels* and *Stanley A. Weigel,* on behalf of the California Land Title Assn.; and by *Messrs Earl Warren,* Attorney General of California, *Robert W. Harrison,* Chief Assistant Attorney General, and *F. Walter French,* Deputy Attorney General, on behalf of that State,—in support of the petition. Reported below: 107 F. 2d 402.

No. 583. WOODALL *v.* COMMISSIONER OF INTERNAL REVENUE. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Todd W. Johnson* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* for respondent. Reported below: 105 F. 2d 474.

No. 600. WILLIAMS ET AL. *v.* EMERY BIRD THAYER DRY GOODS CO. ET AL. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. R. B. Caldwell, Barton Corneau,* and *Henry M. Channing* for petitioners. *Messrs. Frederick H. Wood* and *Armwell L. Cooper* for respondents. Reported below: 107 F. 2d 965.

No. 561. CHEROKEE FUEL CO. *v.* UNITED STATES. January 29, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. M. Walton Hendry* and *Josephus C. Trimble* for petitioner. *Solicitor General Jackson, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 89 Ct. Cls. 279.

No. 590. GEIBEL *v.* SCOTT, JUDGE OF THE SUPERIOR COURT OF CALIFORNIA. January 29, 1940. Petition for writ of certiorari to the Supreme Court of California denied. *Martin E. Geibel, pro se. Mr. W. B. McKesson* for respondent.

No. 601. RUHLIN ET AL. *v.* NEW YORK LIFE INSURANCE CO. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Messrs. John E. Evans, Sr. and *Charles H. Sachs* for petitioners. *Mr. William H. Eckert* for respondent. Reported below: 106 F. 2d 921.

No. 602. HOUSMAN *v.* COMMISSIONER OF INTERNAL REVENUE. January 29, 1940. Petition for writ of certiorari 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, Arnold Raum,* and *F. E. Youngman* for respondent. Reported below: 105 F. 2d 973.

No. 607. MCCURDY *v.* NEW YORK LIFE INSURANCE CO. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Robert C. Faulston* for petitioner. *Messrs. Louis H. Cooke* and *Austin M. Cowan* for respondent. Reported below: 106 F. 2d 181.

No. 618. GEORGE ALLISON & CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION. January 29, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Harrison Tweed* and *F. Trowbridge vom Baur* for petitioners. *Messrs. E. M. Reidy* and *Daniel W. Knowlton* for respondent. Reported below: 70 App. D. C. 375; 107 F. 2d 180.

No. 624. KROGER GROCERY & BAKING CO. *v.* BARKER. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wayne Ely* for petitioner. *Mr. Scerial Thompson* for respondent. Reported below: 107 F. 2d 530.

No. 626. FRANCE MANUFACTURING CO. *v.* JEFFERSON ELECTRIC CO. January 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Albert R. Teare* and *Arthur C. Denison* for petitioner. *Messrs. Frank Parker Davis* and *John A. Dienner* for respondent. Reported below: 106 F. 2d 605.

No. 614. PUBLIC SERVICE COMMISSION *v.* WISCONSIN TELEPHONE CO. On petition for writ of certiorari to the Supreme Court of Wisconsin. February 5, 1940. The motion of the National Association of Railroad and Utilities Commissioners for leave to file a brief *amicus curiae* is granted. The petition for writ of certiorari is denied upon the ground that the Court is unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. Judicial Code, § 237 (b), 28 U. S. C. 344 (b). *Lynch* v. *New York,* 293 U. S. 52; *Honeyman* v. *Hanan,* 300 U. S. 14; *New York City* v. *Central Savings Bank,* 306 U. S. 661; *McGoldrick* v. *Gulf Oil Corp., ante,* p. 2. *Mr. Harold M. Wilkie* for petitioner. *Messrs. Edwin S. Mack, J. Gilbert Hardgrove, Frederic Sammond, Baxter Milne,* and *C. M. Bracelen* for respondent. By leave of Court, briefs of *amici curiae* were filed by *Solicitor General Biddle* and *Messrs. J. Phillip Wenchel, Daniel W. Knowlton, David W. Robinson, Jr.,* and *William J. Dempsey,* on behalf of the United States; and by *Messrs. John E. Benton* and *Clyde S. Bailey,* on behalf of the National Association of Railroad and Utilities Commissioners,—in support of the petition. Reported below: 232 Wis. 274; 287 N. W. 122, 593.

No. 628. STEWART ET AL. *v.* CAPITAL TRANSIT CO. February 5, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and mo-

tion for leave to proceed further *in forma pauperis,* denied. *Mr. Emory B. Smith* for petitioners. Reported below: 70 App. D. C. 346; 108 F. 2d 1.

No. 661. WEST *v.* WASHINGTON ET AL. February 5, 1940. Petition for writ of certiorari to the Supreme Court of Washington, and motion for leave to proceed further *in forma pauperis,* denied. *Fred Hartzell West, pro se.*

No. 670. ROBERTSON ET AL. *v.* CHRONISTER ET AL. February 5, 1940. Petition for writ of certiorari to the Supreme Court of Arkansas, and motion for leave to proceed further *in forma pauperis,* denied. *Dora Robertson, pro se.* Reported below: 199 Ark. 373; 134 S. W. 2d 517.

No. 631. PARKER *v.* AMERICAN SOCIETY OF MECHANICAL ENGINEERS. February 5, 1940. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis,* denied. *John Parker, pro se.* Reported below: 281 N. Y. 586, 692; 22 N. E. 2d 163; 23 N. E. 2d 20.

No. 639. SHELLEY *v.* JORDAN, ASSISTANT DISTRICT DIRECTOR OF NATURALIZATION AND IMMIGRATION. February 5, 1940. 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 for the reason that the Court, upon examination of the papers herein submitted, finds that the application for a writ of certiorari was not filed within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940). *Rebecca Shelley, pro se.* Reported below: 106 F. 2d 1016.

No. 589. C. W. BLAKESLEE & SONS, INC., ET AL. *v.* UNITED STATES. February 5, 1940. Motion to remand, and petition for writ of certiorari to the Court of Claims, denied. *Mr. Raymond E. Hackett* for petitioners. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Robert K. McConnaughey* for the United States. Reported below: 89 Ct. Cls. 226.

No. 615. AMERICAN FEDERATION OF LABOR ET AL. *v.* SWING ET AL. February 5, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied for the want of a final judgment. *Messrs. Walter F. Dodd* and *Daniel D. Carmell* for petitioners. *Messrs. Samuel A. Rinella* and *Myer N. Rosengard* for respondents. Reported below: 298 Ill. App. 63; 372 Ill. 91; 18 N. E. 2d 258; 22 N. E. 2d 857.

No. 599. SANFORD CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 106 F. 2d 882.

No. 606. LEE, TRADING AS VITAMIN PRODUCTS CO., *v.* UNITED STATES. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Francis E. McGovern* for petitioner. *Solicitor General Jackson, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *Benjamin M. Parker* for the United States. Reported below: 107 F. 2d 522.

No. 609. COHEN, TRADING AS STEWART'S JEWELRY SHOP *v.* GLOBE INDEMNITY CO. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Horace S. Whitman* for petitioner. *Mr. Edward H. Cushman* for respondent. Reported below: 106 F. 2d 687.

No. 611. LUZIERS', INC. *v.* NEE, COLLECTOR OF INTERNAL REVENUE. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John B. Gage* and *Albert F. Hillix* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* for respondent. Reported below: 106 F. 2d 130.

No. 612. LEWIS *v.* VENDOME BAGS, INC. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeal for the Second Circuit denied. *Messrs. Samuel E. Darby, Jr.* and *Walter A. Darby* for petitioner. *Mr. Michael Halperin* for respondent. Reported below: 108 F. 2d 16.

No. 616. SEVERSON *v.* HANFORD TRI-STATE AIRLINES, INC., ET AL. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. W. Jensch* for petitioner. *Messrs. Wilfrid E. Rumble* and *Pierce Butler, Jr.,* for respondents. Reported below: 105 F. 2d 622.

No. 619. HARDONCOURT *v.* HARDONCOURT. February 5, 1940. Petition for writ of certiorari to the Supreme Court of New York denied. *Arthur Hardoncourt, pro se.*

Mr. James W. Bailey for respondent. Reported below: 254 App. Div. 899; 255 *id.* 779; 281 N. Y. 599, 678; 7 N. Y. S. 2d 110; 22 N. E. 2d 168, 873.

No. 623. PORT OF SEATTLE *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Glenn J. Fairbrook* and *George Donworth* for petitioner. *Mr. Loren Grinstead* for respondent. Reported below: 106 F. 2d 777.

No. 586. WILLIAMS *v.* ALDREDGE, SHERIFF. February 5, 1940. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. Elbert P. Tuttle* for petitioner. *Mr. A. S. Skelton* for respondent. Reported below: 188 Ga. 607; 4 S. E. 2d 469.

No. 594. DUNHAM *v.* OMAHA & COUNCIL BLUFFS STREET RAILWAY CO. February 5, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry Cole Bates* for petitioner. *Mr. Joseph M. Hartfield* for respondent. Reported below: 106 F. 2d 1.

No. 685. MURPHY *v.* WARDEN OF CLINTON STATE PRISON. February 12, 1940. 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. Joseph G. M. Browne* for petitioner. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry Epstein,* Solicitor General, for respondent. Reported below: 108 F. 2d 861.

No. 689. HADEN *v.* DOWD, WARDEN. February 12, 1940. Petition for writ of certiorari to the Supreme Court of Indiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Oscar B. Thiel* for petitioner. Reported below: 216 Ind. —; 23 N. E. 2d 676.

No. 608. CENTURY DISTILLING CO. *v.* CONTINENTAL DISTILLING CORP. February 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Edward S. Rogers, Karl D. Loos,* and *William T. Woodson* for petitioner. *Messrs. Thomas G. Haight* and *Leonard L. Kalish* for respondent. Reported below: 106 F. 2d 486.

No. 620. CROWLEY, RECEIVER, *v.* ICKES, SECRETARY OF THE INTERIOR. February 12, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. James E. Trask* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Frederick Bernays Wiener, Richard H. Demuth,* and *Aaron B. Holman* for respondent. Reported below: 107 F. 2d 256.

No. 627. BAKER *v.* WISCONSIN. February 12, 1940. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Van B. Wake* for petitioner. *Mr. Harold H. Persons* for respondent. Reported below: 232 Wis. 383; 286 N. W. 535; 287 N. W. 690.

No. 636. EVANS ET AL. *v.* JOHNSTON ET AL. February 12, 1940. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Messrs. Charles S. Deneen* and *Roy Massena* for petitioners. *Messrs.*

Harold M. McLaughlin, Samuel S. Holmes, and *Theodore Schmidt* for respondents. Reported below: 300 Ill. App. 78; 20 N. E. 2d 841.

No. 640. McGregor, Receiver, *v.* Board of Public Utility Commissioners et al. February 12, 1940. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. George W. C. McCarter* for petitioner. *Mr. Frank H. Sommer* for the Board of Public Utility Commissioners; and *Mr. Michael J. Bruder* for Town of Harrison, respondents. Reported below: 123 N. J. L. 303; 8 A. 2d 350.

No. 647. Peters *v.* Mutual Life Insurance Co. February 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. C. H. Welles, 3d,* for petitioner. *Mr. Reese H. Harris* for respondent. Reported below: 107 F. 2d 9.

No. 673. John Hancock Mutual Life Insurance Co. *v.* Lampert. February 12, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George W. Riley* and *Walter R. Kuhn* for petitioner. *Mr. David Groberg* for respondent. Reported below: 107 F. 2d 1016.

No. 656. Sova *v.* W–R Company (formerly Wilcox-Rich Corporation). February 26, 1940. 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. *Alfred L. Sova, pro se. Mr. Arthur W. Dickey* for respondent. Reported below: 106 F. 2d 478.

No. 677. McKee *v.* Johnston, Warden. February 26, 1940. 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. *Frank McKee, pro se.* Reported below: 109 F. 2d 273.

No. 686. Bostic *v.* Rives, Superintendent. February 26, 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. Martin S. Vilas* for petitioner. Reported below: 107 F. 2d 649.

No. 709. In re Edmond C. Fletcher. February 26, 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. *Edmond C. Fletcher, pro se.* Reported below: 107 F. 2d 666.

No. 645. Manton *v.* United States; and

No. 646. Spector *v.* Same. February 26, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Mr. Justice Stone and Mr. Justice Murphy took no part in the consideration and decision of these applications. *Messrs. William E. Leahy* and *William J. Hughes, Jr.* for petitioner in No. 645. *Mr. Harry E. Ratner* for petitioner in No. 646. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. John T. Cahill, William W. Barron, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 107 F. 2d 834.

No. 658. Carolina, Clinchfield & Ohio Railway *v.* Sarah Good Hosiery Mills, Inc. February 26, 1940.

Petition for writ of certiorari to the Supreme Court of North Carolina denied for the want of a final judgment. *Messrs. J. W. Pless* and *Kester Walton* for petitioner. *Mr. J. Y. Gordan, Jr.* for respondent. Reported below: 216 N. C. 474; 5 S. E. 2d 324.

No. 633. SHAKESPEARE COMPANY *v.* ENTERPRISE MANUFACTURING CO. ET AL. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William S. Hodges* for petitioner. *Messrs. Arthur C. Denison* and *A. L. Ely* for respondents. Reported below: 106 F. 2d 800.

Nos. 641 and 642. CARNEGIE-ILLINOIS STEEL CORP. ET AL. *v.* COLD METAL PROCESS CO. February 26, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Merrell E. Clark* and *John E. Jackson* for petitioners. *Messrs. Thomas G. Haight* and *Walter J. Blenko* for respondent. Reported below: 108 F. 2d 322.

No. 644. NATIONAL BISCUIT CO. *v.* SEYMOUR ET AL. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William C. Cannon* and *Ralph E. Cooper* for petitioner. *Mr. John L. Seymour* for respondents. Reported below: 107 F. 2d 58.

No. 657. SHARPE *v.* COMMISSIONER OF INTERNAL REVENUE. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul F. Myers* for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,*

and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 107 F. 2d 13.

No. 659. FLORIDA BLUE RIDGE CORP. *v.* TENNESSEE ELECTRIC POWER CO. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Howell Green* for petitioner. *Mr. Dan MacDougald* for respondent. Reported below: 106 F. 2d 913.

No. 663. CLUM *v.* GUARDIAN LIFE INSURANCE CO. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Gustave B. Garfield* for petitioner. *Mr. Walter L. Hill* for respondent. Reported below: 106 F. 2d 592.

No. 665. HASENBERG *v.* NEW YORK CREDITMEN'S ASSN. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. Bertram Wegman* and *Jesse Climenko* for petitioner. *Mr. George C. Levin* for respondent. Reported below: 107 F. 2d 1020.

No. 580. MUNICIPAL COUNCIL OF SAN RAFAEL ET AL. *v.* HOSPITAL DE SAN JUAN DE DIOS. February 26, 1940. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Mr. Thomas E. Rhodes* for petitioners. *Mr. Gabriel La ó* for respondent.

No. 660. BATES *v.* UNITED STATES. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Herbert Pope*

for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Ellis N. Slack, Richard H. Demuth, Edward H. Foley, Jr., Bernard Bernstein,* and *Joseph B. Friedman* for the United States. Reported below: 108 F. 2d 407.

No. 666. CANTLEY, RECEIVER, *v.* ANDREWS ET AL. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George C. Willson* and *Peyton R. Evans,* and *Miss May T. Bigelow* for petitioner. *June C. Smith* for respondents. Reported below: 107 F. 2d 642.

No. 676. ATLANTIC GREYHOUND CORP. ET AL. *v.* LYON ET AL. February 26, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George E. Allen* for petitioners. *Messrs. V. P. Randolph, Jr.* and *Archibald G. Robertson* for respondents. Reported below: 107 F. 2d 157.

No. 747. CONSIDINE *v.* PENNSYLVANIA. March 4, 1940. Petition for writ of certiorari to the Supreme Court of Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Robert Considine, pro se.*

No. 678. GREENWOOD COUNTY *v.* DUKE POWER CO. ET AL. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. MR. JUSTICE REED took no part in the consideration and decision of this application. *Messrs. W. H. Nicholson, James F. Dreher,* and *D. W. Robinson, Jr.* for petitioner. *Messrs. W. S. O'B. Robinson, Jr.* and *Wm. B. McGuire, Jr.* for respondents. Reported below: 107 F. 2d 484.

No. 637. COMPANIA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE. March 4, 1940. Petition for writ of certiorari to the Supreme Court of the Philippines denied. *Messrs. C. A. Dewitt* and *E. A. Perkins* for petitioner. *Messrs. Nathan R. Margold* and *John B. Jago* for respondent.

No. 648. WINKELMAN *v.* ALLMAN. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter C. Fox, Jr.* for petitioners. *Mr. Roy G. Allman* for respondent. Reported below: 106 F. 2d 663.

No. 668. PUGET SOUND NAVIGATION CO. *v.* UNITED STATES. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lawrence Bogle, Edward G. Dobrin,* and *Cassius E. Gates* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 107 F. 2d 73.

No. 680. SHYVERS *v.* SECURITY-FIRST NATIONAL BANK OF LOS ANGELES. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John A. Jorgenson* for petitioner. *Mr. Edmund W. Pugh* for respondent. Reported below: 108 F. 2d 611.

No. 684. CLARK *v.* UNITED STATES. March 4, 1940. 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 Biddle, Assistant Attorney General Clark,* and *Messrs. Joseph W. Burns*

and *Lee A. Jackson* for the United States. Reported below: 108 F. 2d 969.

No. 688. PETTINGILL *v.* FULLER. March 4, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Florence E. Moore* for petitioner. *Mr. John W. Redmond* for respondent. Reported below: 107 F. 2d 933.

No. 691. SOUTHERN PACIFIC CO. *v.* SHERMAN, ADMINISTRATRIX. March 4, 1940. Petition for writ of certiorari to the District Court of Appeal, First Appellate District, of California, denied. *Mr. Arthur B. Dunne* for petitioner. *Mr. Louis E. Goodman* for respondent. Reported below: 34 Cal. App. 2d 490; 93 P. 2d 812.

No. 735. GORDON ET AL. *v.* WIRTZ ET AL. See *ante*, p. 630.

No. 669. MCDONALD *v.* NEW YORK. March 11, 1940. Petition for writ of certiorari to the Court of Appeals of New York, and motion for leave to proceed further *in forma pauperis*, denied. *George McDonald, pro se.* Reported below: 256 App. Div. 956; 281 N. Y. 776; 11 N. Y. S. 2d 233; 24 N. E. 2d 25.

No. 679. BUCKNER ET AL. *v.* UNITED STATES. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Moses Polakoff* for petitioners. *Solicitor General Biddle, 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: 108 F. 2d 921.

No. 725. McLean et al. *v.* Burkinshaw, Ancillary Committee. March 11, 1940. The motion of the guardian ad litem for leave to file brief in opposition to the petition for writ of certiorari is granted. The petition for writ of certiorari to the Court of Appeals for the District of Columbia is denied. *Messrs. Robert H. McNeill* and *George B. Fraser* for petitioners. *Mr. Neil Burkinshaw, pro se.* By leave of Court, *Mr. Austin F. Canfield,* guardian ad litem, filed a brief, opposing the petition. Reported below: 107 F. 2d 665.

No. 672. Berliner Handels-Gesellschaft *v.* United States. March 11, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Maxwell C. Katz, Otto C. Sommerich,* and *Raymond T. Heilpern* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Thomas E. Harris* for the United States. Reported below: 90 Ct. Cls. 75; 30 F. Supp. 490.

No. 692. Southern Pacific Co. *v.* Weiand, Administratrix. March 11, 1940. Petition for writ of certiorari to the District Court of Appeal, Third Appellate District, of California, denied. *Messrs. Arthur B. Dunne* and *George R. Freeman* for petitioner. *Mr. Herbert W. Erskine* for respondent. Reported below: 34 Cal. App. 2d 500; 93 P. 2d 1023.

No. 693. Southern Pacific Co. *v.* Woodward, Administratrix. March 11, 1940. Petition for writ of

certiorari to the District Court of Appeal, Third Appellate District, of California, denied. *Messrs. Arthur B. Dunne, William H. Devlin, A. I. Diepenbrock,* and *Horace B. Wulff* for petitioner. *Mr. Stephen W. Downey* for respondent. Reported below: 35 Cal. App. 2d 130; 94 P. 2d 1028.

No. 694. Arbetman et al. *v.* Reconstruction Finance Corporation et al. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Meyer Abrams* for petitioners. *Solicitor General Biddle* and *Messrs. Clifford J. Durr, Hans A. Klagsbrunn,* and *William S. Allen* for respondents. Reported below: 109 F. 2d 167.

No. 695. Donald et al. *v.* District of Columbia. March 11, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. James T. Crouch* for petitioners. *Messrs. Elwood H. Seal, Vernon E. West,* and *Milton D. Korman* for respondent. Reported below: 108 F. 2d 15.

No. 696. Clarke *v.* Gold Dust Corp. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James M. Snee* for petitioner. *Mr. George W. C. McCarter* for respondent. Reported below: 106 F. 2d 598.

No. 700. Flannery et al. *v.* Flannery Bolt Co. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. Denning Stewart* for petitioners. *Messrs. Roy G. Bostwick* and *William H. Parmelee* for respondent. Reported below: 108 F. 2d 531.

No. 701. BARRETT *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. March 11, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. William Cattron Rigby, Hugh C. Smith,* and *Eugene R. West* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Richard H. Demuth* for respondents. By leave of Court, *Mr. William H. McGrann* filed a brief on behalf of the Retired Officers of the U. S. Navy et al., as *amici curiae,* in support of the petition. Reported below: 108 F. 2d 481.

No. 708. BOROUGH OF EDGEWATER *v.* BODINE, JUSTICE, ET AL. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Milton T. Lasher* for petitioner. *Mr. Samuel Slaff* for respondents. Reported below: 125 N. J. L. 212; 8 A. 2d 375.

No. 710. LINEA SUD-AMERICANA, INC. *v.* 7,295.40 TONS OF LINSEED AND ARCHER-DANIELS-MIDLAND CO. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roscoe H. Hupper and F. Herbert Prem* for petitioner. *Messrs. Ira A. Campbell* and *Clement C. Rinehart* for respondent. Reported below: 108 F. 2d 755.

No. 711. HOLT *v.* UNITED STATES. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Olin R. Holt, pro se. Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, Fred E. Strine, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 108 F. 2d 365.

No. 716. VAIL, EXECUTRIX, *v.* COUNTY OF SOMERSET. March 11, 1940. Petition for writ of certiorari to the Supreme Court of New Jersey denied. *Mr. T. Girard Wharton* for petitioner. *Mr. Ralph E. Lum* for respondent. Reported below: 123 N. J. L. 415; 8 A. 2d 696.

No. 723. EMPLOYERS LIABILITY ASSURANCE CORP. *v.* NEWTON. March 11, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. R. M. Hughes, Jr.* and *Leon T. Seawell* for petitioner. *Messrs. William Shepherd Drewry* and *Charles B. Godwin, Jr.* for respondent. Reported below: 107 F. 2d 164.

No. 739. LOVE *v.* UNITED STATES. March 25, 1940. 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. *Harold R. Love, pro se.* Reported below: 108 F. 2d 43.

No. 699. KING *v.* REALTY MORTGAGE CO. ET AL. March 25, 1940. 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. JUSTICE BLACK took no part in the consideration and decision of these applications. *Mr. Erle Pettus* for petitioner. *Mr. Douglas Arant* for respondents. Reported below: 107 F. 2d 90.

No. 731. UNITED STATES *v.* STANDARD OIL COMPANY OF CALIFORNIA. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. MR. JUSTICE STONE took no part in the

consideration and decision of this application. *Solicitor General Biddle* for the United States. *Messrs. Oscar Lawler, Donald R. Richberg, Eugene M. Prince,* and *Wm. H. Burges* for respondent. Reported below: 107 F. 2d 402.

No. 653. CLEVELAND TRUST CO. ET AL. *v.* SCHRIBER-SCHROTH CO.;

No. 654. SAME *v.* ABERDEEN MOTOR SUPPLY COMPANY; and

No. 655. SAME *v.* F. E. ROWE SALES CO. March 25, 1940. The motion to consider the petition for writs of certiorari on a reduced number of copies of the record is granted. The petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit is denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of these applications. *Messrs. Arthur C. Denison, F. O. Richey, Wm. C. McCoy,* and *Milton Tibbetts* for petitioners. *Messrs. John H. Bruninga* and *John H. Sutherland* for respondents. Reported below: 108 F. 2d 109.

No. 718. AMERICAN CASUALTY CO. *v.* WINDHAM ET AL. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Mr. T. Baldwin Martin* for petitioner. Reported below: 107 F. 2d 88.

No. 722. STEWART *v.* PENNSYLVANIA (CITY OF JEANNETTE). March 25, 1940. 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 writ of certiorari to the Mayor's Court, City of Jeannette, Pennsylvania,

is denied. *Messrs. Joseph F. Rutherford* and *Hayden C. Covington* for petitioner. *Mr. Harris C. Arnold* for respondent. Reported below: 137 Pa. Super. 445; 9 A. 2d 179.

No. 687. KERNOCHAN, EXECUTOR, *v.* UNITED STATES. March 25, 1940. Petition for writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for the United States. Reported below: 89 Ct. Cls. 507; 29 F. Supp. 860.

No. 697. RUBENSTEIN *v.* UNITED STATES. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. E. Leahy, Wm. J. Hughes, Jr.,* and *James F. Reilly* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Joseph W. Burns* and *Lee A. Jackson* for the United States. Reported below: 108 F. 2d 1019.

No. 702. GLADE CANDY CO. *v.* FEDERAL TRADE COMMISSION;

No. 703. SHUPE-WILLIAMS CANDY CO. *v.* SAME; and

No. 704. OSTLER CANDY CO. *v.* SAME. March 25, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Herldon H. Bowen* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 106 F. 2d 962.

No. 706. ELMWOOD CORPORATION *v.* UNITED STATES. March 25, 1940. Petition for writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Douglas Arant* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Maurice J. Mahoney* for the United States. Reported below: 107 F. 2d 111.

No. 712. BANNER MACHINE CO. *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John W. Ford* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Warren F. Wattles* for respondent. Reported below: 107 F. 2d 147.

No. 717. TATLE *v.* SCHMIDT, TRUSTEE IN BANKRUPTCY. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. David Charness* for petitioner. *Mr. Giles F. Clark* for respondent. Reported below: 108 F. 2d 453.

No. 736. PAINE & WILLIAMS CO. *v.* BALDWIN RUBBER CO. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John F. Oberlin* and *Howard F. Burns* for petitioner. *Messrs. George I. Haight, Rockwell T. Gust,* and *Clarence B. Zewadski* for respondent. Reported below: 107 F. 2d 350.

No. 761. GULF OIL CORP. *v.* MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK. March 25, 1940. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Matthew S. Gibson* for petitioner. *Messrs. William C. Chanler, Paxton Blair,* and *Sol*

Charles Levine for respondent. Reported below: 256 App. Div. 207; 281 N. Y. 647; 282 N. Y. 612; 9 N. Y. S. 2d 544; 22 N. E. 2d 480; 25 N. E. 2d 392.

No. 720. MEREDITH *v.* CONE ET AL. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert J. Pleus* for petitioner. *Messrs. Harry L. Thompson* and *Giles J. Patterson* for respondents. Reported below: 109 F. 2d 476.

No. 721. WORRELL *v.* FEDERAL LAND BANK OF BALTIMORE. March 25, 1940. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Grover C. Worrell* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Robert K. McConnaughey,* and *Thomas M. Darnall,* and *Miss May T. Bigelow* for respondent. Reported below: 174 Va. 175; 3 S. E. 2d 402.

No. 726. FLEISHER ENGINEERING & CONSTRUCTION CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF HALLENBECK. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank Gibbons* for petitioners. *Alice B. Marion* for respondent. Reported below: 107 F. 2d 925.

No. 728. BUDER *v.* NEW YORK TRUST CO. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Mark Eisner* for petitioner. *Messrs. David Paine* and *Joseph M. Hartfield* for respondent. Reported below: 107 F. 2d 705.

No. 729. GOLDSMITH *v.* UNITED STATES. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace G. Marks* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 108 F. 2d 917.

No. 737. UNION SIMPLEX TRAIN CONTROL CO. *v.* GENERAL RAILWAY SIGNAL CO. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward M. Colbach* for petitioner. *Mr. Clifton V. Edwards* for respondent. Reported below: 106 F. 2d 1018.

No. 741. H. E. FLETCHER CO. *v.* NATIONAL LABOR RELATIONS BOARD. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Richard B. Walsh* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts,* and *Laurence A. Knapp* for respondent. Reported below: 108 F. 2d 459.

No. 743. NORTH AMERICAN ACCIDENT INSURANCE CO. *v.* TEBBS. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Ernest D. Hurd* for petitioner. *Mr. George A. Critchlow* for respondent. Reported below: 107 F. 2d 853.

No. 744. EDDY *v.* RECONSTRUCTION FINANCE CORPORATION ET AL. March 25, 1940. Petition for writ of certiorari

to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel Silbiger* and *John Kennedy White* for petitioner. *Solicitor General Biddle* and *Mr. C. J. Durr* for respondents.

No. 745. YGNACIO SANCHEZ *v.* UNITED STATES. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. C. Mann* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 108 F. 2d 735.

No. 746. MCDONALD, TESTAMENTARY GUARDIAN, ET AL. *v.* MUTUAL LIFE INSURANCE CO. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John A. Osoinach* and *Charles C. Brown* for petitioners. *Mr. Millsaps Fitzhugh* for respondent. Reported below: 108 F. 2d 32.

No. 751. UNITED STATES *v.* POWE ET AL. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Biddle* for the United States. *Mr. Harry T. Smith* for respondents. Reported below: 109 F. 2d 147.

No. 753. WHAM, TRUSTEE, *v.* MARTIN ET AL. March 25, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Edward W. Rawlins* for petitioner. *Mr. Charles C. Spencer* for respondents. Reported below: 372 Ill. 258; 23 N. E. 2d 692.

No. 758. ALLEN *v.* COMMISSIONER OF INTERNAL REVENUE. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Edward H. Green* and *Lawrence A. Baker* for petitioner. *Attorney General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Lee A. Jackson,* and *Richard H. Demuth* for respondent. Reported below: 108 F. 2d 961.

No. 772. SUMMER *v.* MANUFACTURERS TRUST CO. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioner. *Mr. Dan Gordan Judge* for respondent. Reported below: 107 F. 2d 396.

No. 775. HANOVER FIRE INSURANCE CO. *v.* NEWMAN'S, INC. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Dan MacDougald* for petitioner. *Mr. A. C. Wheeler* for respondent. Reported below: 108 F. 2d 561.

No. 784. KEIG, TRUSTEE IN BANKRUPTCY, *v.* LAKE SHORE ATHLETIC CLUB MEMBERS' COMMITTEE ET AL. March 25, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Roy Massena* and *Donald N. Schaffer* for petitioner. *Mr. Roy D. Keehn* for respondents. Reported below: 107 F. 2d 865.

No. 785. LOWMAN *v.* FEDERAL LAND BANK OF LOUISVILLE ET AL. April 1, 1940. 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. Samuel E. Cook* for petitioner. Reported below: 107 F. 2d 540.

No. 740. UNITED STATES EX REL. KARPATHIOU *v.* SCHLOTFELDT, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied for the reason that application therefor was not made within the time provided by law. § 8(a), Act of February 13, 1925 (43 Stat. 936, 940). *Mr. George E. Dierssen* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *W. Marvin Smith* for respondent. Reported below: 106 F. 2d 928.

No. 754. LANDAY *v.* UNITED STATES;

No. 755. LANE *v.* SAME;

No. 756. ATTIX *v.* SAME; and

No. 757. BROWN *v.* SAME. April 1, 1940. Petition for writs 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. Edward N. Barnard* and *William G. Comb* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, J. Albert Woll, M. Joseph Matan,* and *William J. Connor* for the United States. Reported below: 108 F. 2d 698.

No. 714. CUBAN-AMERICAN SUGAR CO. *v.* UNITED STATES. April 1, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. David A. Buckley, Jr., Jacob H. Gilbert, Harvey L. Rabbitt,* and *Loring M. Black;* and *Susan Brandeis* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and

Messrs. Sewall Key and *Arnold Raum* for the United States. Reported below: 89 Ct. Cls. 215; 27 F. Supp. 307.

No. 760. AMERICAN EMPLOYERS' INSURANCE CO. *v.* WILLIAMS. April 1, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Frank H. Myers* for petitioner. Reported below: 107 F. 2d 953.

No. 762. BALTIMORE & OHIO RAILROAD CO. *v.* RADER. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edward W. Rawlins* and *James F. Wright* for petitioner. *Messrs. Joseph D. Ryan* and *V. Russell Donaghy* for respondent. Reported below: 108 F. 2d 980.

No. 763. GENERAL MOTORS ACCEPTANCE CORP. *v.* COLLER, TRUSTEE IN BANKRUPTCY. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John Thomas Smith* for petitioner. Reported below: 106 F. 2d 584.

No. 764. POLAND UNION *v.* FIRST NATIONAL BANK OF HERKIMER ET AL. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Leonard W. Ferris* and *Edward L. Smith* for petitioner. *Mr. James P. O'Donnell* for respondents. Reported below: 109 F. 2d 54.

No. 766. BOESCH MANUFACTURING CO. ET AL. *v.* UNITED STATES HAT MACHINERY CORP. April 1, 1940.

Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert S. Blair, Daniel L. Morris, Paul A. Blair,* and *John C. Blair* for petitioners. *Messrs. Vernon M. Dorsey* and *T. Clay Lindsey* for respondent. Reported below: 108 F. 2d 417.

No. 769. VANDERBILT, BY GILCHRIST, GENERAL GUARDIAN, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. F. Sims McGrath* and *Clarence Castimore* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *Morton K. Rothschild* for respondent. Reported below: 107 F. 2d 1023.

No. 771. OSWALD JAEGER BAKING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Giles F. Clark* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *F. E. Youngman* for respondent. Reported below: 108 F. 2d 375.

No. 776. S. C. LOVELAND, INC. ET AL. *v.* PENNSYLVANIA SUGAR CO. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Forrest E. Single, Lester S. Parsons,* and *James J. Lenihan* for petitioners. *Messrs. T. Catesby Jones* and *Leonard J. Matteson* for respondent. Reported below: 108 F. 2d 603.

No. 798. FRANKLIN LIFE INSURANCE CO. *v.* CRITZ. April 1, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ed C. Brewer* for petitioner. *Mr. J. L. Roberson* for respondent. Reported below: 109 F. 2d 417.

No. 773. MCCANN *v.* NEW YORK STOCK EXCHANGE ET AL. April 8, 1940. 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. JUSTICE DOUGLAS took no part in the consideration and decision of these applications. *Gene McCann, pro se. Mr. Charles H. Tuttle* for respondents. Reported below: 107 F. 2d 908.

No. 707. REPUBLIC STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 787. CENTRAL COUNCIL OF STEEL PLANTS, NORTHERN DISTRICT, REPUBLIC STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. April 8, 1940. Petitions for writs 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 these applications. *Messrs. Luther Day, Thomas F. Patton, Joseph W. Henderson,* and *Mortimor S. Gordon* for petitioner in No. 707. *Mr. Frank T. Bow* for petitioner in No. 787. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf,* and *Ruth Weyand* for respondents. Reported below: 107 F. 2d 472.

No. 738. LAWYERS TITLE INSURANCE CO. *v.* LAWYERS TITLE INSURANCE CORP. April 8, 1940. Petition for writ of certiorari to the Court of Appeals for the District of

Columbia denied. *Messrs. Louis M. Denit* and *Clarence A. Brandenburg* for petitioner. *Mr. Andrew D. Christian* for respondent. Reported below: 109 F. 2d 35.

No. 765. KELLY ET AL. *v.* ANAHEIM FIRST NATIONAL BANK ET AL. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles C. Montgomery* for petitioners. Reported below: 107 F. 2d 890.

No. 786. CLAWSON & BALS, INC. *v.* HARRISON, COLLECTOR OF INTERNAL REVENUE. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. R. Morrison* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *George H. Zeutzius* for respondent. Reported below: 108 F. 2d 991.

No. 790. VAN CAMP MILK CO. *v.* FRANZEL, TRUSTEE IN BANKRUPTCY, ET AL. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Paul Y. Davis* and *Kurt F. Pantzer* for petitioner. *Messrs. James W. Noel, Clair McTurnan, William R. Higgins, Denver C. Harlan,* and *Joseph J. Daniels* for respondents. Reported below: 107 F. 2d 568.

No. 794. SNIDER *v.* MOORE. April 8, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Messrs. Seth W. Richardson* and *Alfons B. Landa* for respondent. Reported below: 109 F. 2d 840.

No. 795. National Electric Signal Co. *v.* City of Electra et al. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Munson H. Lane* for petitioner. *Messrs. Henry R. Ashton* and *S. J. Brooks* for respondents. Reported below: 108 F. 2d 37.

No. 797. Doyle et al. *v.* Loring, Administratrix, et al. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. S. J. Rose* and *Joseph A. Padway* for petitioners. *Mr. W. Morris Miles* for respondents. Reported below: 107 F. 2d 337.

No. 802. American Eagle Fire Insurance Co. et al. *v.* Gayle et al. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank M. Drake* for petitioners. *Mr. Orie S. Ware* for respondents. Reported below: 108 F. 2d 116.

No. 806. American Steamship Owners Mutual Protection & Indemnity Assn., Inc. *v.* Export Steamship Corp. et al. April 8, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ira A. Campbell* for petitioner. *Mr. John W. Griffin* for Export Steamship Corp. et al., and *Mr. Arthur M. Boal* for American Insurance Co.,—respondents. Reported below: 108 F. 2d 1013.

No. 819. Yardley *v.* Houghton Mifflin Co. April 22, 1940. 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.*

Sidney S. Bobbe for petitioner. *Messrs. Drury W. Cooper, Thomas J. Byrne,* and *Allan C. Bakewell* for respondent. Reported below: 108 F. 2d 28.

Nos. 748 and 749. MISSOURI-KANSAS PIPE LINE CO. *v.* COLUMBIA GAS & ELECTRIC CORP. ET AL. April 22, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Arthur G. Logan* for petitioner. *Messrs. Douglas M. Moffat* and *Clarence A. Southerland* for Columbia Gas & Electric Corp. et al., and *Messrs. Daniel O. Hastings, William H. Button,* and *James B. Alley* for Columbia Oil & Gasoline Corp.,—respondents. *Attorney General Jackson* and *Assistant Attorney General Arnold* filed a memorandum on behalf of the United States, opposing the petition. Reported below: 108 F. 2d 614.

No. 792. DAVIS *v.* SECURITIES & EXCHANGE COMMISSION. April 22, 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 petitioner. *Solicitor General Biddle* and *Messrs. Richard H. Demuth, Chester T. Lane,* and *Christopher M. Jenks* for respondent. Reported below: 109 F. 2d 6.

No. 793. STEELMAN ET AL. *v.* WICHITA FALLS & SOUTHERN RAILWAY CO. April 22, 1940. Petition for writ of certiorari to the District Court of the United States for the Northern District of Texas denied. *Mr. David M. Palley* for petitioners. *Messrs. Clarence A.*

Miller and *John B. King* for respondent. Reported below: 30 F. Supp. 750.

No. 800. WELCH ET UX. *v.* UNITED STATES EX REL. TENNESSEE VALLEY AUTHORITY; and

No. 801. LEWIS ET AL. *v.* SAME. April 22, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Russell R. Kramer* for petitioners. *Solicitor General Biddle* and *Messrs. William C. Fitts, Jr.* and *Thomas E. Harris* for respondent. Reported below: 108 F. 2d 95.

No. 807. PET MILK CO. *v.* GRAY. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wayne Ely* for petitioner. *Mr. Ralph F. Lesemann* for respondent. Reported below: 108 F. 2d 974.

No. 811. ANDERSON *v.* UNITED STATES. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert Ash, W. J. Sebald, Roy Messena,* and *Donald N. Schaffer* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* and *Miss Louise Foster* for the United States. Reported below: 108 F. 2d 475.

No. 812. CORTE ET AL. *v.* ALBERT MILLER & CO. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Samuel M. Johnston* and *Wm. H. Armbrecht* for petitioners. *Mr. Harry T. Smith* for respondent. Reported below: 107 F. 2d 432.

No. 791. JOHN P. SQUIRE CO. *v.* UNITED STATES. April 22, 1940. Petition for writ of certiorari to the Court of Claims denied. *Mr. W. Parker Jones* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 90 Ct. Cls. 276; 30 F. Supp. 708.

No. 810. SCALES ET UX. *v.* PRUDENTIAL INSURANCE CO. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wallace E. Davis* for petitioners. *Mr. J. Thomas Gurney* for respondent. Reported below: 109 F. 2d 119.

No. 820. VAN EVERY *v.* COMMISSIONER OF INTERNAL REVENUE. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Howard B. Henshey* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Thomas E. Harris* and *Miss Louise Foster* for respondent. Reported below: 108 F. 2d 650.

No. 824. HARTFORD ACCIDENT & INDEMNITY CO. *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. April 22, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 109 F. 2d 674.

Nos. 827, 828, 829, and 830. OSTERLING *v.* COMMONWEALTH TRUST CO. ET AL. April 22, 1940. Petition for writs of certiorari to the Supreme Court of Pennsylvania

denied. *Mr. John D. Stedeford* for petitioner. *Mr. Samuel G. Wagner* for respondents. Reported below: 337 Pa. 225; 10 A. 2d 17.

No. 831. Lowell Trucking Corp. et al. *v.* Niagara Fire Insurance Co. April 22, 1940. Petition for writ of certiorari to the Superior Court in and for the County of Essex, Massachusetts, denied. *Mr. John F. Havlin* for petitioners. *Mr. Albert T. Gould* for respondent. Reported below: 23 N. E. 2d 873.

No. 832. Centennial Oil Co. *v.* Thomas, Collector of Internal Revenue. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 109 F. 2d 359.

No. 837. York, Nebraska, *v.* Iowa-Nebraska Light & Power Co. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ernest B. Perry* and *Robert Van Pelt* for petitioner. *Mr. George A. Lee* for respondent. Reported below: 109 F. 2d 683.

No. 855. Hunt, Administrator, et al. *v.* Seeley et al. April 22, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Scott Snodgrass* for petitioners. *Mr. T. R. Boone* for respondents. Reported below: 109 F. 2d 595.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.

No. 591. METROPOLITAN LIFE INSURANCE CO. *v.* BANION, ADMINISTRATOR, ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. January 29, 1940. Dismissed per stipulation of counsel. *Messrs. William E. Mullen, Horace N. Hawkins, Harry Cole Bates,* and *Edward J. Boughton* for petitioner. *Messrs. William J. Wehrli* and *E. E. Enterline* for respondents. Reported below: 106 F. 2d 561.

No. 518. FIRST NATIONAL BANK OF ALTOONA, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 519. INDEPENDENT OIL CO. *v.* SAME;

No. 520. ROSENFELT *v.* SAME;

No. 521. HIRSCH *v.* SAME;

No. 522. S. M. COHN *v.* SAME;

No. 523. H. L. COHN *v.* SAME;

No. 524. C. N. COHN *v.* SAME;

No. 525. B. COHN TRUST *v.* SAME; and

No. 526. B. COHN *v.* SAME. On petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit. February 26, 1940. Dismissed on motion of counsel for the petitioners. *Messrs. S. Leo Rushland* and *Samuel Kaufman* for petitioners. *Solicitor General Biddle* for respondent. Reported below: 104 F. 2d 865.

No. 527. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INDEPENDENT OIL CO.;

No. 528. SAME *v.* ROSENFELT;

No. 529. SAME *v.* HIRSCH;

No. 530. SAME *v.* S. M. COHN;
No. 531. SAME *v.* H. L. COHN;
No. 532. SAME *v.* C. N. COHN;
No. 533. SAME *v.* B. COHN TRUST; and
No. 534. SAME *v.* B. COHN. On petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit. February 26, 1940. Dismissed on motion of counsel for the petitioner. *Solicitor General Biddle* for petitioner. *Messrs. S. Leo Rushlander* and *Samuel Kaufman* for respondents. Reported below: 104 F. 2d 865.

PETITIONS FOR REHEARING GRANTED, FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.

No. 473. MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, *v.* GULF OIL CORP. February 5, 1940. The petition for rehearing is granted. The judgment entered January 15, 1940, *ante,* p. 2, is vacated and the case is restored to the docket for reargument and assigned for hearing on Monday, February 26, next. *Messrs. William C. Chanler, Paxton Blair,* and *Sol Charles Levine* for petitioner. *Mr. Matthew S. Gibson* for respondent. Reported below: 256 App. Div. 207; 281 N. Y. 647; 282 N. Y. 612; 9 N. Y. S. 2d 544; 22 N. E. 2d 480; 25 *id.* 392.

No. 87. WHITE *v.* TEXAS. See *ante,* pp. 631, 641.

No. 584. CRANE-JOHNSON COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. March 25, 1940. The motion for leave to file petition for rehearing is granted. The petition for rehearing is also granted. The order denying certiorari, 308 U. S. 627, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is granted. *Mr. John E.*

Hughes for petitioner. *Solicitor General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 105 F. 2d 740.

No. 87. WHITE *v.* TEXAS. See *ante,* pp. 631, 641.

No. 726. FLEISHER ENGINEERING & CONSTRUCTION CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF HALLENBECK. April 22, 1940. The petition for rehearing is granted. The order denying certiorari, *ante,* p. 677, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. *Mr. Frank Gibbons* for petitioners. *Alice B. Marion* for respondent. Reported below: 107 F. 2d 925.

PETITIONS FOR REHEARING DENIED, FROM JANUARY 16, 1940, THROUGH APRIL 22, 1940.*

No. 19. OKLAHOMA PACKING CO., FORMERLY WILSON & CO., ET AL. *v.* OKLAHOMA GAS & ELECTRIC CO. ET AL. January 29, 1940. Motion for leave to file a petition for rehearing, and motion to recall the mandate, denied. *Ante,* p. 4.

No. 456. GEORGE *v.* VICTOR TALKING MACHINE CO. January 29, 1940. Motion for leave to file a second petition for rehearing denied. 308 U. S. 611, 638.

No. 4. TREINIES *v.* SUNSHINE MINING CO. ET AL. January 29, 1940. 308 U. S. 66.

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* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 63. LeTulle *v.* Scofield, Collector of Internal Revenue. January 29, 1940. 308 U. S. 415.

No. 129. General American Tank Car Corp. *v.* El Dorado Terminal Co. January 29, 1940. 308 U. S. 422.

No. 537. Helvering, Commissioner of Internal Revenue, *v.* Tyng. January 29, 1940. 308 U. S. 527.

No. 538. Helvering, Commissioner of Internal Revenue, *v.* Buchsbaum. January 29, 1940. 308 U. S. 527.

No. 566. Great Atlantic & Pacific Tea Co. *v.* Federal Trade Commission. January 29, 1940. 308 U. S. 625.

No. 578. Quanah, Acme & Pacific Ry. Co. *v.* United States et al. January 29, 1940. 308 U. S. 527.

No. 550. Mims *v.* New Mexico. February 5, 1940. 308 U. S. 626.

No. 557. Interstate Oil Co. et al. *v.* Gormley, Receiver. February 5, 1940. 308 U. S. 626.

No. 577. Stirn *v.* Atlas Corporation et al. February 5, 1940. 308 U. S. 622.

No. 598. Philadelphia-Detroit Lines, Inc. *v.* United States et al. February 5, 1940. 308 U. S. 528.

No. 122. CHICOT COUNTY DRAINAGE DISTRICT *v.* BAXTER STATE BANK ET AL. February 12, 1940. 308 U. S. 371.

No. 610. SANDERS *v.* ALDREDGE, SHERIFF. February 12, 1940. 308 U. S. 625.

No. 621. VILES *v.* PRUDENTIAL INSURANCE CO. February 12, 1940. 308 U. S. 626.

No. 210. MORGAN, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. See *ante*, p. 626.

No. 204. KOBILKIN *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL. February 26, 1940.

No. 222. ILLINOIS CENTRAL RAILROAD CO. *v.* MINNESOTA. February 26, 1940.

No. 230. CARPENTER *v.* WABASH RAILWAY CO. ET AL. February 26, 1940.

No. 601. RUHLIN ET AL. *v.* NEW YORK LIFE INSURANCE CO. February 26, 1940.

No. 603. JAGELS, "A FUEL CORPORATION," *v.* MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK. February 26, 1940.

No. 605. MILAR *v.* BURLEIGH, EXECUTRIX, ET AL. February 26, 1940.

No. 617. STEWART *v.* ST. SURE, JUDGE. February 26, 1940.

No. 626. FRANCE MANUFACTURING CO. *v.* JEFFERSON ELECTRIC CO. February 26, 1940.

No. 374. WILSON *v.* LOUISVILLE JOINT STOCK LAND BANK ET AL. March 4, 1940. Motion for leave to file petition for rehearing denied. 308 U. S. 590.

No. 616. SEVERSON *v.* HANFORD TRI-STATE AIRLINES, INC., ET AL. March 4, 1940.

No. 628. STEWART ET AL. *v.* CAPITAL TRANSIT CO. March 4, 1940.

No. 685. MURPHY *v.* WARDEN OF CLINTON STATE PRISON. March 4, 1940.

Nos. 429 and 430. ABRAHAM & STRAUS, INC. *v.* ART METAL WORKS, INC. March 11, 1940. Motion for leave to file petition for rehearing granted, and petition for rehearing denied. 308 U. S. 621.

No. 138. MCCARROLL, COMMISSIONER OF REVENUES OF ARKANSAS, *v.* DIXIE GREYHOUND LINES, INC. March 11, 1940.

No. 193. NATIONAL LABOR RELATIONS BOARD *v.* WATERMAN STEAMSHIP CORP. March 11, 1940.

No. 246. DEITRICK, RECEIVER, *v.* GREANEY. March 11, 1940.

No. 631. PARKER *v.* AMERICAN SOCIETY OF MECHANICAL ENGINEERS. March 11, 1940.

No. 355. UNITED STATES *v.* MOSCOW FIRE INSURANCE CO. ET AL. March 25, 1940. The petition for rehearing is denied. It is ordered that the stay against payment by the Bank of New York & Trust Company (Bank of New York) pursuant to the judgment of the Supreme Court of New York dated August 22, 1934, be, and it hereby is, vacated. See 308 U. S. 52; and *ante,* p. 624.

No. 604. STANDARD OIL CO. ET AL. *v.* UNITED STATES. March 25, 1940. Petition for rehearing denied. MR. JUSTICE STONE took no part in the consideration and decision of this application.

No. 666. CANTLEY, RECEIVER, *v.* ANDREWS ET AL. March 25, 1940.

No. 625. GETZ ET AL. *v.* BALTIMORE & OHIO R. CO. ET AL. March 25, 1940. Motion for leave to file a petition for rehearing denied.

No. 239. FISCHER *v.* PAULINE OIL & GAS CO. March 25, 1940.

Nos. 641 and 642. CARNEGIE-ILLINOIS STEEL CORP. ET AL. *v.* COLD METAL PROCESS CO. March 25, 1940.

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No. 5. Woodring, Secretary of War, et al. *v.* Wardell, Receiver; and

No. 6. Inland Waterways Corp. et al. *v.* Young, Receiver. April 22, 1940. Petitions for rehearing denied. Mr. Justice Reed and Mr. Justice Murphy took no part in the consideration and decision of these applications.

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No. 761. GULF OIL CORP. *v.* MCGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK. April 22, 1940.

AMENDMENT OF RULES OF COURT.

ORDER OF MARCH 25, 1940

It is ordered that Rule 41 of the Rules of this Court be, and the same is hereby, amended to read as follows:

"41

"JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI

"(See § 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939)

"1. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the court, and such other parts of the record as are material to the errors assigned. The petition shall contain a summary and short statement of the matter involved; the relevant parts of statutes involved (see Rule 27 (f)); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) The petition, brief and record shall be filed with the clerk and forty copies shall be printed under his supervision. The record shall be printed in the same way and upon the same terms that records on appeal are required to be printed. The estimated costs of printing shall be paid within five days after the estimate is furnished by the clerk and if pay-

ment is not so made the petition may be summarily dismissed. When the petition, brief and record are printed the petitioner shall forthwith serve copies thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

"2. Within twenty days after the petition, brief and record are served (unless enlarged by the court, or a justice thereof when the court is not in session) the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs and record, shall be distributed by the clerk to the court for its consideration. (See Rule 38, par. 4 (a).)

"The provision of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

"3. The same general considerations will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. (See par. 5 of Rule 38.)"

It is further ordered that the regulations prescribed by this Court in reference to appeals from the Court of Claims, appearing in 210 U. S., appendix, be, and they hereby are, rescinded.

APPENDIX.

The opinion of the Court which follows is that delivered in No. 19, *Oklahoma Packing Co. et al.* v. *Oklahoma Gas & Electric Co.*, on December 4, 1939. On a petition for rehearing, this opinion was withdrawn and replaced (January 15, 1940, 308 U. S. 530) by the one reported *ante*, p. 4. For the separate opinion of Hughes, C. J., in which McReynolds and Roberts, JJ., concurred, see *ante*, p. 9.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The case concerns a rate controversy which has been winding its slow way through state and federal courts for thirteen years.[1] While the relationship of two utilities with Wilson & Co., a consumer of natural gas, complicates the situation, the legal issues before us may be disposed of as though this were a typical case of a utility resisting an order reducing its rates.[2] Oklahoma Gas &

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[1] A history of the controversy is to be found in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272; 288 P. 316; *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 54 F. 2d 596; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 6 F. Supp. 893; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 178 Okla. 604; *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. 2d 770.

[2] Oklahoma Natural Gas Co. and Oklahoma Gas and Electric Co., both engaged in the sale of natural gas in and about Oklahoma City, had agreed to a division of territory. Under that agreement, Wilson & Co. bought gas from Gas & Electric. The Oklahoma Corporation Commission found that Natural Gas had held itself out to provide gas to industrial consumers at a lower rate than that at which Wilson & Co. was able to buy from Gas & Electric. The Commission then ordered Natural Gas to provide Wilson & Co. with its gas at prevailing industrial rates. Both Natural Gas and Gas & Electric resisted the

Electric Company (hereafter called Gas & Electric) appealed to the Oklahoma Supreme Court from such an order by the Oklahoma Corporation Commission. The reduction was stayed pending the appeal, but to protect Wilson & Co. against a potential overcharge, Gas & Electric gave a supersedeas bond. Gas & Electric lost its appeal, *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272; 288 P. 316, and Wilson & Co. brought suit on the bond. That suit was instituted in one of the district courts of Oklahoma. To enjoin prosecution of the latter suit Gas & Electric invoked the jurisdiction of the United States District Court for the Western District of Oklahoma.[3] This relief was granted and sustained by the Circuit Court of Appeals for the Tenth Circuit. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. 2d 770. Since the case in part was in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 103 F. 2d 765, and also presented novel aspects of important questions of federal law, we granted certiorari, 306 U. S. 629. We are not concerned with the merits of the Commission's order.

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order. Natural Gas contended that it had never held itself out to industrial consumers; Gas & Electric claimed that it was being unconstitutionally deprived of its right to sell to Wilson & Co. at the higher rate. If, pending appeal from the Commission, the order were not stayed, Wilson & Co. would have been able to purchase gas from Natural Gas at the lower rate and Gas & Electric would have been forced either to lower its rates to meet the competition or to lose the business.

[3] In 1928 Natural Gas complied with the order; and since that time Wilson & Co. has been buying gas at the lower rate prescribed by the Commission. The sole question now involved in these proceedings is the liability of Gas & Electric to Wilson & Co. for alleged overcharges between 1926 and 1928. The District Court found specifically that the Corporation Commission had made no threat to enforce penalties for violations of the 1926 order, and as to the Commission, declined to grant any injunctive relief. Cf. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 390.

At the threshold we are met by the procedural objection, seasonably made, that Wilson & Co., a Delaware corporation, was improperly sued in the District Court of the Western District of Oklahoma. The objection is unavailable. Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process "in any action in the State of Oklahoma." Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, Wilson & Co. was amenable to suit in the Western District of Oklahoma.

Petitioners further urge (1) that their plea of *res judicata* should have been sustained and (2) that § 265 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1162, 28 U. S. C. § 379, derived from the Act of March 2, 1793, 1 Stat. 334), was a bar to the suit.

The claim of *res judicata* is based on the prior determination in 1930 by the Supreme Court of Oklahoma that the contested order of the Corporation Commission was valid. *Oklahoma Gas & Elec. Co.* v. *Wilson & Co.*, 146 Okla. 272; 288 P. 316. The theory of the present bill, filed in 1932, was that the review which the Oklahoma Supreme Court afforded the respondents in 1930 was "legislative" rather than "judicial" in character, and therefore left open the judicial review sought below. After the bill was filed but before the injunction now challenged was decreed, the Oklahoma Supreme Court held that its decision in a case like that of *Oklahoma Gas & Elec. Co.* v. *Wilson & Co., supra,* was a judicial judgment. *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243; 51 P. 2d 327.

In view of the authoritative construction thus placed by the highest court of Oklahoma on what it had done

in 1930, the respondents had in fact been accorded by the Oklahoma Supreme Court judicial review of precisely the same legal issues which it sought to re-litigate in this suit.[4] And by its decree in this suit the District Court made an adjudication in direct conflict with that made by the Oklahoma Court seven years earlier.

This, it is suggested, is to confound the fog, in which the scope of review of the Oklahoma Supreme Court was shrouded in 1930, with the clarity of adjudication made explicit by the *Ginners'* case in 1935. But for centuries our law has been operating on such notions of relation and in situations far more drastic and trying to individual litigants than this case presents. See *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; Holmes, J., dissenting in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370. It is part of the price paid for the overriding benefits of a system of justice based on more or less general principles as against *ad hoc* determinations. For, in holding that its review of the order of the Corporation Commission was a judicial determination and therefore an adjudication of the issues sought to be re-litigated here, the Oklahoma Supreme Court did not profess to make new law or to change the old. Even if it had, and had retrospectively given judicial significance to its action in 146 Okla. 272; 288 P. 316, *res judicata* would still come into play and the only basis for relief could be an appeal to *stare decisis*. But the discouraging history of such a juristic sport as was the doctrine of *Gelpcke* v. *Dubuque*, 1 Wall. 175, admonishes us to adhere to a state court's declaration of its own law even though it has had a checkered unfolding. See Mr. Justice Holmes, dissenting, in *Muhlker* v. *New York & Harlem R. Co.*, 197 U. S. 544, 574. But here we are not presented with the recondite difficulties of a situation comparable to *Gelpcke*

[4] From this judicial determination by the Oklahoma Supreme Court, no review was sought here.

v. *Dubuque*. The state court, as we have already indicated, did not go back on its past; it merely clarified what it had previously done.

The present case, therefore, presents a situation very different from that dealt with in *Corporation Commission* v. *Cary,* 296 U. S. 452. That case merely decided that the grant of an interlocutory injunction to stay enforcement of a Commission order was not "an improvident exercise of judicial discretion" when at the time the decree issued the Oklahoma decisions left doubts whether or not the state law afforded judicial review, as required by the Johnson Act. (Act of May 14, 1934, 48 Stat. 775.)

Whether a state court decision serves to foreclose future litigation in the federal courts of course depends on the applicability of the state law of *res judicata* to the particular decision. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71; *Covington* v. *First National Bank,* 198 U. S. 100; *Wright* v. *Georgia Railroad & Banking Co.,* 216 U. S. 420. In the absence of any peculiar local doctrine the generally accepted principles of *res judicata* will be assumed to govern. Nor will a particular decision be deemed excepted from the scope of *res judicata* unless the state court has explicitly so indicated. We have not learned of any Oklahoma departure from the general notions of *res judicata.* Nor has the Oklahoma Supreme Court, with full opportunity for reviewing the course of litigation arising out of the particular order, indicated that its decision of 1930 (146 Okla. 272; 288 P. 316), recognized by it as a judicial adjudication, is not to have one of the most important incidents of a judicial adjudication—finality for purposes of re-litigation.

The reliance which is placed upon *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 178 Okla. 604; 63 P. 2d 703, carries no such significance. To be sure, in that case the Oklahoma Supreme Court reversed a lower court judgment in favor of Wilson & Co. in the action which later was stayed by the District Court in the present

proceedings. The Oklahoma Supreme Court did not hold that its determination in the earlier proceeding was not a final adjudication, but merely sought to define and accept the jurisdiction of the federal court in view of the uncertainty as to state law at the time federal jurisdiction was invoked.[5] We interpret this action of the Oklahoma Supreme Court as a generous application of the doctrine of comity between state and federal courts. But in staying action in the state court to await disposition of the controversy in the federal court, the Oklahoma Supreme Court merely gave the federal court right of way to settle all relevant issues appropriately raised in the federal action. One of these issues was whether or not the 1930 decision of the Oklahoma Supreme Court had foreclosed further litigation in the federal court. That depended on whether or not the 1930 decision was a judicial adjudication. The holding in the *Ginners'* case was that it was. In its 1936 decision (178 Okla. 604; 63 P. 2d 703) the Oklahoma Supreme Court did not say, though it could have said, that its review of this very order was not judicial. On the contrary, it said that it was judicial. The situation would, of course, be wholly different had the Supreme Court of Oklahoma deemed its review in 146 Okla. 272; 288 P. 316 to have been legislative in character and as such incapable of generating *res judicata*. *Prentis* v. *Atlantic Coast Line Co.*, 211

[5] "In the instant case, in view of the fact that defendants' right to a judicial remedy in the state courts was uncertain, the federal court acquired jurisdiction of the cause instituted therein by defendants. That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order. The suit was a direct attack upon such order, and until its validity was established in that suit, the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the Commission, the defendants' liability on such order is not finally determined judicially until final determination of the equitable action." 178 Okla. 604, 606; 63 P. 2d 703, 704.

U. S. 210, 227. We must therefore attach to its earlier judicial determination that characteristic finality which is the essence of *res judicata.*

But even if the validity of the order passed upon in 1930 (146 Okla. 272; 288 P. 316) could have been re-litigated under Oklahoma law, it should have been allowed to be so litigated in the Oklahoma courts. Whatever else the Oklahoma Supreme Court may have given to a federal district court by a show of comity, it could not have given it authority denied by Congress. The District Court exercised its jurisdiction to "stay proceedings" previously begun in the state court. Inasmuch as the scope of the present suit is precisely the same as that of the action in the state court which this suit sought to restrain, § 265 of the Judicial Code [6] operates as a bar upon the district court's power. The injunction below is within the plain interdiction of an act of Congress, and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon that act. Compare *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115; *Wells, Fargo & Co.* v. *Taylor,* 254 U. S. 175. See Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 354, 372–77. That the injunction which issued below was a restraint of the parties and not a formal restrain upon the state court itself, is immaterial. *Hill* v. *Martin,* 296 U. S. 393, 403. Cf. *Kohn* v. *Central Distributing Co.,* 306 U. S. 531.

The judgment below is reversed, with directions to dismiss the bill.

Reversed.

[6] Sec. 265 provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

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